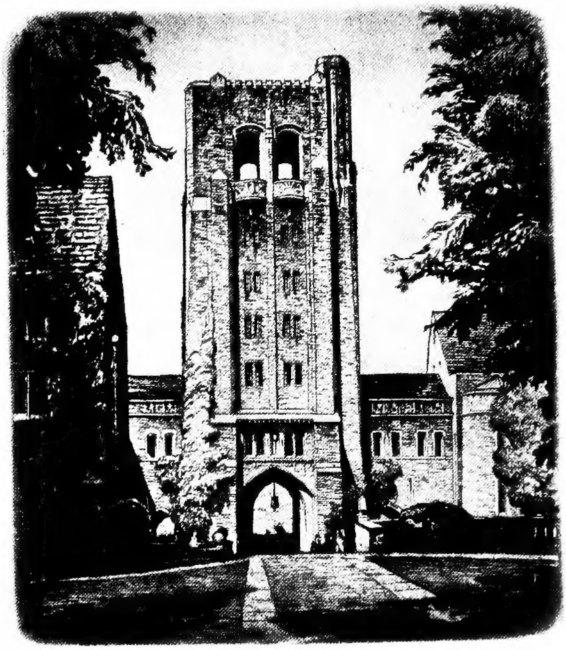

A TREATISE

ON THE LAW OF

CORPORATIONS

HAVING A

CAPITAL STOCK

BY

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OF THE NEW YORK BAR

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CHAPTER XXI.

SALES OF STOCK—SALES WHILE SUITS ARE PENDING AFFECTING THAT STOCK; FORGERY; LOST AND STOLEN CERTIFICATES OF STOCK; CONFISCATION OF STOCK.

A. STOLEN AND LOST CERTIFICATES, AND PURCHASES WITHOUT A CERTIFICATE OF THE STOCK.

§ 358. *Stolen or lost certificates of stock indorsed in blank.*—One of the most important elements of the negotiability of promissory notes is that, if the holder of such note loses it or it is stolen from him when it is indorsed in blank, a subsequent *bona fide* purchaser of such note is protected as against the person who lost it. A different rule seems to prevail as regards certificates of stock indorsed in blank and then lost or stolen. In this respect certificates of stock are not negotiable. It has been clearly held that a purchaser from a thief of certificates of stock indorsed in blank is not protected, nor is any subsequent purchaser of that identical certificate allowed to claim the stock, unless the owner has been guilty of negligence. The real owner of the certificate may compel the corporation, which has refused to recognize the thief's transferee's title, to register the stock as his, or he may have damages against

a *bona fide* transferee of the thief where such transferee has sold the stock.[1] Where stock in a bank stands in the name of a person for sixty-five years without the identity of the stockholder being known and without dividends being claimed by him, although the bank annually advertised the unclaimed dividends, clear proof of

[1] Anderson *v.* Nicholas, 28 N. Y. 600 (1864), where the purchaser of the stolen certificate was not a *bona fide* purchaser. The court said that even if he had been a *bona fide* purchaser he would not be protected. Barstow *v.* Savage Min. Co., 64 Cal. 388 (1883), substantially overruling Winter *v.* Belmont Min. Co., 53 Cal. 428 (1879). The mere fact of losing it is no proof of negligence. Biddle *v.* Bayard, 13 Pa. St. 150 (1850). The purchaser of a certificate indorsed in blank and stolen is not protected. Given's Appeal, 16 Atl. Rep. 75 (Pa. 1888). The *bona fide* purchaser of a certificate of stock indorsed in blank, but which was stolen from the owner, is not protected. East Birmingham Land Co. *v.* Dennis, 85 Ala. 565 (1888). A stock broker is liable to the owner for the value of mining shares received for sale from one who had stolen them, although he acted in good faith, without notice, and paid the proceeds to the thief, relying on his representations of ownership. Swim *v.* Wilson, 90 Cal. 126 (1891). *Cf.* § 452, *infra.* In Knox *v.* Eden Musée, etc. Co., 148 N. Y. 441, 456 (1896), the court said that there was "no case entitled to be regarded as authority which denies to the owner of a stock certificate which has been lost without his negligence, or stolen, the right to reclaim it from the hands of any person in whose possession it subsequently comes, although the holder may have taken it in good faith and for value." . . . "The title of the true owner of a lost or stolen certificate may be asserted against any one subsequently obtaining its possession, although the holder may be a *bona fide* purchaser." Where a certificate of stock is stolen from a pledgee and the transfer on the back is insufficient in that the pledgor's name was written not at the end of the transfer but at the beginning, the pledgor may by a bill in equity redeem the stock from a person who purchased it from the thief. A suit in equity lies inasmuch as an act is involved as to the amount due and the dividends received. The ten-years statute of limitations applies, there being no acquiescence or unreasonable delay. Treadwell *v.* Clark, 190 N. Y. 51 (1907). Even though a stockholder loses two certificates of stock and another person finds two of the same amount, nevertheless it is for a jury to decide whether it is the same stock. McFadden *v.* Goettert, 131 Cal. 333 (1901). In a suit against a corporation for refusing to transfer stock, the fact that the certificates had been lost since the refusal need not be alleged. Blair Co. *v.* Rose, 26 Ind. App. 487 (1901). Where the owner of a certificate of stock endorsed in blank puts it in his safe-deposit box and allows a clerk to have a key of the box and the clerk abstracts the certificate and sells it to a *bona fide* purchaser, it is a question for the jury as to who stands the loss. Aull *v.* Colket, 2 W. N. Cas. 322 (1875). Where the vendor of stock sends the certificates endorsed in blank to a supposed bank by mail, and the vendee, who has organized the bank for fraudulent purposes, thereby obtains possession of the certificates and sells them without the draft attached to the stock being paid, a *bona fide* purchaser of the certificates is protected. Beckwith *v.* Galice, etc. Co., 93 Pac. Rep. 453 (Ore. 1908).

the identity of such stockholder must be given by his alleged descendants, who do not produce the certificate of stock.[1] Where certificates of stock indorsed in blank are deposited in a bank, and the cashier fraudulently abstracts and disposes of them, he is guilty of embezzlement at common law, and there can be no *bona fide* purchaser of such stock.[2] In Nevada it is held that the purchaser and vendor of the stolen certificate is liable in damages to its real owner, although the former acted as a broker and without notice.[3] The *bona fide* purchaser of a stolen certificate of stock indorsed in blank cannot compel the corporation to register him as a stockholder.[4] The person stealing certificates of stock is guilty of larceny, and may be convicted for the same.[5] The corporation cannot obtain an injunction against a possible action by the purchaser of stolen certificates who has applied for registry and been refused it,[6] although doubtless it may interplead when sued for refusing a

1 Moss *v.* Manhattan Co., 48 N. Y. App. Div. 561 (1900).

2 O'Herron *v.* Gray, 168 Mass. 573 (1897).

3 Bercich *v.* Marye, 9 Nev. 312 (1874); Barstow *v.* Savage Min. Co., 64 Cal. 388 (1883). According to the California decisions the same rule would be applied to negotiable instruments. In another case, where a broker innocently sold for a principal a stolen negotiable government bond, the broker was held liable to the true owner. Kimball *v.* Billings, 55 Me. 147 (1867). The court expressly refused, in this case, to place the broker in the same position as an innocent purchaser for value. In Zulick *v.* Markham, 6 Daly, 129 (1875), it was sought to extend this doctrine to the sale of certificates of stock which had only been misapplied. Here defendant, a broker, had innocently sold for a fraudulent principal indorsed certificates of stock, which had not been stolen from the owner, but had been delivered by him to defendant's fraudulent principal, who had sold the certificates to defendant through another innocent broker. The New York court held the broker in this case to stand on the same footing as an innocent purchaser and not liable to the owner for the proceeds; but no opinion was expressed as to the rule of liability if the stock had been stolen instead of misapplied.

4 Sherwood *v.* Meadow Valley Min. Co., 50 Cal. 412 (1875). Although two persons have a safety-deposit box in common, and one of them steals therefrom a certificate of stock owned by the other and indorsed in blank by the latter, yet a purchaser even in good faith of such stolen certificate is not protected. Bangor, etc. Co. *v.* Robinson, 52 Fed. Rep. 520 (1892). See also Knox *v.* Eden Musée, etc. Co., 148 N. Y. 441 (1896), where certificates of stock which had been returned to the corporation were stolen before they had been canceled. This case came before the court again in 17 N. Y. App. Div. 365.

5 People *v.* Griffin, 38 How. Pr. 475 (1869). A criminal statute against fraudulently issuing stock does not apply to a transaction where the treasurer obtained a certificate which he as an individual had pledged, and after obtaining it canceled it as treasurer and issued a new certificate to himself in place thereof. State *v.* Moore, 69 N. H. 99 (1896).

6 Buffalo Grape Sugar Co. *v.* Alberger, 22 Hun, 349 (1880).

transfer.[1] Where an agent fraudulently sells stock which has been intrusted to him, the purchaser, if *bona fide,* is protected, inasmuch as this is not a theft, but a breach of trust.[2]

Where certificates of stock indorsed in blank have been stolen, and the thief or his transferee has obtained a registry on the corporate books and obtained new certificates of stock, and these new certificates have been sold, the purchaser is protected in his possession of the stock.[3] In Michigan this is held to be the rule, even though such purchaser took the stock with full knowledge of all the facts.[4] This decision may have gone too far, but it is in accordance with the general rule that the rights and equities of all holders of stock back of the registry and issue of the certificates in existence are not allowed to affect the stockholdership or rights of purchasers of these new certificates. In England it has been held that a certificate of fully paid up stock running to "bearer" is negotiable, and if stolen and then sold to a *bona fide* holder for value without notice, the latter may compel the company to pay subsequent dividends to him in respect to such a share warrant.[5]

§ 359. *Owner of a lost certificate of stock may obtain a new certificate.*—An owner of a certificate of stock who has lost it or had it stolen from him may, by taking proper proceedings or by giving proper security to the corporation, have new certificates issued to him. In Louisiana it is held that, upon satisfactory proof of the loss of certificates of stock, a writ of *mandamus* will issue to compel the corporation to issue new certificates, and that no bond of indemnity need be given.[6] But the better rule is that, except in cases of the clearest proof of loss, the corporation shall not be re-

1 See § 387, *infra.*

2 See § 351, *supra.*

3 Approved in Scarlett *v.* Ward, 52 N. J. Eq. 197 (1893); Mandlebaum *v.* North Am. Min. Co., 4 Mich. 465 (1857). A purchaser of certificates of stock need not look back of the last registry of transfer on the corporate books. A breach of trust back of that does not invalidate his title. Winter *v.* Montgomery Gaslight Co., 89 Ala. 544 (1889). See also note 1, p. 1071, and § 387, *infra.*

4 Mandelbaum *v.* North Am. Min. Co., 4 Mich. 465 (1857).

5 Webb, etc. Co. *v.* Alexandria, etc. Co., Ltd., 93 L. T. Rep. 339 (1905).

6 State *v.* New Orleans Gas Light Co., 25 La. Ann. 413 (1873). Where sixteen years have elapsed since a stockholder lost his certificate of stock and gave notice to that effect to the corporation, the court may grant *mandamus* for the issue of a new certificate in lieu thereof without security being given. State *v.* New Orleans, etc. R. R., 51 La. Ann. 909 (1899). In the case, State *v.* New Orleans, etc. Exchange, 114 La. 324 (1905), the court made a decree in regard to a lost certificate of stock that a new one be issued upon the giving of a bond with a good surety for the value of the lost certificate, or in lieu thereof, the issue of a duplicate certificate so marked upon its face.

quired to issue new certificates unless a bond of indemnity against its liability to possible legal holders of the lost certificate be given.[1] In New York, by statute, security may be required in all such cases.[2] A stockholder may file a bill in equity to compel the corporation to issue to him a new certificate of stock in place of one that is lost, even though the statute gives an additional remedy.[3] It would seem reasonable that a bond of indemnity should be given to the corporation, since, in case the old certificate has not been lost, but has been sold by its owner, the corporation is liable in damages to the purchaser for issuing new certificates without a surrender of the old.[4] Where certificates of stock have been lost, and a party

1 Galveston City Co. *v.* Sibley, 56 Tex. 269 (1882), where one who became a stockholder in 1841 died in 1865, and his heirs applied for a new certificate in 1878. Société Générale *v.* Walker, L. R. 11 App. Cas. (H. L.) 20 (1885), affirming Société Générale *v.* Tramways Union Co., L. R. 14 Q. B. D. 424; Butler *v.* Glen Cove Starch Co., 18 Hun, 47 (1879). A corporation need not issue new certificates of stock in place of those which are lost unless a bond of indemnity be given. Guilford *v.* Western U. Tel. Co., 43 Minn. 434 (1890). No bond of indemnity will be required where twelve years have elapsed since the certificate of stock was lost. A citizen of Minnesota may sue in its courts to compel a foreign corporation to issue a new certificate if proper service can be had. The fact that two prior judgments in New York and Minnesota required an indemnity bond to be given is no bar to a third suit five years later. Guilford *v.* Western U. Tel. Co., 59 Minn. 332 (1894). Where a person buys stock at a bankrupt sale, but does not get the certificates, and ten years elapse, such purchaser is entitled to a *mandamus* requiring the corporation to issue new certificates to him. State *v.* Southern, etc. Co., 108 La. 24 (1902).

2 Laws 1892, Ch. 688, §§ 50 *et seq.* Where an application is made under the New York statute for a new certificate, in place of one that has been lost or destroyed, and there is no direct proof of the destruction, the court should require publication of the notice of the proceeding, and where the value of the stock is $20,000, although the par value is but $5,000, a bond in the sum of $25,000 is reasonable. Matter of Speir, 69 N. Y. App. Div. 149 (1902). Before proceedings under the New York statute to obtain a new certificate for a lost certificate of stock may be instituted, a demand on the corporation must be made. The court may require publication of the application and also the giving of notice to the stockholder of record. Matter of Coats, 75 N. Y. App. Div. 469 (1902). This statute does not give a remedy to a purchaser of stock at a receiver's sale. If he is unable to obtain the outstanding certificates his remedy is different. *Re* Biglin *v.* Friendship Assoc., 46 Hun, 223 (1887).

3 Kinnan *v.* Forty-second, etc. Ry., 140 N. Y. 183 (1893).

4 See §§ 360–362, *infra*. Persons receiving a duplicate certificate on the ground of loss of the original may be compelled by the company to return it where the original turns up in another person's hands, the certificate having been sold to the latter by the former owner. New York Central, etc. R. R. *v.* Stokes, N. Y. L. J., Nov. 16, 1888, p. 1091. In Keller *v.* Eureka, etc. Co., 43 Mo. App. 84 (1890), the court held that the corporation need not issue an ordinary certificate in

turns up with them and applies for transfer on the corporate books, the real owner may enjoin a transfer of the certificate, and also any transfer by the corporation on its books, *pendente lite.*[1] In North Carolina there is a statute to the effect that an indemnity bond must be given in order to obtain a new certificate for one that has been lost, and the company's treasurer is entitled to retain the new certificate for five years.[2]

§ 360. ***Rights of a purchaser of a certificate of stock where the corporation has registered a transfer to another without a surrender of the certificate.***—It sometimes happens that an owner of stock, after selling his stock, and delivering to the vendee the certificate therefor indorsed in blank, has gone to the corporation before such transfer is registered, and by misrepresentation or other fraudulent means induced the corporation to issue to another purchaser a new certificate of stock without a surrender of the old one. It is the duty of the corporation to refuse to register a transfer unless the old certificate is delivered up. The outstanding certificate is a continuing affirmation by the corporation that no registry of a transfer of the stock represented by that certificate will be allowed until the certificate itself is presented and surrendered. This affirmation is sometimes declared in a by-law,[3] and sometimes it is printed on the face of the certificate itself.[4] The obligation of the corporation, however, to require a surrender of the old certificate upon obtaining a registry is the same whether there is a by-law or a statement on the certificate, or neither of these. It exists without any express declaration.[5] Where stock is transferred without a transfer

place of one that was lost, but might write upon the new certificate the word "duplicate." The issue by a corporation of new certificates of stock in place of lost certificates does not constitute an overissue of stock. Kinnan *v.* Forty-second, etc. R. R., 21 N. Y. Supp. 789 (1893); aff'd, 140 N. Y. 183.

1 Sierra Nevada, etc. Co. *v.* Sears, 10 Nev. 346 (1875). Where the treasurer of a corporation is in debt to it and pledges his stock as security therefor, and the president puts it away, and afterwards the president buys the stock from the treasurer, but the certificate cannot be found, and a new certificate is issued for it and delivered to the president, and two years thereafter the treasurer finds the old certificate of stock and pledges it, the president is protected in his purchase, there having been no culpable negligence on his part. Farmers' Bank *v.* Diebold, etc. Co., 66 Ohio St. 367, (1902).

2 Hendon *v.* North Carolina R. R., 125 N. C. 124 (1899). See s. c., 127 N. C. 110 (1900).

3 Bridgeport Bank *v.* New York, etc. R. R., 30 Conn. 231 (1861); Strange *v.* Houston, etc. R. R., 53 Tex. 162 (1880); New York, etc. R. R. *v.* Schuyler, 34 N. Y. 30 (1865).

4 Cushman *v.* Thayer Mfg. Co., 76 N. Y. 365 (1879).

5 Factors', etc. Ins. Co. *v.* Marine, etc. Co., 31 La. Ann. 149 (1879). As regards the English rule herein, see 2 Ry. & Corp. L. J. 577 and 625.

of the certificate, and the transferrer afterwards transfers the certificate to another party, the former is liable to the first transferee.[1] But even though the president sells and transfers a part of his stock to another person and then obtains from the corporation a new certificate to himself representing the stock so sold and transferred, thereby making an overissue, he is not liable as for a conversion at the instance of the first transferee.[2] So also if the vendor afterwards obtains the certificates and sells them again to others, he is liable to the first person to whom he sold his interest.[3] Where the treasurer of a corporation is in debt to it and pledges his stock as security therefor, and the president puts it away, and afterwards the president buys the stock from the treasurer, but the certificate cannot be found, and a new certificate is issued for it and delivered to the president, and two years thereafter the treasurer finds the old certificate of stock and pledges it, the president is protected in his purchase, there having been no culpable negligence on his part.[4] Where a stockholder pledges his certificate and thereafter causes the corporation to issue a new certificate to other parties without the old certificate being surrendered, and such new parties cause the company to be reorganized by their vote, the holder of the original certificate may set aside such reorganization.[5] Even though a new certificate is issued, under a statute, on the affidavit of a stockholder of record that he has lost the old certificate, and such new certificate is issued to a purchaser of his rights thereto, yet if as a matter of fact the stockholder had prior thereto pledged the old certificate, the pledgee may file a bill in equity against such purchaser to cancel the new certificate.[6]

§ 361. *Liability of the corporation herein.*—It is the duty and right of a corporation to refuse to allow a registry of a transfer of stock unless the outstanding certificate representing the stock is delivered up and canceled. If it allows a transfer to be registered without the old certificate being produced and surrendered, it is liable to any person who, without notice, purchases or has purchased the outstanding certificate,[7] except where the old certificate of stock

1 Mahaney *v.* Walsh, 16 N. Y. App. Div. 601 (1897).

2 O'Dwyer *v.* Verdon, 115 N. Y. App. Div. 37 (1906).

3 Beckitt *v.* Bilbrough, 8 Hare, 188 (1850). But the latter is not liable to take the shares nor to indemnify his vendor even if the company is formed. Jackson *v.* Cocker, 4 Beav. 59 (1841).

4 Farmers' Bank *v.* Diebold, etc. Co., 66 Ohio St. 367 (1902).

5 First Nat. Bank, etc. *v.* Stribling, 16 Okl. 41 (1906).

6 Downing *v.* Thompson, 103 Va. 58 (1904).

7 Factors', etc. Ins. Co. *v.* Marine, etc. Co., 31 La. Ann. 149 (1879), where a pledgee recovered damages against

was stolen or lost. This rule is well established, and is based on the usages and requirements of trade, and on public policy, which

the corporation for issuing new certificates without a surrender of the one which the plaintiff held; Smith *v.* American Coal Co., 7 Lans. 317 (1873), where an unrecorded transferee recovered damages against a corporation for issuing a certificate to a purchaser at execution sale on an attachment against the transferrer. See also § 486 *et seq., infra;* Cushman *v.* Thayer Mfg. Co., 76 N. Y. 365 (1879); Bank *v.* Lanier, 11 Wall. 369 (1870), the court saying: "It is equally clear that the bank, in allowing this stock to be transferred to other parties while the certificates were outstanding in the hands of *bona fide* holders, was guilty of a breach of corporate duty," and is liable; New York, etc. R. R. *v.* Schuyler, 34 N. Y. 30, 81 (1865); Holbrook *v.* New Jersey Zinc Co., 57 N. Y. 616 (1874), the court saying: "It cannot be denied that, if a corporation having power to issue stock certificates does in fact issue such a certificate, in which it affirms that a designated person is entitled to a certain number of shares of stock, it thereby holds out to persons who may deal in good faith with the person named in the certificate that he is an owner and has capacity to transfer the shares. This proposition does not rest on any view of the negotiability of stock, but on general principles appertaining to the law of estoppel;" Moores *v.* Citizens' Nat. Bank, 111 U. S. 156 (1883), where the court seemed to hold that the person receiving new certificates without requiring a surrender of the old ones is not such a *bona fide* transferee of stock as may hold the corporation liable; Brisbane *v.* Delaware, etc. R. R., 94 N. Y. 204 (1883), aff'g 25 Hun, 438, and holding that, until the purchaser of the outstanding certificates presents them, the corporation is protected in paying dividends to the transferee without the certificates. If no certificate has been issued the rule does not apply. First Nat. Bank *v.* Gifford, 47 Iowa, 575 (1877). The unregistered holder of the certificates is protected, since, if he were obliged to notify the corporation at the time he purchases the stock, "the value of these certificates as a basis of credit would be greatly impaired, particularly where the pledge is made at a distance from the domicile of the corporation." Smith *v.* Crescent City, etc. Co., 30 La. Ann. 1378 (1878). See also Bridgeport Bank *v.* New York, etc. R. R., 30 Conn. 231 (1861), the court saying: "The *bona fide* holders of such certificates had a right to rely upon the certificates, under the circumstances, as securing to them the stock which they represented, against all transfers to other parties." Strange *v.* Houston, etc. R. R., 53 Tex. 162 (1880), to the same effect, on the ground that the non-production of the original certificate "is notice to the company that a superior title may be in a third party." In Cady *v.* Potter, 55 Barb. 463 (1869), a corporation sustained its bill of interpleader as between a person to whom it had issued stock on a transfer without a surrender of the old certificate and a person to whom it afterwards issued the stock on a surrender of the old certificate. If a corporation allows a transfer to be made on its books without the transfer on the old certificate being signed, it is liable to the owner of the old certificate, even though the old certificate is delivered up and the attorney in fact of the owner shows his power of attorney at the time of the transfer on the books. Tafft *v.* Presidio, etc. R. R., 84 Cal. 131 (1890); Lee *v.* Citizens' Nat. Bank, 2 Cin. Super. Ct. (Ohio), 298 (1872), holding that the holder of the old certificates is entitled to have the

favors the protection of those who invest their money in certificates of stock, relying upon the corporation to protect the holder of such certificates.[1] Thus, the corporation has been held liable even though seventeen years have elapsed since a new certificate was obtained, the latter having been obtained on the ground that the outstanding certificate had been lost.[2] The corporation need not assume any risk, but may refuse to permit a registry on its books of the transfer unless the old certificate is produced and surrendered.[3] Where, however, the corporation is compelled to make the registry by legal proceedings, it cannot be held liable to the holder of the outstanding certificate.[4] And where the certifi-

illegal registry canceled. In England there seems to be no decision directly in point.

1 Factors', etc. Ins. Co. *v.* Marine, etc. Co., 31 La. Ann. 149 (1879), the court saying: "We think that, by thus making stocks transferable by mere delivery of the certificate, the law has intended to interdict corporations from transferring stocks on their books, except upon surrender of the certificate or upon proof of its loss or destruction. These certificates of stock have become such important factors in trade and credit that the law has intended to surround those who take them with the safeguards it accords to the holders of the other great agencies of commerce—bills, notes, bills of lading, etc."

2 Cleveland, etc. R. R. *v.* Robbins, 35 Ohio St. 483 (1880). But the corporation is not liable for dividends paid in the meantime. It was held, further, that a by-law allowing such issue of new certificates in case of loss had no effect as regards the plaintiff, and that the statute of limitations ran against the plaintiff only from the time he had notice of the new certificate. As to subrogation by the owner of a certificate of stock to a bond given to the corporation, see Greenleaf *v.* Ludington, 15 Wis. 558 (1862).

3 The corporation may refuse to issue stock to the heirs of a stockholder unless they surrender the old certificates. State *v.* New Orleans, etc. R. R., 30 La. Ann. 308 (1878); New London Nat. Bank *v.* Lake Shore, etc. Ry., 21 Ohio St. 221 (1871), where the corporation refused to allow registry by a purchaser at an execution sale, although it was quite plain that the judgment debtor's sale of the certificates had been in fraud of creditors. As between two unregistered transferees, the one with the certificate is entitled to the stock, especially where he purchased first. Maybin *v.* Kirby, 4 Rich. Eq. (S. C.) 105 (1851); Société Générale *v.* Walker, L. R. 11 App. 20 (1885), aff'g L. R. 14 Q. B. D. 424. So, also, as between a *bona fide* purchaser, to whom the certificates are transferred, and a third party, to whom the vendor had given the stock previous to the sale, the vendee with the certificates is protected. Crawford *v.* Dox, 5 Hun, 507 (1875). In Wilson *v.* Atlantic, etc. R. R., 2 Fed. Rep. 459 (1880), where an assignee in bankruptcy applied for registry, the bankrupt having fled with the certificates, it was held that the corporation was bound to allow transfer and to issue new certificates upon a bond of indemnity being given. However, a sale of a certificate of stock to a *bona fide* purchaser is to be upheld, even as against a receiver who has been appointed and been given legal ownership of the stock. Dudley *v.* Gould, 6 Hun, 97 (1875).

4 Friedlander *v.* Slaughter-house

cate which is surrendered to the corporation is stolen from the corporation before its cancellation, the purchaser thereof is not protected.[1] In England a certificate of stock has few of the elements of quasi negotiability which it has in America, and hence not so much importance is attached, in most cases, to the delivery up of the old certificate when on a transfer a new certificate is issued.[2]

Co., 31 La. Ann. 523 (1879). See also ch. XXII, § 388, *infra.* Where stock deposited with a trustee for purposes of reorganization, and transferable certificates are issued therefor by the trustee, a claimant of stock which another person has deposited, and for which such other person has the trustee's certificate, cannot compel the trustee to deliver up the stock until the trustee's certificate is returned, even though the party holding it is a party defendant. Bean *v.* American Loan, etc. Co., 122 N. Y. 622 (1890). But see § 330, *supra.*

1 In Knox *v.* Eden Musée, etc. Co., 148 N. Y. 441 (1896), certificates of stock had been delivered to the corporation for transfer and the new certificates had been duly issued. The old certificates were put in a safe uncanceled, and were illegally abstracted by an employee and sold. The court held that the company was not liable on such certificates to a person who took them in pledge from such employee. The court, however, based its decision, not on the fact that the pledgee took with notice, but on the principle of law that no one could acquire title to stolen certificates of stock. A transferee who receives new certificates of stock is not affected by the fact that the old certificates are fraudulently re-issued by a corporate officer. See § 292, *supra.*

2 A dictum in Shropshire Union, etc. Co. *v.* Queen, L. R. 7 H. L. 496, 509 (1875), does not support the rule which prevails in this country. The court said: Whether a transfer or shares in a company can or cannot be made without the production of the certificates of the shares is "entirely within the discretion of the directors. They were not bound to permit a transfer without the production of the certificates; but, though not bound to permit a transfer, I apprehend they would not be in any way answerable if the transfer should be in any case made without the production of the certificates of the shares." The case of Hart *v.* Frontino, etc. Min. Co., L. R. 5 Exch. 111 (1870), holds, however, that where the corporation cancels the stockholdership of one who purchased after registry without a surrender of the old certificates having been obtained, he may hold it liable in damages. As between two unrecorded transfers, one having the certificate, and the other—a subsequent purchaser—not having it, the former prevails. Société Générale *v.* Tramways Union Co., L. R. 14 Q. B. D. 424 (1884). See also cases in § 325, *supra,* and §§ 377, 412, *infra.* In Canada the outstanding certificate of stock need not be surrendered in order to transfer the stock on the corporate books; and hence, where the registered holder makes two transfers to different persons, the company is not liable for allowing transfer to the one who first presents his transfer, even though he has not the old certificate. Smith *v.* Walkerville, etc. Co., 23 App. Rep. (Can.) 95 (1896).

In England, even if the secretary by mistake delivers the old certificates back to the transferrer and he pledges them, the pledgee is not protected, the basis of this decision being that the proximate cause of the loss was the transferrer and not the secretary, but in England the transfers are made by instruments separate

§ 362. *Rights of purchaser of stock without certificates.*—A purchaser of stock who does not receive the certificates of the stoc he has purchased, but who nevertheless obtains a registry on th corporate books, and receives new certificates without a surrende of the old, and who sells the new certificates, is not liable in dam ages to the holder of the old certificates,[1] unless he obtained registr with knowledge that his vendor had already sold the old certificate to another.[2] The remedy of the latter is against the corporatio or he may sue the corporate officer who allowed the transfer.[3] Th purchaser of the stock may insist on the old certificate being pro duced and surrendered at the time of registration, but if he waive this right, and a registry is made, he cannot afterwards refuse t accept the stock on that account.[4] The corporation is not liable t the person who is registered as a stockholder without the surrende of the old certificate, at least not where the registry is by the sec retary, without special authority from the board of directors.

from the certificates. Longman *v.* Bath, etc. Ltd., [1905] 1 Ch. 646. In England shares of the capital stock cannot be transferred without the production of the certificate, where the certificate recites on its face that no transfer can be registered without its production, and hence the company is liable to a pledgee of the certificate, even though he does not apply for a transfer until after the owner has transferred the shares to a third person, without producing the original certificate. Rainford *v.* Keith, etc. Co., Ltd., [1905] 2 Ch. 147; rev'g [1905] 1 Ch. 296.

1 Baker *v.* Wasson, 53 Tex. 150 (1880). *Cf.* s. c., 59 Tex. 140. Even though a new certificate is issued, under a statute, on the affidavit of a stockholder of record that he has lost the old certificate, and such new certicate is issued to a purchaser of his rights thereto, yet if as a matter of fact the stockholder had prior thereto pledged the old certificate, the pledgee may file a bill in equity against such purchaser to cancel the new certificate. Downing *v.* Thompson, 103 Va. 58 (1904).

2 Scripture *v.* Francestown Soapstone Co., 50 N. H. 571 (1871).

3 Baker *v.* Wasson, 59 Tex. 14 (1883).

4 Boatmen's Ins. etc. Co. *v.* Able, 4 Mo. 136 (1871). A bank cashier ma transfer bank stock standing in hi name in the stock register, eve though he does not turn back the ce tificates. Finn *v.* Brown, 142 U. S 56 (1891). In Indiana, where an ad ministrator cannot sell personal pro erty except in a certain way, the co poration is liable to the estate if allows a transfer of stock on its book under a sale by the administrato who has not complied with the lav The purchaser, however, who does no see the old certificates, but takes ne certificates issued by the corporatio is protected. Citizens' St. Ry. *v.* Rob bins, 128 Ind. 449 (1891).

5 Hall *v.* Rose Hill, etc. Co., 70 Il 673 (1873); Houston Ry. *v.* Van A styne, 56 Tex. 439 (1882), holdin that the corporation is not boun to recognize as a stockholder on who obtains registry without a su render of the old certificates, a reg lar registry with a surrender of suc certificates having previously been o tained by another. *Cf.* Hart *v.* Fro tino, etc. Co., L. R. 5 Exch. 11 (1870).

Where, however, the purchaser of stock, without the certificates, obtained registry on the corporate book, the corporation cannot afterwards remove his name in favor of the purchaser of the old certificate. The former may compel the corporation to replace his name.[1] The pledgee who does not receive the certificate of stock, but takes a separate written assignment thereof and files that with the company and obtains from the company a certificate that the shares have been transferred on the books, may hold the company liable if subsequently the company on presentation of the original certificate of stock duly indorsed transfers the same to a purchaser thereof.[2] If the corporation issues a new certificate to a *bona fide* pledgee without the surrender of the old certificate, it thereby waives the by-law requiring such surrender.[3] Where the company by mistake allows a transfer and issues new stock to a party after the vendor has already sold the stock to another party, and after the latter has obtained a transfer, the company is liable to the second purchaser.[4] It has been held that a pledge made by a separate written assignment of the stock, the certificates remaining in the pledgor's possession and continuing to stand in his name on the corporate books, is not good as against the pledgor's receiver who takes possession of the certificates.[5] Where no certificates of stock are issued and a stockholder delivers an assignment of her stock for a specified sum, delay in paying the sum does not enable the vendor to sell the stock in the meantime to some one else.[6]

B. SALES OF STOCK WHILE SUITS ARE PENDING AFFECTING THAT STOCK.

§ 363. *Legal proceedings as affecting sales of outstanding certificates of stock.*—It is a well established principle of law that shares of stock may, for certain purposes, have a *situs* at two separate places at the same time. For the purposes of suits concerning rights to its title, for taxation, and for a few other purposes, shares of stock follow the domicile of the stockholder.[7] On the other

1 Cady *v.* Potter, 55 Barb. 463 (1869). In Platt *v.* Birmingham Axle Co., 41 Conn. 255 (1874), the corporation was protected by its lien, and the fact that it bought the stock without the certificates was not the essential point of the case. The corporation cannot interplead after it has allowed the transfer, but it may interplead if it has refused to transfer to any one. See also § 387, *infra*.

2 Equitable, etc. Co. *v.* Johnson, 36 Col. 377 (1906).

3 Richardson *v.* Longmont, etc. Co., 19 Colo. App. 482 (1904).

4 Balkis Consol. Co. *v.* Tomkinson, [1893] A. C. 396.

5 Atkinson *v.* Foster, 134 Ill. 472 (1890).

6 Judson *v.* Stonnington Min. Co., 128 Mich. 103 (1901).

7 It is important here to distinguish

hand, it has at the same time a *situs* where the corporation exists, and this *situs* may be for the purposes of suits concerning the title to the stock, for attachment and execution, and for various other similar purposes. Great difficulty arises in many instances of legal proceedings affecting the title to stock, by reason of the fact that, where the defendant has in his possession the certificates of stock, and is not enjoined from transferring them, he may transfer them, either before or after suit has been commenced against him to obtain possession of the stock represented by such certificates, or to subject it to his debts. The question then arises whether the *bona fide* transferee of such certificate is to be allowed to retain the stock, or whether the successful plaintiff in the suit against the defendant who has transferred the stock may follow such stock and take it from the transferee. This conflict of right between the purchaser of the outstanding certificates and the purchaser whose title is based on judicial proceedings arises most often in cases of attachment or execution issued against shares of stock at the domicile of the corporation. In such cases the better rule seems to be that transferees of the certificate held by the defendant are protected and entitled to protection at the hands of the corporation, if their purchase was made before the attachment or execution was levied; but that transfers made after the levy are not binding so far as the corporation and the plaintiffs to the suit are concerned, provided the suit itself is successful.[1] The same difficulty and conflict of rights arise in suits to reclaim stock which has been taken from the plaintiff by fraud, or by the torts of an agent or pledgee, or by the breach of trust of an executor, administrator, guardian, or trustee.[2] The plaintiff seeking to recover his stock, certificates for which are in the hands of the defendant, seems to have but two modes of procedure whereby he may prevent the defendant from transferring the certificates. The suit should be brought in the state of the domicile of the corporation and attachment against the

shares of stock from the certificates for those shares. The stock itself is not the same as the certificate representing it. Winslow *v.* Fletcher, 53 Conn. 390 (1886). Though prevented by injunction from transferring, the corporation must preserve the rights of a party who notifies it of his rights. Purchase *v.* New York Exch. Bank, 3 Rob. (N. Y.) 164 (1865). As regards the rights and duties of the corporation herein when stock is sold under an execution or is attached, see § 489, *infra.*

[1] Smith *v.* American Coal Co., 7 Lans. 317 (1873); Smith *v.* Crescent City, etc. Co., 30 La. Ann. 1378 (1878); and ch. XXVII, *infra.*

[2] Holbrook *v.* New Jersey Zinc Co., 57 N. Y. 616 (1874); Leitch *v.* Wells, 48 N. Y. 585 (1872).

stock issued,[1] or an injunction obtained against any transfer.[2] The court will enjoin a party from voting upon or disposing of his stock in a corporation *pendente lite* where the plaintiffs show that they transferred the stock to the defendant on the latter's agreement not to sell the same, except with the consent of the former, and that when he did sell the stock three-fourths of the proceeds should belong to the former, and it appearing further that the defendant had given the stock to his sister without consideration.[3] A stockholder whose stock has been wrongfully pledged may enjoin the corporation from allowing a transfer by the pledgee who has applied for the same, and the pledgor need not allege that the pledgee took with notice. It is for the pledgee to intervene and prove that the pledge was *bona fide*.[4] It is true that, after judgment has been obtained and the decree of the court executed, any subsequent transfer of the certificates by the defendant is null and may be disregarded by the plaintiff and by the corporation.[5] But while the suit is pending the defendant may transfer the certificates, and the *bona fide* transferee takes a good title to the stock. The latter is not affected by or bound to take notice of a *lis pendens* in that suit.[6] If no temporary injunction is obtained, a transfer made on the corporate books pending suit is good, and the corporation cannot be made liable, although a party defendant.[7] Where the real owner of stock

1 Quarl *v.* Abbett, 102 Ind. 233 (1885). By a statute in Rhode Island in suits in equity a writ of attachment may be levied upon stock the same as in suits at law. Ladd *v.* Franklin, etc. Co., 24 R. I. 311 (1902).

2 Sierra Nevada, etc. Co. *v.* Sears, 10 Nev. 346 (1875). Even though the questions of fact are disputed, yet a preliminary injunction may be granted to prevent the transfer of stock pending a suit to recover it back on the ground of fraud and duress. Hoy *v.* Altoona, etc. Co., 136 Fed. Rep. 483 (1905). Where by fraud a corporation has been induced to sell stock and it sues to recover back the same, it may have an injunction against the defendant assigning or transferring the stock, but cannot enjoin him from voting it. Maine, etc. Co. *v.* Alexander, 115 N. Y. App. Div. 112 (1906). Even though a stockholder has been enjoined from selling his stock or exercising any rights in regard to it, he may join with other stockholders in compelling directors to restore to the corporation property which they had converted. Maine, etc. Co. *v.* Alexander, 115 N. Y. App. Div. 475 (1906). See also § 579, *infra.*

3 Weston *v.* Goldstein, 39 N. Y. App. Div. 661 (1899).

4 Reynolds *v.* Touzalin Imp. Co., 62 Neb. 236 (1901).

5 Sprague *v.* Cocheco Mfg. Co., 10 Blatchf. 173 (1872); s. c., 22 Fed. Cas. 960.

6 Quoted and approved in Central, etc. *v.* Smith, 95 Pac. Rep. 307 (Col. 1908).

7 Hawes *v.* Gas Consumers' Ben. Co., 12 N. Y. Supp. 924 (1891). See also editorial N. Y. L. J., March 29, 1890. *Cf.* § 387, *infra.* In the case of Lamb, etc. Co. *v.* Lamb, 119 Mich. 568 (1899), where a party claiming to be the real owner of stock filed a bill to compel the holder of such stock to deliver up the same, but it appeared that the

brings suit against a transferee of that stock who has obtained a new certificate therefor and succeeds in the suit, and in the meantime the defendant has assigned the stock to a third party, the corporation may institute suit and interplead between the successful claimant of the stock and the transferee of the stock from the defendant. The defendant in the former suit need not be joined as a party in the latter suit. The purchaser of the certificate may be enjoined from transferring the same, and may be compelled to deposit the certificate with the clerk of the court.[1] The purchaser must prove that he is a *bona fide* purchaser.[2] Although the party seeking the stock of which he has been deprived by fraud makes the party complained of and the corporation itself parties defendant, yet, if the certificates are not obtained from the party holding them, the court will not order the corporation to issue new certificates. The outstanding certificates may pass into the hands of a *bona fide* purchaser.[3] A claimant of stock in a corporation may institute suit at the place where the company is incorporated for the purpose of obtaining possession of the stock, even though the holders of the stock are non-residents and are brought into the case only by publication and substituted service. The court acquires jurisdiction over

defendant had already disposed of the stock before the commencement of the suit, the court refused to grant relief, even though it further appeared that the defendant had other stock in the same corporation equal in amount to the stock in issue. A stockholder cannot maintain a suit against the corporation to enjoin other stockholders from selling their stock to a second corporation, such second corporation and the other stockholders not being parties to the suit. Ingraham *v.* National Salt Co., 36 N. Y. Misc. Rep. 646 (1902); aff'd, 72 N. Y. App. Div. 582; appeal dismissed, 172 N. Y. 644.

1 American, etc. Assoc. *v.* Brantingham, 57 N. Y. App. Div. 399 (1901). Where, by order of the court, the corporation has interpleaded between two claimants to stock, the court will retain jurisdiction and determine the defendants' rights, and where in another action one of the defendants has been decreed to be the owner of the stock, the other defendant, although not a party to that action, but who claims to be a *bona fide* purchaser of the certificates, must establish such *bona fide* ownership and has the burden of proof to that extent. American, etc. Assoc. *v.* Brantingham, 37 N. Y. Misc. Rep. 426 (1902).

2 Where a claimant of stock has brought suit against the holder of the stock and obtains judgment that the stock be transferred to such claimant, a person claiming to have purchased the stock in the meantime must prove that he is a *bona fide* purchaser and that he purchased before final judgment. American Press Association *v.* Brantingham, 75 N. Y. App. Div. 435 (1902).

Where the title to stock has been litigated, and pending the litigation a third person buys the stock, such third person is not a *bona fide* purchaser, she having been a witness in the suit. Printing, etc. Co. *v.* Brantingham, 77 N. Y. App. Div. 280 (1902).

3 Joslyn *v.* St. Paul Dist. Co., 44 Minn. 183 (1890); Bean *v.* American Loan, etc. Co., 122 N. Y. 622 (1890).

the defendants.[1] Especially if the certificates of stock are within the jurisdiction, the court may obtain jurisdiction over non-resident defendants by publication.[2] A citizen of Alabama cannot maintain in the courts of Alabama a suit to enjoin non-residents from transferring stock in a non-resident corporation where the defendants are not personally served within the state.[3] Where a decree directs the transfer of certain stock in the distribution of an estate, and the corporation makes such transfer and thereafter the decree is reversed on appeal, the executors may bring suit to have the transfer canceled. The suit is properly in equity.[4] But where, in accord-

1 Jellenik *v.* Huron, etc. Co., 177 U. S. 1 (1900), rev'g 82 Fed. Rep. 778. A suit lies in a New Jersey court to compel the transfer of stock in a New Jersey corporation, even though the stockholder of record is a non-resident and is not served within the state. Andrews *v.* Guayaquil, etc. Ry., 69 N. J. Eq. 211 (1905). A suit to adjust conflicting interests in stock may be instituted in the state where the corporation exists, and non-residents may be brought in by statutory notice of such suit. Patterson *v.* Farmington, etc. Ry., 76 Conn. 628 (1904). A suit to recover back stock which has been illegally transferred by a trustee may be brought in the state where the corporation was incorporated, even though the holder of the outstanding certificate is a non-resident, and the latter may be served by publication. People's Nat. Bank *v.* Cleveland, 117 Ga. 908 (1903). A contributor to a fund to be invested by syndicate managers in stocks and other property has not such an interest in the stocks as enable him to maintain a suit in the state where the corporations are organized as against the non-resident syndicate managers. Jones *v.* Gould, 141 Fed. Rep. 698 (1905); aff'd, 149 Fed. Rep. 153. A decree of a South Carolina court allowing the transfer of stock held in trust in a South Carolina corporation is not binding on the remaindermen if they were not parties to the proceedings. Putnam *v.* Lincoln, etc. Co., 118 N. Y. App. Div. 469 (1907). A bill in equity may be filed by a citizen of New Jersey and a foreigner to have stock in a New Jersey corporation, then held by foreigners, awarded to complainants and new certificates issued to the latter. Pending the suit the court may appoint a receiver of the stock and may enjoin transfer. Service on the defendant foreigners may be made by publication. Sohege *v.* Singer Mfg. Co., 68 Atl. Rep. 64 N. J. (1907).

2 Ryan *v.* Seaboard, etc. R. R., 83 Fed. Rep. 889 (1897); Merritt *v.* American, etc. Co., 79 Fed. Rep. 228 (1897). See also §§ 12, 13, *supra;* §§ 475, 766*c*, *infra.*

3 Rucker *v.* Morgan, 122 Ala. 308 (1899). A suit in equity does not lie in the United States court in Nevada, at the instance of a resident of that state, to recover stock owned by non-residents in an Arizona corporation where service upon them is made only upon the publication. The stock is not within that district, within the meaning of the federal statute. McKane *v.* Burke, 132 Fed. Rep. 688 (1904). The mere fact that certificates of stock owned by a citizen of New York in a New York corporation happened to be in Missouri at the time of his death, does not authorize the public administrator in Missouri to administer such stock as property within the state. Richardson *v.* Busch, 198 Mo. 174 (1906). As to injunctions, see also §§ 391, 579, *infra.*

4 Ashton *v.* Heggerty, 130 Cal. 516 (1900).

ance with a judgment, stock is delivered and the party receiving it sells it and thereafter the judgment is reversed, such stock cannot be recovered back from the transferee.[1] Where stock is tied up by an injunction which is afterwards vacated, and in the meantime the stock depreciates in value, the loss can be recovered from the enjoining party if the stocks could and would have been sold before the depreciation if they had not been so tied up. But if such stocks are in pledge, and the pledgor does not pay the loan while the stocks are so tied up, no damages can be recovered.[2] Where an injunction against the sale of stock is dissolved, the damages recoverable on the bond may include a decline in the price at which the stock may be sold.[3] If an attachment on stock is vacated, the depreciation in its value between the time when it was levied and the time when it was vacated is collectible under the undertaking given in the attachment proceeding.[4] Under the statutes of California even though stock is distributed by executors in accordance with a decree of distribution, and the distributees sell the stock, and it is transferred on the books of the company, nevertheless if the decree is reversed on appeal, the transfers are void and the company is liable for dividends paid in the meantime to such purchasers. In a suit by the executors to recover such dividends the purchasers need not be made parties.[5]

§ 364. *Lis pendens as affecting a purchase of stock.*—A purchaser of certificates of stock is not chargeable with constructive notice that a suit is pending in which his vendor is defendant, and that the plaintiff is endeavoring to obtain possession and title to the stock which the purchaser is buying.[6] The doctrine of *lis pendens* has no application to sales of shares of stock. The purchaser is bound to know that a judgment or decree has been rendered and executed affecting the certificates he is buying, if such a judgment or decree exists; but he is not bound to know that a suit is pending in which judgment has not yet been rendered.[7] That a *lis pendens* in a suit involving shares of stock does not affect a purchaser of the certificate representing those shares, the purchase being made while the suit is pending, was clearly established by the court of

1 Thaxter *v.* Thain, 100 N. Y. App. Div. 488 (1905).

2 Fourth Nat. Bank, etc. *v.* Crescent, etc. Co., 52 S. W. Rep. 1021 (Tenn. 1897). See also § 579, *infra*.

3 Slack *v.* Stephens, 19 Colo. App. 538 (1904).

4 McCarthy *v.* Boothe, 2 Cal. App. 170 (1905).

5 Ashton *v.* Zeila Min. Co., 134 Cal. 408 (1901).

6 Quoted and approved in Central, etc. *v.* Smith, 95 Pac. Rep. 307 (Col. 1908).

7 Quoted and approved in Central, etc. *v.* Smith, 95 Pac. Rep. 307 (Col. 1908).

appeals of New York in the case of Holbrook *v.* New Jersey Zinc Company.[1]

C. FORGERY.

§ 365. *Forgery as affecting a sale of stock.*—An owner of shares of stock cannot be deprived of his property by a forgery, through which his certificates of stock pass into the hands of innocent purchasers. He may be deprived of his stock, but has in lieu thereof the right to collect the value of that stock, either from the corporation, if it has permitted a transfer, or from parties who have held the stock. The rights and remedies of the stockholder who has lost possession of certificates of stock by forgery vary according to the extent to which his certificate has been transferred. His remedy may be against the transferees of the certificate before a registry has been obtained, or it may be against the corporation for allowing a registry, or it may be against the person obtaining the registry. The forgery itself may consist of any writing on the certificate of stock, whereby, with intent to defraud, it is falsely and materially so made or altered as to have an apparent legality.[2] Generally the forgery is of the name of the stockholder to the transfer on the back of the certificate.[3] The forgery may, however, be committed by changing the number of shares of stock which the transferrer has written out in the transfer,[4] or by inserting the numbers of shares of stock of one corporation in a blank transfer

1 57 N. Y. 616 (1874), following Leitch *v.* Wells, 48 N. Y. 586 (1872). See Dovey's Appeal, 97 Pa. St. 153 (1881), where the court refused to pass upon this question; also Bank of Virginia *v.* Craig, 6 Leigh (Va.) 399, 435 (1835), holding that a *lis pendens* in a suit by sureties to restrain guardian from selling stock is not notice to the corporation to refuse to allow him to register a transfer. The equi-435 (1835), holding that a *lis pendens* does not apply to certificates of stock. American Press Assoc. *v.* Brantingham, 75 N. Y. App. Div. 435 (1902).

2 See 1 Bouvier's L. Dict., p. 679; 2 Bish. Cr. L., § 523. For an article on fraudulent certification of stock certificates by the secretary, see 36 Am. Law Rev. 875.

3 Nearly all of the cases in the several following sections are cases of a forgery of the stockholder's name to a transfer. It is forgery for one trustee to write in the names of the other trustees without authority. Cottam *v.* Eastern Counties Ry., 1 J. & H. 243 (1860); Sloman *v.* Bank of England, 14 Sim. 475 (1845). Or for one partner to write in the name of the other partner without authority, where the stock stood in their joint names. Midland Ry. *v.* Taylor, 8 H. L. Cas. 751 (1862), aff'g Taylor *v.* Midland Ry., 29 L. J. (Ch.) 731 (1860).

4 Matthews *v.* Massachusetts Nat. Bank, Holmes, 396 (1874); s. c., 16 Fed. Cas. 1113; Sewall *v.* Boston Water-power Co., 86 Mass. 277 (1862), where the alteration was treated as a forgery so far as legal rights were concerned, although the alteration was due to an innocent misunderstanding of a clerk.

duly signed by the stockholder, but signed for the purpose of transferring shares of stock in another and different corporation.[1]

The subject of forgery by one or more corporate officers, whereby spurious and overissued stock is issued, there being no old certificates returned to the company at that time, is considered elsewhere.[2]

The subject now under consideration is where the name of a stockholder is forged to an assignment of the certificate, or the certificate itself is modified.

§ 366. *Rights and liabilities of transferees of forged certificates of stock, there being no intervening registry on corporate books.*—The position of a transferee of a certificate of stock which is invalid by reason of forgery depends largely on whether there has been an intervening registry of transfer on the corporate books after the former owner was deprived of his stock by the forgery. The forger himself is of course liable, not only to the real stockholder, but also to any other person who has been injured by the forgery. If the purchaser of stock from one who has forged a transfer of the same sells the same after being notified by the real owner that the latter claims the stock and has been deprived of it by forgery, the real owner may recover damages in trover for the value of the stock from the person who so sells, although the latter purchased in good faith and without notice of the forgery.[3] Where an agent of a stockholder forges his name to the certificates of stock and pledges them with a party to secure a loan to the agent's principal, such loan cannot be collected, even though the proceeds went to the credit of the principal and were afterwards embezzled by the agent under a power of attorney to check out the principal's money, the party loaning the money on the certificates of stock not having any knowledge of such power of attorney at the time.[4] If the forgery is committed by a member of a firm, the real owner may sue the firm for money had and received, and may recover the value of the stock and dividends.[5] Where the forger has sold stock to a purchaser without notice, and the latter has sold to another purchaser without notice, and the latter is deprived of his apparent ownership on account of the forgery, the second transferee may hold the first transferee liable.[6] This principle grows out of the well-

1 Swan *v.* North British, etc. Co., 7 H. & N. 603 (1862), practically overruling *Ex parte* Swan, 7 C. B. (N. S.) 400 (1859).

2 See §§ 291-298, *supra.*

3 Monk *v.* Graham, 8 Mod. 9 (1721).

4 Fay *v.* Slaughter, 194 Ill. 157 (1901).

5 Marsh *v.* Keating, 1 Bing. N. Cas. 198 (1834); Stone *v.* Marsh, 6 B. & C. 551 (1827).

6 Matthews *v.* Massachusetts Nat.

established rule of law that, in a sale of chattels, there is an implied warranty of title, unless the circumstances are such as to give rise to a contrary presumption. A person who signs as a witness a forged transfer of stock is personally liable, even though he did so without knowledge of the fraud.[1] The broker and auctioneer of stock which passes through their hands cannot, it seems, be held liable, though it turns·out that on account of a forgery there was no title to the stock in the party whom they represented.[2] The transferee whose title is based on a forgery has no rights as against the corporation, where there has been no registry on the corporate books after the forgery. He cannot compel the corporation to allow him to register his transfer. If the corporation has already registered him as transferee, it may repudiate its registry so far as *he* is concerned, and refuse to recognize him as a stockholder or as having the right to transfer the stock.[3] Such a registered transferee has no right of action against the corporation by reason of its re-

Bank, Holmes, 396 (1874); s. c., 16 Fed. Cas. 1113. This was an extremely hard case, involving a rigid application of the principle, since the defendant's name appeared on the back of the certificate of stock as a transferrer when in fact it had only been a pledgee, and on payment of the pledge had retransferred the stock. As to the liability of brokers for the forgery of their employee in delivering spurious stock to a customer, see Andrew *v.* Clark, 72 Md. 396 (1890). See § 452, *infra.* Compare, however, §§ 296 and 358, notes, *supra.* A purchaser without notice of a forged bond may recover back the price paid by him to the vendor, even though the vendor was himself a *bona fide* purchaser and without notice of the illegality of the bond. There is an implied warranty of identity of the thing sold. Meyer *v.* Richards, 163 U. S. 385 (1896). See also § 764, *infra.* For an article by J. B. Ames on the liability of an innocent purchaser of a certificate of stock, the transfer of which has been forged, see 17 Harvard Law Review, 543.

1 Second Nat. Bank *v.* Curtiss, 2 N. Y. App. Div. 508 (1896); aff'd, 153 N. Y. 681.

2 Machinists' Nat. Bank *v.* Field, 126 Mass. 345 (1879). See also Isham *v.* Post, 141 N. Y. 100 (1894), as to the liability of a trustee. Where stock stands in the name of two trustees and one signs a transfer and the signature of the other trustee is forged thereto, a stock broker who causes the corporation to make a transfer thereunder is liable to the corporation, even though he acted in good faith. Oliver *v.* Governor & Co., [1902] 1 Ch. 610; aff'd, [1903] A. C. 114; *sub nom.* Starkey *v.* Governors, etc. of Bk. of England.

3 Simm *v.* Anglo-American Tel. Co., L. R. 5 Q. B. D. 188 (1879); Whitewright *v.* American Tel., etc. Co., N. Y. Daily Reg., Aug. 6, 1886 (Superior Ct.); Waterhouse *v.* London, etc. Ry., 41 L. T. Rep. 553 (1879); Hambleton *v.* Central Ohio R. R., 44 Md. 551 (1876); Brown *v.* Howard F. Ins. Co., 42 Md. 384 (1875); Hildyard *v.* South Sea Co., 2 P. Wms. 76 (1722). *Cf.* Ashby *v.* Blackwell, 2 Eden, 299 (1765), holding the corporation liable not only to the real owner, but also to the transferee obtaining registry. See § 358, *supra*, as to the rights of the transferee of the first registered holder. A forged transfer conveys no

scission of the registry,[1] although the rule may be different if he purchased by reason of the fact that he was allowed such registry on the corporate books.[2] The person who first obtains a registry after a forgery has deprived the real owner of his stock cannot retain the new certificates as against the real owner of the old ones.[3] A *bona fide* purchaser of a certificate of stock, the transfer to which has been forged, is liable to the corporation if he presents the certificate to the corporation for transfer and obtains such transfer to himself, where the corporation has been held liable to the owner of the stock whose name was forged to the transfer.[4]

§ 367. *Liability of corporation to real owner of stock for allowing registry of forged transfer — Rights of the corporation in such cases.*—It is the duty of a corporation to prevent and refuse a registry of transfer of stock where that transfer has been forged. If the corporation fails to detect the forgery it is liable to the real owner of the stock who has been deprived of it by the forgery.[5]

title to stock. Richardson *v.* Emmett, 61 N. Y. App. Div. 205 (1901); rev'd on another point in 170 N. Y. 412. See 159 Fed. Rep. 916.

1 See § 358, *supra*, and § 370, *infra*.

2 Metropolitan Sav. Bank *v.* Baltimore, 63 Md. 6 (1884). In this case the plaintiff took the forged certificates in pledge from the forger. Afterwards, upon the forger's applying for a further loan on the same pledge of stock, the corporation refused unless the stock was registered in its name, which was accordingly done. Held, that the bank lost the first loan, but had recourse to the corporation for the second loan.

3 Johnston *v.* Renton, L. R. 9 Eq. 181 (1870). In Scarlett *v.* Ward, 52 N. J. Eq. 197, 210 (1893), the court said, in regard to the exception as to one who applies *bona fide* for a transfer of stock that has been forged: "This exception, I take it, is founded on the fact that the person who so obtains registry has had possession of the certificate and forged indorsement, and has thus been put on inquiry as to whether it is genuine, and has used it without such inquiry, and still holds the fruit of the fraud affected by the forgery."

4 Corporation of Sheffield *v.* Barclay & Co., Ltd., [1905] A. C. 392 rev'g [1903] 2 K. B. 580 and restoring decision of Lord Alverstone, C. J., [1903] 1 K. B. 1. See also § 367, *infra*.

5 Pratt *v.* Taunton Copper Mfg. Co., 123 Mass. 110 (1877); Sewall *v.* Boston Water-power Co., 86 Mass. 277 (1862); Pratt *v.* Boston, etc. R. R., 126 Mass. 443 (1879); Johnston *v.* Renton, L. R. 9 Eq. 181 (1870); Cottam *v.* Eastern Counties Ry., 1 J. & H. 243 (1860); Midland Ry. *v.* Taylor, 8 H. L. Cas. 751 (1862), aff'g Taylor *v.* Midland Ry., 29 L. J. (Ch.) 731 (1860); Davis *v.* Bank of England, 2 Bing. 393 (1824); Swan *v.* North British, etc. Co., 7 H. & N. 603 (1862), substantially overruling same case in court of law, *Ex parte* Swan, 7 C. B. (N. S.) 400 (1859); Pollock *v.* National Bank, 7 N. Y. 274 (1852); American Tel., etc. Co. *v.* Day, 52 N. Y. Super. Ct. 128 (1885); Dalton *v.* Midland Ry., 12 C. B. 458 (1852); Baltimore *v.* Ketchum, 57 Md. 23 (1881); Coates *v.* London, etc. Ry., 41 L. T. Rep. 553 (1879); Blaisdell *v.* Bohr, 68 Ga. 56 (1881); Sloman *v.* Bank of England, 14 Sim. 475 (1845). For a careful analysis of the English cases to the effect that the corporation

The owner of the stock may compel the corporation to cancel the illegal registry and restore the name of the plaintiff.[1] Inasmuch, however, as a *bona fide* transferee of the illegally *registered* transferrer is entitled to retain the stock, the former owner of the stock, in suing the corporation, should demand relief in the alternative, that the stock be restored to him, or that he be given damages in

is liable to a person who actually pays money or loses money in reliance upon the "certification" or act of the corporation directly with the purchaser of a certificate, even though there has been no intervening transfer, see 6 Judicial Review (Eng.), 58. See also Telegraph Co. *v.* Davenport, 97 U. S. 369 (1878), where the court said: "Upon the facts stated there ought to be no question as to the right of the plaintiffs to have their shares replaced on the books of the company and proper certificates issued to them, and to recover the dividends accrued on the shares after the unauthorized transfer; or to have alternative judgments for the value of the shares and the dividends. Forgery can confer no power nor transfer any rights. The officers of the company are the custodians of its stock-books, and it is their duty to see that all transfers of shares are properly made, either by the stockholders themselves or persons having authority from them. If upon the presentation of a certificate for transfer they are at all doubtful of the identity of the party offering it with its owner, or if not satisfied of the genuineness of a power of attorney produced, they can require the identity of the party in the one case, and the genuineness of the document in the other, to be satisfactorily established before allowing the transfer to be made. In either case they must act upon their own responsibility. . . . Neither the absence of blame on the part of the officers of the company in allowing an unauthorized transfer of stock, nor the good faith of the purchaser of stolen property, will avail as an answer to the demand of the true owner." A corporation is liable to the owner of stock if it allows a transfer of the stock to be made to a transferee who forged the owner's name to the transfer on the back of the certificate of stock. Penn. Co. *v.* Phila. etc. R. R., 153 Pa. St. 160 (1893).

1 Johnston *v.* Renton, L. R. 9 Eq. 181 (1870); Cottam *v.* Eastern Counties Ry., 1 J. & H. 243 (1860); Sloman *v.* Bank of England, 14 Sim. 475 (1845). Where a person's stock has been transferred on the corporate books on a forged power of attorney, he may file a bill to compel the corporation to cancel the transfer and re-issue the stock to him, or else to pay him the value thereof. The court also held in this case that the fact that the stockholder gave a person access to the safe-deposit box containing such certificates of stock was no defense to the corporation, and also the fact that the stockholder had authorized such person to sign the stockholder's name to other certificates of stock was no defense to the corporation. Pennsylvania Co. *v.* Franklin Ins. Co., 181 Pa. St. 40 (1897). A corporation canceling a certificate of stock and issuing another certificate to the assignee under a forged assignment will be required to re-issue to the original owner a certificate in lieu of the one canceled. The holder of the certificate which was illegally issued is not a necessary party to the suit unless it is shown that the plaintiff is insolvent, or that there will be an overissue by the corporation if the certificate is issued to the plaintiff. Chicago Edison Co. *v.* Fay, 164 Ill. 323 (1896).

lieu thereof.[1] Or he may demand that the corporation replace the stock by going into the market, if necessary, and purchasing similar stock.[2] If the stockholder sues the corporation for a dividend on stock which by a forged assignment has been registered in the name of another person, the corporation cannot interplead.[3] A court of equity has concurrent jurisdiction with law in remedying a forged transfer of stock.[4] The corporation, the co-conspirators, and the transferees of the forged certificate are all proper parties to the suit;[5] but the only necessary party is the corporation itself.[6] On the other hand, it is the transferee obtaining registry who warrants the validity of his title and right to transfer; and if the corporation is compelled to pay damages to the real owner on account of allowing such registry, it may have recourse to and collect the same damages from the transferee who obtained the registry, however innocent the latter may have been.[7] Where stock stands in the name of two trustees, and one of them signs a transfer and forges the name of the other trustee and sells the stock through a broker, the other trustee whose name was forged may hold the corporation liable for the stock, if it has allowed a transfer, and the corporation may hold the broker liable.[8] Where a person forges the power of attorney on a certificate of stock and transfers the stock to himself, and the corporation issues to him a new certificate in his name, and he pledges the same to a *bona fide* pledgee, and such pledgee afterwards transfers the loan and stock as collateral to the corporation itself, the corporation cannot hold the pledgee liable in regard to the forgery.[9] Where the corporation is sued by the real owner of the stock for allowing the registry of

1 This is the usual prayer for relief in this country.

2 Pratt *v.* Boston, etc. R. R., 126 Mass. 443 (1879). See also § 284, *supra.*

3 Dalton *v.* Midland Ry., 12 C. B. 458 (1852).

4 Blaisdell *v.* Bohr, 68 Ga. 56 (1881).

5 Blaisdell *v.* Bohr, 68 Ga. 56 (1881). As to a statutory criminal liability of an officer forging and issuing stock, see State *v.* Haven, 59 Vt. 399 (1887).

6 Chicago Edison Co. *v.* Fay, 164 Ill. 323 (1896); Baltimore *v.* Ketchum, 57 Md. 23 (1881); Pratt *v.* Boston, etc. R. R., 126 Mass. 443 (1879). In a stockholders' action to compel the corporation to re-transfer stock to them which has been transferred on the corporate books by forgery, the holders of the new certificates are not allowed to come in and defend. Barton *v.* London, etc. Ry., L. R. 38 Ch. D. 144 (1888); aff'd, 62 L. T. Rep. 164.

7 Boston, etc. R. R. *v.* Richardson, 135 Mass. 473 (1883), the court saying also in a dictum that the defendant has a remedy over against the parties that sold to him. See also § 366, *supra.*

8 Oliver *v.* Governor, etc., [1901] 1 Ch. 652; aff'd, [1902] 1 Ch. 610 and [1903] A. C. 114; *sub nom.* Starkey *v.* Governors, etc. of Bk. of England.

9 Philadelphia Nat. Bank *v.* Smith, 195 Pa. St. 38 (1900).

a transfer based on forgery, it cannot institute an independent action bringing in all the parties interested and enjoining the action of the owner of the stock.[1] The liability of the corporation on stock which was forged by corporate officers or fraudulently issued by them is considered elsewhere.[2] Where the treasurer of a charitable corporation forges a resolution of the board of trustees authorizing him to sell bonds registered in the name of the corporation, and he executes fraudulently a power of attorney from the corporation to him as treasurer to make such sale, the corporation which issued the bonds and then allowed a transfer on such forged resolution is liable to the charitable corporation for so doing. The charitable corporation may hold liable a broker who witnessed the power of attorney even in good faith. If the corporation which issued and registered the bonds is held liable, it has recourse against the broker by reason of the stock exchange rules which renders liable a broker who witnesses signatures to transfers of stocks or bonds.[3] Where a certificate of stock provides on its face that it must be signed by a transfer agent the corporation is not liable on a certificate to which the transfer agent's name had been forged by an employee of the corporation.[4] Where a trust company, as registrar of stock, allows a transfer on a forged assignment, it is liable to the owner for the value of the stock, less any amount which he may have recovered from other parties.[5]

§§ 368, 369. The right of the rightful owner of the stock to complain of the forgery whereby his certificate has passed into the possession of another may be barred by estoppel or ratification.[6]

1 American Tel., etc. Co. *v.* Day, 52 N. Y. Super. Ct. 128 (1885).

2 See § 293, *supra.*

3 Clarkson Home *v.* Missouri, etc. R. R., 182 N. Y. 47 (1905). Where a broker identifies to a corporation a person as a stockholder, in order that the latter may transfer stock, and such transfer is forged, the broker is liable to the corporation for the cost of the stock which the corporation had to purchase on the market for the benefit of the real owner of the stock. Bank of England *v.* Cutler, 96 L. T. Rep. 636 (1907); aff'd, 98 L. T. Rep. 336 (1908).

4 Dollar, etc. Co. *v.* Pittsburg, etc. Co., 213 Pa. St. 307 (1906).

5 Wiechers *v.* Central Trust Co., 80 Hun, 576 (1894). Where a prospectus, offering for sale trustee's transferable certificates, states that such certificates represent stock deposited with the trustee the stock being in an English corporation, the trustee is personally liable if it turns out that the English corporation had a prior lien on the stock to the full extent of its value. The trustee was bound to take notice of the lien created by the by-laws of the English corporation. The rule of *caveat emptor* has been relaxed so as to create an implied warranty of title on the part of the seller. Even though the trustee acted as agent, yet, the principal not being disclosed, the trustee is held liable. McClure *v.* Central Trust Co., 165 N. Y. 108 (1900).

6 Even though a person forges the

Formerly it was held that the negligence of the owner of the stock would be a bar to his remedy.[1] Later decisions, however, have firmly established the rule that "there must be either something that amounts to an estoppel, or something that amounts to a ratification, in order to make the negligence a good answer."[2] Accordingly, the rightful owner of the stock is held not to be barred of his remedy by the fact that the stockholder, a corporation, allowed its corporate seal to be in the possession of its secretary, whereby he sold the stock owned by the corporation,[3] or by the fact that the owner delayed several months, during which time the forger escaped,[4] or that he transferred on the back of the certificate only part of the shares specified in the certificate;[5] or that he gave his address wrong, and thereby a letter of inquiry did not reach him;[6] or that he allowed his clerk, the forger, to have access to his papers, and gave him blank transfers duly signed to use in transferring other stock;[7] or that the guardian of the plaintiff was negligent.[8] The statute of limitations in behalf of the corporation begins to run against a cause of action for forged transfer only from the time when the corporation denies its liability therefor.[9]

§ 370. *Rights of transferees who purchase after a registry has been obtained.*—It has already been shown that the transferees of a certificate of stock which has been put in circulation by forgery are not allowed to retain such stock where there has not been, at some time subsequent to the forgery, a transfer registered on the corporate books. It has also been shown that he who applies to the corporation for a registry of transfer, such registry being the first one since the forgery was committed, is not allowed to retain the stock. An entirely different rule prevails as regards all sub-

name of a stockholder on the back of the latter's certificate of stock and pledges it, yet if the stockholder, being informed of the transfer by the secretary, confirms it, and the stock is sold to a *bona fide* purchaser, the owner cannot complain. Dover *v.* Pittsburg, etc. Co., 143 Cal. 501 (1904).

1 Coles *v.* Bank of England, 10 Ad. & E. 437 (1839), where the continuous receipt of dividends on a less quantity of stock than she was entitled to was held a bar, though the stockholder was old and infirm.

2 Bank of Ireland *v.* Evans Charities, 5 H. L. Cas. 389 (1855).

3 Bank of Ireland *v.* Evans Charities, 5 H. L. Cas. 389 (1855); and Merchants of the Staple *v.* Bank of England, 56 L. T. Rep. 665 (1887), where the preceding case was reluctantly followed.

4 Davis *v.* Bank of England, 2 Bing. 393 (1824).

5 Sewall *v.* Boston Water-power Co., 86 Mass. 277 (1862).

6 Johnston *v.* Renton, L. R. 9 Eq. 181 (1870).

7 Swan *v.* North British, etc. Co., 7 H. & N. 603 (1862), substantially overruling *Ex parte* Swan, 7 C. B. (N. S.) 400 (1859).

8 Telegraph Co. *v.* Davenport, 97 U. S. 369 (1878).

9 Barton *v.* North Staffordshire Ry., L. R. 38 Ch. D. 458 (1888).

sequent *bona fide* holders of the new certificate obtained by the first registry. The person who obtains the first registry has no rights except as against his transferrer. But all subsequent purchasers without notice are fully protected. They cannot be compelled to give up the stock, either to the corporation or to the person who lost it by forgery.[1] This rule arises, not from the law of negligence, but from the law of estoppel operating against the corporation. It is in accord with the demands of trade and the constant tendency of the law to protect *bona fide* purchasers of certificates of stock.

D. CONFISCATION OF STOCK.

§ 371. During the late Rebellion, acts of confiscation were passed both by the United States government and by the Confederate government, and shares of stock owned by parties in one section of the country in corporations domiciled in the other section were confiscated. The result of the war having established that the Confederate government was an illegal one, all its acts of confiscation became null and void, and all transfers and registers of stock thereunder were held to be void utterly. The whole line of transactions based on the confiscation fell with the confiscation itself.[2] The corporation was held not liable to purchasers whose title was based on the confiscation, since it acted under compulsion of a power

1 Machinists' Nat. Bank *v.* Field, 126 Mass. 345 (1879); *Re* Bahia, etc. Ry., L. R. 3 Q. B. 584 (1868), where, however, the corporation, having canceled all the registries made subsequent to the forgery, was held liable in damages to a purchaser subsequent to the first registry. The court said that the giving of a certificate "is a declaration by the company to all the world that the person in whose name the certificate is made out and to whom it is given is a shareholder in the company, and it is given by the company with the intention that it shall be so used by the person to whom it is given, and acted upon in the sale and transfers of shares." A purchaser of certificates of stock need not look back of the last registry of transfer on the corporate books. A breach of trust back of that does not invalidate his title. Winter *v.* Montgomery Gaslight Co., 89 Ala. 544 (1889). See also § 358, *supra*. A corporation cannot refuse to transfer stock on the ground that the vendor fraudulently induced the company to issue the stock to him, where the company had been guilty of laches in not seeking a remedy before the transfer. The vendee in this case was a director. American Wire Nail Co. *v.* Bayless, 91 Ky. 94 (1891). "A secretary is a mere servant. His position is that he is to do what he is told, and no person can assume that he has any authority to represent anything at all." Hence a receipt by the secretary that certificates of stock had been actually lodged in the corporate office for transfer does not bind the corporation where they were not actually lodged, and the receipt was a part of a fraud. George Whitechurch, Ltd. *v.* Cavanagh, [1902] A. C. 117.

2 Dewing *v.* Perdicaries, 96 U. S. 193 (1877).

temporarily greater than the law itself.[1] If the corporation neglects to remedy the confusion and claims growing out of the illegal confiscation of stock, any stockholder may institute an action in its behalf for that purpose.[2] The stock is to be restored to the owner against whom the confiscation proceedings were had; and if the corporation, during the Rebellion, voluntarily paid dividends to the illegal holders of the stock, it must pay the same to the plaintiff, even though it would have been compelled to pay such dividends to the Southern holder if it had not done so voluntarily.[3] On the other hand, proceedings for the confiscation of stock under the confiscation acts of the United States government, passed by reason of the late Rebellion, are held to have been effective if in accordance with established rules of procedure. Where, however, no notice of the proceedings was given to the defendant, and her name and the stock were not accurately described, the proceedings were void; and the corporation, having obeyed the illegal judgment of confiscation, was held liable in damages to the Southern owner of the stock.[4] Under the confiscation acts of the United States of 1861 and 1862, stock owned by a rebel in a Michigan railroad could be condemned by giving notice of seizure to the railroad corporation. This amounted to an attachment or garnishment.[5]

1 Dewing *v.* Perdicaries, 96 U. S. 193 (1877); also Central R. R., etc. Co. *v.* Ward, 37 Ga. 515 (1868).

2 Perdicaris *v.* Charleston Gas-light Co., Chase's Dec. 435 (1869); s. c., 19 Fed. Cas. 217; affirmed *sub nom.* Dewing *v.* Perdicaries, 96 U. S. 193 (1877).

3 Keppel *v.* Petersburg R. R., Chase's Dec. 167 (1868); s. c., 14 Fed. Cas. 357.

4 Chapman *v.* Phœnix Nat. Bank, 85 N. Y. 437 (1881), reversing s. c., 44 N. Y. Super. Ct. 340. See also Avil *v.* Alexandria Water Co., 1 Hughes, 408 (1877); s. c., 2 Fed. Cas. 254.

5 Miller *v.* U. S., 11 Wall. 268 (1870).

CHAPTER XXII.

SALES OF STOCK—FORMAL METHOD OF TRANSFERRING CERTIFICATES AND REGISTRY THEREOF.

§ 372. *Subject treated herein.*—Having considered the competency of parties to enter into a contract of sale of stock;[1] the legality, enforceability, and character of that contract;[2] and the rights of third parties as affecting the contract between the transferrer and transferee,[3]—it is now necessary to discuss certain formalities whereby the title to stock is transferred. These formalities are peculiar to sales of stock. The only analogy to them is perhaps that arising from the making of a deed of real estate, and a registry of

1 Ch. XIX, *supra*. 2 See ch. XX, *supra*. 3 Ch. XXI, *supra*.

the same at a recorder's office. In many respects, however, this analogy does not apply. Thus, the corporation itself has many rights and duties herein which a register of deeds has not. The rules given herein have arisen for the most part out of the necessities and usages of business as sanctioned by the courts.

§ 373. *The two usual steps in perfecting a transfer of stock.*—To transfer a share of stock there are generally two distinct steps to be taken: First, the certificate is assigned by the transferrer to the transferee; and second, that assignment and transfer are perfected and completed by delivering the assigned certificate to the corporation, obtaining an entry on the corporate transfer book to the effect that the transferee has acquired the stock of the transferrer, and taking from the corporation a new certificate of stock certifying that the newly-recorded stockholder owns a specified amount of stock. The corporation then cancels the old certificate of stock[1] and posts the transfer into the stock ledger.[2]

§ 374. *Omission of either or both steps.*—Either and even both of these two steps in the complete transfer of stock may be omitted; and yet, where the facts estop the various parties from denying that a transfer has been made, it will be held to be complete. Thus, it has been held that an owner of stock may transfer his stock to another by a delivery of the certificate without any assignment.[3] This happens when a registry of transfer is made without any surrender of the old certificate.[4] So far as the transferrer is concerned such a method of transfer is effectual. Such cases also arise where the corporation has never issued certificates of stock. The stockholder may then transfer his stock without assigning a certificate.[5] A subscription of stock may be assigned, even though

1 In Knox *v.* Eden Musée, etc. Co., 148 N. Y. 441 (1896), certificates of stock had been delivered to the corporation for transfer, and the new certificates had been duly issued. The old certificates were put in a safe uncanceled, and were illegally abstracted by an employee and sold. The court held that the company was not liable on such certificates to a person who took them in pledge from such employee. The court, however, based its decision, not on the fact that the pledgee took with notice, but on the principle of law that no one could acquire title to stolen certificates of stock.

2 The purposes of the stock-ledger are explained in § 14, *supra*.

3 See §§ 308, 465.

4 See § 361, *supra*.

5 Brigham *v.* Mead, 92 Mass. 245 (1865); First Nat. Bank *v.* Gifford, 47 Iowa, 575 (1877). Where no certificates of stock are issued, a stockholder may transfer his interest by an ordinary assignment in writing. McGue *v.* Rommel, 148 Cal. 539 (1906). Where no certificate of stock has been issued to a stockholder a separate instrument signed by the stockholder transferring a part of her stock to a party is a sufficient transfer thereof and a certificate of stock may

only a part of the subscription has been called for and paid, and even though no certificate of stock has even been issued. Such assignment may be oral.[1] No certificate of stock is necessary in order to transfer title to the stock.[2] But, where no certificates of stock have been issued, a purchaser of a subscriber's right to the stock is not protected as a purchaser of a certificate of stock is protected.[3] Where the certificates for unpaid stock are never issued, and the stockholder disposes of his interests to another person, and the corporation recognizes that person as such stockholder, the original subscriber is no longer liable.[4] Where the corporation issues a new certificate without a surrender of the old one, it may be liable to a holder of the new certificate.[5]

A. METHOD OF TRANSFERRING THE CERTIFICATE.

§ 375. *Usual forms of assignment and powers of attorney whereby the transferrer assigns the certificate of stock to his transferee.*— A certificate of stock is a paper issued by the corporation to a stockholder, stating that the person specified therein is the owner of a certain number of shares of its capital stock. The assignment of this certificate is made, it seems, in three different ways: First, it has been held that it may be made by a simple delivery of the certificate without any writing.[6] Where a deed of trust refers to cer-

be issued to such new party. Richardson *v.* Longmont, etc. Co., 19 Colo. App. 483 (1904). Where no certificates of stock have been issued a stockholder may assign his stock by a written instrument. Lipscomb's Admr. *v.* Condon, 56 W. Va. 416 (1904). See also § 382, *infra.* Although the charter prescribes that stock shall be transferred in such manner as the by-laws direct, yet, if the by-laws do not provide for transfers, a common-law transfer is sufficient. An oral transfer is sufficient where no certificates have been issued, and where such transferee is entered on the corporate books as a stockholder. Kiely *v.* Smith, 27 Grant's Ch. (Can.) 220 (1879).

1 Manchester St. Ry. *v.* Williams, 71 N. H. 312 (1902).

2 May *v.* McQuillan, 129 Mich. 392 (1902).

3 Manchester St. Ry. *v.* Williams, 71 N. H. 312 (1902).

4 Dain, etc. Co. *v.* Trumbull, etc. Co., 95 Mo. App. 144 (1902).

5 See § 361, *supra*, and § 381, *infra.* A pledgee who does not receive the certificate of stock, but takes a separate written assignment thereof and files that with the company and obtains from the company a certificate that the shares have been transferred on the books, may hold the company liable if subsequently the company on presentation of the original certificate of stock duly endorsed transfers the same to a purchaser thereof. Equitable, etc. Co. *v.* Johnson, 36 Col. 377 (1906).

6 See § 308, *supra*, where a delivery of a certificate of stock *causa mortis* was held good, without any writing assigning the certificate; and § 465, note, *infra.* See also Masury *v.* Arkan-

tain stock and transfers the same to the trustee and authorizes him to transfer the stock to himself on the books, an indorsement of the certificates is unnecessary to pass title to the trustee.[1] Again, it may be made by a formal instrument of assignment duly signed by the transferrer. This instrument may be separate from the certificate of stock or may be printed in blank on the back of it. In either case, in order to make the transfer complete by a registry of it on the corporate books, it is necessary for the transferrer to go to the office of the corporation and sign the transfer in the corporate transfer book, whereby the transfer is recorded. The third and most usual method of assigning a certificate of stock is by a formal instrument of assignment, similar to the one explained above, united with a power of attorney authorizing a person, whose name is generally left blank, to be subsequently filled in, to sign the corporate transfer book, whereby the transfer is recorded. This instrument of transfer and the power of attorney are generally printed in blank on the back of the certificate of stock.[2] It enables the transferee to obtain a registry without the presence of the transferrer, provided the corporate registry agent is satisfied with the signature and intent of the transferrer to assign the stock. Although a transfer is on a separate piece of paper, and is not acknowledged as required by a rule of the stock exchange, nevertheless a pledgee

sas National Bank, 93 Fed. Rep. 603 (1899); Fraser *v.* Charleston, 11 S. C. 486 (1878). *Cf.* Sitgreaves *v.* Farmers', etc. Bank, 49 Pa. St. 359 (1865); Davis *v.* Bank of England, 2 Bing. 393 (1824); Burrall *v.* Bushwick R. R., 75 N. Y. 211 (1878); Dunn *v.* Commercial Bank, 11 Barb. 580 (1852). A deed of release of shares of stock is a sufficient transfer. Hastings *v.* Blue Hill Turnp. Corp., 26 Mass. 80 (1829). If a corporation allows a transfer to be made on its books without the transfer on the old certificate being signed, it is liable to the owner of the old certificate, even though the old certificate is delivered up and the attorney in fact of the owner shows his power of attorney at the time of the transfer on the books. Tafft *v.* Presidio, etc. Co., 84 Cal. 131 (1890). A decision of a state court that a *donatio causa mortis* of bank stock was effective, although the donor merely delivered the certificates of stock without transferring the same on the back thereof, does not raise a federal question, even though the stock was national-bank stock. Leyson *v.* Davis, 170 U. S. 36 (1898).

1 Curtis *v.* Crossley, 59 N. J. Eq. 358 (1900). A transfer need not be on the back of the certificate. A statement in a collateral note that the stock has been deposited as security, and that on default the pledgee might sell the same at public auction is sufficient to give the purchaser at such sale sufficient title to entitle him to a transfer on the corporate books. Bank of Culloden *v.* Bank of Forsyth, 120 Ga. 575 (1904).

2 A stockholder does not transfer his stock by merely putting his name in the first line of a transfer reading "Know all men by these presents that . . . do hereby appoint," etc., without signing his name at the end of the transfer, as called for by the

may be a *bona fide* holder.[1] A person who signs as a witness a forged transfer of stock is personally liable, even though he did so without knowledge of the fraud.[2] Where a broker identifies to a corporation a person as a stockholder, in order that the latter may transfer stock, and such transfer is forged, the broker is liable to the corporation for the cost of the stock which the corporation had to purchase on the market for the benefit of the real owner of the stock.[3] The blank power of attorney is generally filled in by the transfer clerk, who inserts his own name and thereby becomes the attorney.[4] This power of attorney is not revoked by the death of the transferrer before it is used.[5] A general power of attorney to sell land and build houses does not justify a sale of stock.[6] A general

form, and hence a purchaser of the certificate from a thief of the same is not protected and a suit lies to compel the purchaser to give up the stock, and if the corporation has been merged into another corporation, the purchaser must account for what he received from such other corporation. Treadwell *v.* Clark, 114 N. Y. App. Div. 493 (1906); aff'd, 190 N. Y. 51. Even though a person's name appears on a certificate of stock on the transfer on the back thereof, yet if a line is drawn through it and the certificate is canceled and a new one issued to the original owner, the person whose name is canceled is presumed not to have been the owner. Gillett *v.* Chicago Title & T. Co., 82 N. E. Rep. 891 (Ill. 1907).

1 Smith *v.* Savin, 141 N. Y. 315 (1894).

2 Second, etc. Bank *v.* Curtiss, 2 N. Y. App. Div. 508 (1896); aff'd, 153 N. Y. 681. Where the treasurer of a charitable corporation forges a resolution of the board of trustees authorizing him to sell bonds registered in the name of the corporation, and he executes fraudulently a power of attorney from the corporation to him as treasurer to make such sale, the corporation which issued the bonds and then allowed a transfer on such forged resolution is liable to the charitable corporation for so doing. The charitable corporation may hold liable a broker who witnessed the power of attorney even in good faith. If the corporation which issued and registered the bonds is held liable it has recourse against the broker by reason of the stock exchange rules which renders liable a broker who witnessed signatures to transfers of stocks or bonds. Clarkson Home *v.* Missouri, etc. R. R., 182 N. Y. 47 (1905).

3 Bank of England *v.* Cutler, 96 L. T. Rep. 636 (1907); aff'd, 98 L. T. Rep. 336 (1908).

4 The fact that the officer of the corporation fills in his own name as agent to transfer does not make him the agent of the stockholder as regards notice of the agent's frauds. Allen *v.* South Boston R. R., 150 Mass. 200 (1889). See also § 382, *infra.*

5 Fraser *v.* Charleston, 11 S. C. 486 (1878); Leavitt *v.* Fisher, 4 Duer (N. Y.) 1 (1854); United States *v.* Cutts, 1 Sumn. 133 (1832); s. c., 25 Fed. Cas. 745. The death of the transferrer of a certificate of stock does not affect the right of the transferee to have the stock transferred on the corporate books. Culp *v.* Mulvane, 66 Kan. 143 (1903).

6 Camden F. Ins. Assoc. *v.* Jones, 53 N. J. L. 189 (1890), holding also that the corporation is liable for allowing a transfer of stock where the stockholder did not sign the transfer nor authorize another to transfer it.

power of attorney authorizing an agent to sell and transfer stocks, etc., authorizes him to sign the stockholder's name to a transfer, but not a transfer to himself.[1] Permitting, without injury, a transfer under a power of attorney thirteen years old is not proper vigilance on the part of a corporation.[2] An agent's written authority to transfer stock is revoked by death.[3] A transferee who receives new certificates of stock is not affected by the fact that the old certificates have been fraudulently reissued by a corporate officer.[4]

§ 376. *Questions which arise herein.*—The assignment of a certificate of stock by the transferrer to the transferee, considered apart from the actual registry of such assignment on the corporate books, involves the question whether such an assignment should be under seal; whether, after the assignment and the delivery thereof, the transferrer can claim any rights of ownership as against the transferee, even though there be no registry of the transfer; and whether a transfer and power of attorney duly signed by the transferrer, but left in blank as to the name of the transferee and attorney, are legal and may pass from hand to hand until some holder cares to fill up the blanks. These and incidental questions are discussed in the following sections.

§ 377. *A seal is not necessary to a transfer of stock.*—In America an assignment or transfer of a certificate of stock need not be under seal.[5] Formerly it was the custom to have all such transfers made by deed, duly sealed. As the nature of stock and certificates of stock, however, came to be understood more clearly, it became a rule of law that a transfer of the certificate, like the transfer of choses in action, did not require a seal. Not even the presence of the seal gives the transfer the character of a sealed instrument. The seal is a superfluity and is disregarded.[6]

1 Tafft *v.* Presidio, etc. Co., 84 Cal. 131 (1890), rev'g 22 Pac. Rep. 485 (1889). A stockholder's power of attorney to his agent "to exchange old issues or certificates [of stock], and receive new issues or certificates in lieu thereof," does not authorize the agent to sell or pledge the stock. The corporation is liable for allowing a transfer to a third person on such authority. Quay *v.* Presidio, etc. R. R., 82 Cal. 1 (1889).

2 Pennsylvania R. R.'s Appeal, 86 Pa. St. 80 (1878).

3 *In re* Kern's Estate, 176 Pa. St. 373 (1896).

4 See § 292, *supra.* Where a person, as preliminary to making a loan with stock as collateral, indorses his stock over to the lender and leaves it with the corporate secretary, and then the loan is abandoned, the secretary is bound to deliver back the stock. Galvin *v.* Mac Mining, etc. Co., 14 Mont. 508 (1894).

5 Quiner *v.* Marblehead Social Ins. Co., 10 Mass. 476 (1813); Atkinson *v.* Atkinson, 90 Mass. 15 (1864). If, however, the by-laws require it, the transfer must be under seal. Bishop *v.* Globe Co., 135 Mass. 132 (1883), holding also that the word "seal" is insufficient.

6 German Union, etc. Assoc. *v.*

In England, on the other hand, transfers of railway stocks are generally required by charter to be under seal. This is held to give the instrument the character of a deed; and hence, in accordance with the ancient technical rule of law that a deed must be filled out as to the grantee and other essential particulars before it is sealed in order to be valid, it has been held in England that a transfer of a certificate of stock, duly signed and sealed, but with the name of the transferee in blank, is void absolutely.[1] In those English companies, however, whose charters do not require transfers to be sealed, the transfer may be by an ordinary instrument in writing, and the presence of a seal will be disregarded.[2]

§ 378. *The assignment of the certificate of stock estops the transferrer from claiming any further title in the stock as against subsequent bona fide transferees, although such assignment be not registered.*[3]—There is no case which denies this principle of law.

Sendmeyer, 50 Pa. St. 67 (1865); Commercial Bank *v.* Kortright, 22 Wend. 348 (1839); McNeil *v.* Tenth Nat. Bank, 46 N. Y. 325 (1871); Bridgeport Bank *v.* New York, etc. R. R., 30 Conn. 231, 274 (1861); Easton *v.* London J. S. Bank, L. R. 34 Ch. D. 95 (1886).

1 Hibblewhite *v.* McMorine, 6 M. & W. 200 (1840), per Parke, B.; *Re* Balkis Consol. Co., 58 L. T. Rep. 300 (1888); Tayler *v.* Great Indian, etc. Ry., 4 De G. & J. 559 (1859); Société Générale *v.* Tramways Union Co., L. R. 14 Q. B. D. 424 (1884), where transfer was to be by deed; aff'd, Société Générale *v.* Walker, L. R. 11 App. 20 (1885). *Cf.* § 325, *supra*, and § 412, *infra*.

2 *Re* Tees Bottle Co., 33 L. T. Rep. 834 (1876); Walker *v.* Bartlett, 18 C. B. 845 (1856); *Re* Barned's Banking Co., L. R. 3 Ch. App. 105 (1867); *Ex parte* Sargent, L. R. 17 Eq. 273 (1874); Ortigosa *v.* Brown, 47 L. J. (Ch.) 168 (1878). The American cases incline to the opinion that, even though a seal were required, the sealed transfer would not be void because of the blanks left in it. Bridgeport Bank *v.* New York, etc. R. R., 30 Conn. 231, 274 (1861); Commercial Bank *v.* Kortright, 22 Wend. 348 (1839); Matthews *v.* Massachusetts Nat. Bank, 1 Holmes, 396, 407 (1874); s. c., 16 Fed. Cas. 1113, 1118; McNeil *v.* Tenth Nat. Bank, 46 N. Y. 325 (1871).

3 Masury *v.* Arkansas Nat. Bank, 93 Fed. Rep. 603 (1899); Scott *v.* Pequonnock Nat. Bank, 15 Fed. Rep. 494 (1883); Brown *v.* Smith, 122 Mass. 589 (1877); Fitchburg Sav. Bank *v.* Torrey, 134 Mass. 239 (1883); Duke *v.* Cahawba Nav. Co., 10 Ala. 82 (1846); Chouteau Spring Co. *v.* Harris, 20 Mo. 382 (1855); St. Louis P. Ins. Co. *v.* Goodfellow, 9 Mo. 149 (1845); Gilbert *v.* Manchester Iron Mfg. Co., 11 Wend. 627 (1834); Sargent *v.* Essex Marine Ry. Corp., 26 Mass. 202 (1829); Nesmith *v.* Washington Bank, 23 Mass. 324 (1828); Sargent *v.* Franklin Ins. Co., 25 Mass. 90 (1829); Conant *v.* Reed, 1 Ohio St. 298 (1853); Baltimore, etc. Ry. *v.* Sewell, 35 Md. 238 (1871); Bank of America *v.* McNeil, 10 Bush (Ky.), 54 (1873); U. S. *v.* Vaughan, 3 Binn. (Pa.) 394 (1811); Beckwith *v.* Burrough, 13 R. I. 294 (1881); Farmers', etc. Bank *v.* Wasson, 48 Iowa, 336 (1878); Carroll *v.* Mullanphy Sav. Bank, 8 Mo. App. 249 (1880); Broadway Bank *v.* McElrath, 13 N. J. Eq. 24 (1860); Smith *v.* Crescent City,

On close examination of the cases which seem to militate against it, it will be found that the issue involved was whether the unregistered transferee was protected against third persons who claimed title back of the transferrer. The transferrer himself is not allowed to impeach his unregistered transferee's title. Even in Connecticut, where at an early day the court held that the registry was the origin of the title of the transferee, the court was considering the rights of third persons, and not the rights of the transferrer himself.[1] That the transferrer cannot question the completeness of his transfer of title is a rule binding not only on himself, but also upon his assignees in bankruptcy or insolvency.[2] The transferee is estopped also from attacking the assignment of the certificate on the ground of informalities in the transfer.[3] A *bona fide* pledgee of stock indorsed in blank on the back is protected.[4] In Maryland,

etc. Co., 30 La. Ann. 1378 (1878); People's Bank *v.* Gridley, 91 Ill. 457 (1879); Richardson *v.* Longmont, etc. Co., 19 Colo. App. 483 (1904). Nor can the transferrer avoid the assignment before registry on the ground that no consideration passed. Hall *v.* U. S. Ins. Co., 5 Gill (Md.) 484 (1847); Cushman *v.* Thayer Mfg. Co., 76 N. Y. 365 (1879). Such an assignment satisfies a contract to sell stock. White *v.* Salisbury, 33 Mo. 150 (1862); Merchants' Nat. Bank *v.* Richards, 6 Mo. App. 454 (1879); aff'd, 74 Mo. 77. The fact that the corporation subsequently refuses to register the transfer does not prevent title passing, as between transferrer and transferee. Crawford *v.* Provincial Ins. Co., 8 Up. Can. C. P. 263 (1859).

1 Northrop *v.* Newtown, etc. Co., 3 Conn. 544, 552 (1821); Fisher *v.* Essex Bank, 71 Mass. 373 (1855); the rights of attaching creditors being involved.

2 *Ex parte* Dobson, 2 Mont. D. & De G. 685 (1842); Dickinson *v.* Central Nat. Bank, 129 Mass. 279 (1880); Morris *v.* Cannan, 4 De G., F. & J. 581 (1862); Sibley *v.* Quinsigamond Nat. Bank, 133 Mass. 515 (1882). Even though by the statutes of a state (Arizona) a transfer of the stock is not good until recorded except as between the parties, yet where various stockholders have pooled their stock by turning in their certificates of stock to one person to hold, and one of the parties so pooling has sold his pool certificate, and the manager of the pool knowing that fact refuses to permit the stock itself to be correspondingly transferred on the books of the company, and later, fraudulently obtains a judgment against the party who originally entered the pool, and sells out his stock under such judgment, he may be compelled by a court of equity to transfer the stock o the purchaser of the pool certificate, even though the stock has advanced in value and two years have intervened. Brissell *v.* Knapp, 155 Fed. Rep. 809 (1907).

3 Quoted and approved in Richardson *v.* Longmont, 19 Colo. App. 483 (1904). Holyoke Bank *v.* Goodman Paper Mfg. Co., 63 Mass. 576 (1852); Maguire's Case, 3 De G. & S. 31 (1849); Sheffield, etc. Ry. *v.* Woodcock, 7 M. & W. 574 (1841); Cheltenham, etc. Ry. *v.* Daniel, 2 Q. B. 281 (1841); Home Stock Ins. Co. *v.* Sherwood, 72 Mo. 461 (1880). The legal sufficiency of the instrument of transfer cannot be questioned by the transferrer. Chew *v.* Bank of Baltimore, 14 Md. 299 (1859).

4 Gilbert *v.* Erie Bldg. Assoc., 184

however, a distinction is drawn between the rights of a *bona fide* purchaser and a *bona fide* pledgee. It is held that the usual form of transfer on the back of certificates of stock, signed by the stockholder, with the name of the transferee left blank, does not protect a *bona fide* pledgee. The pledgee is chargeable with notice of all the facts and equities.[1] Where no certificates of stock have been issued, a purchaser of a subscriber's right to the stock is not protected as a purchaser of a certificate of stock is protected.[2] Where a person resident in England purchases certificates of stock in a French corporation and fails to have the certificates transferred on the books, an administration on such certificates may be taken out in England.[3] In delivering stock to a life tenant the executor may endorse on the certificate that it is to be held by the legatee under the terms of the will.[4]

§ 379. *Effect of charter provision requiring registry.*—The same rules prevail even though the certificate or by-laws, or charter itself, declares that a transfer shall not be legal or complete or effectual until it is registered on the corporate books.[5] As between

Pa. St. 554 (1898). A *bona fide* pledgee of a certificate of stock from a broker with a separate assignment thereof in blank, signed by the person to whom the certificate runs, is protected. O'Mara *v.* Newcomb, 88 Pac. Rep. 167 (Colo. 1906).

1 Under this decision it would seem to be necessary to enlarge the terms and form of the usual assignment and power of attorney on the back of certificates of stock. German Sav. Bank *v.* Renshaw, 78 Md. 475 (1894), a case wherein a broker holding stock on a margin repledged it at a bank.

2 Manchester St. Ry. *v.* Williams, 71 N. H. 312 (1902).

3 In the Goods of Agnese, [1900] P. 60.

4 De Loney *v.* Hull, 58 S. E. Rep. 349 (Ga. 1907).

5 Johnston *v.* Laflin, 103 U. S. 800 804 (1880), affirming 5 Dill. 65 (1878); s. c., 13 Fed. Cas. 758; Masury *v.* Arkansas Nat. Bank, 93 Fed. Rep. 603 (1899); Noyes *v.* Spaulding, 27 Vt. 420 (1855), where the court said: "That provision is similar to the statute in this state in relation to the transfer of real estate, under which it has uniformly been held that the title passes to the grantee as between the parties to the conveyance, though the deed is unrecorded. . . . The object of having the transfer recorded on the books of the corporation is notice, and that is the only object. For that reason the transfer, though unrecorded, is good against the party and all those who have notice in fact of the transfer." The words on a certificate of stock that it is transferable only on the books of the company are "only for the convenience and protection of the corporation itself," and if the certificate is endorsed in blank on the back, it can be sold and any purchaser can fill in his name and have a new certificate issued to him, the court saying: "As a rule, stocks are so sold and bought in this busy age, and pass from seller to buyer, quasi negotiable. . . . The convenience and necessities of commercial centers will always require such a usage." Shattuck *v.* American Cement Co., 205 Pa. St. 197 (1903); U. S. *v.* Cutts, 1 Sumn. 133 (1832); s. c., 25 Fed. Cas. 745; First Nat. Bank *v.* Gifford, 47 Iowa, 575 (1877). The same provision was involved in nearly all the cases cited in preceding sec-

the transferrer and transferee, the unregistered assignment is complete and effectual in contradiction of such declarations. The courts construe these provisions of the certificate or by-laws or charter to be intended, not to affect the rights of the transferee as against the transferrer, but to affect the rights of the transferee as against attaching creditors of his transferrer and other third parties claiming an interest in the stock, and also to affect his right to claim dividends, the privilege of voting, and other rights of a stockholder.[1] The corporation itself is not bound to take notice of an unrecorded transfer, of which it has no actual notice.[2]

§ 380. *Certificate of stock may be assigned with the name of the transferee left blank.*—By a commercial usage, which has been repeatedly recognized as valid by the courts, certificates of stock may be assigned by a transfer duly signed by the transferrer, but with the name of the transferee left blank.[3] Generally the com-

tions. See also Johnson *v.* Underhill, 52 N. Y. 203 (1873); Bank of Utica *v.* Smalley, 2 Cow. 770 (1824); Baldwin *v.* Canfield, 26 Minn. 43 (1879), where the court said that charter "provisions of this kind are intended solely for the protection and benefit of the corporation; they do not incapacitate a shareholder from transferring his stock without any entry upon the corporation books." In Colorado it is held that the statute requiring transfer on the corporate books in order to transfer title renders void a transfer without such registration on the corporate books. Central, etc. *v.* Smith, 95 Pac. Rep. 307 (Col. 1908).

1 Continental Nat. Bank *v.* Eliot Nat. Bank, 7 Fed. Rep. 369 (1881); Merchants', etc. Bank *v.* Richards, 6 Mo. App. 454 (1879); aff'd, 74 Mo. 77; and cases cited *supra*, and § 465, *infra*. As between the transferrer and transferee, the transfer is complete even though not registered, and even though the charter requires registry. Bates-Farley, etc. Bank *v.* Dismukes, 107 Ga. 212 (1899).

2 An unrecorded pledgee of stock is not entitled to be notified of proceedings for a consolidation with another company. A corporation is not liable to an unrecorded pledgee of its stock, even though a consolidation is brought about and the new stock issued to the pledgor thereby depriving the pledgee of the value of the stock held in pledge, the corporation having acted in good faith. Cleveland City Ry. *v.* First Nat. Bank, 68 Ohio St. 582 (1903).

3 Walker *v.* Detroit Transit Ry., 47 Mich., 338 (1882); Pennsylvania R. R.'s Appeal, 86 Pa. St. 80 (1878); Cutting *v.* Damerel, 88 N. Y. 410 (1882); German Union, etc. Assoc., *v.* Sendmeyer, 50 Pa. St. 67 (1865). A power of attorney on the back of a certificate of stock signed in blank is sufficient to transfer shares of stock in a corporation. Andrews *v.* Worcester, etc. R. R., 159 Mass. 64 (1893). "Even in the absence of such usage, a blank transfer on the back of the certificate, to which the holder has affixed his name, is a good assignment; and a party to whom it is delivered is authorized to fill it up by writing a transfer and power of attorney over the signature." McNeil *v.* Tenth Nat. Bank, 46 N. Y. 325, 331 (1871). "There is no force in the suggestion that the power of attorney in the present case was incomplete, because there were blanks for the

bined instrument of transfer and power of attorney on the back of the certificate is signed by the stockholder and delivered to the purchaser, with the names of the transferee and the attorney left blank. Such a certificate of stock, transferred in blank, may be sold and passed from hand to hand. Any purchaser of the certificate, duly signed but transferred in blank, may fill up the blanks and insert his own name.[1] He may fill in his own name as transferee, and the name of an agent as the attorney to make the registry, or he may leave the latter blank and allow the registry clerk to fill in his own name, as is generally done.

number of shares and for the name of the attorney. Any holder might fill up the blanks and constitute himself the attorney. These points are too well settled to need discussion." Holbrook *v.* New Jersey Zinc Co., 57 N. Y. 616, 623 (1874). A transfer of stock by signing the transfer on the back of the certificate need not be dated, nor need all the blanks be filled in to convey complete title at law and in equity. Aspell *v.* Campbell, 64 N. Y. App. Div. 393 (1901). A *bona fide* pledgee of a certificate of stock from a broker with a separate assignment thereof in blank, signed by the person to whom the certificate runs, is protected. O'Mara *v.* Newcomb, 88 Pac. Rep. 167 (Colo. 1906). A stockholder does not transfer his stock by merely putting his name in the first line of a transfer reading "Know all men by these presents that ....do hereby appoint," etc. without signing his name at the end of the transfer, as called for by the form, and hence a purchaser of the certificate from a pledgee of the same is not protected and a suit lies to compel the purchaser to give up the stock, and if the corporation has been merged into another corporation, the purchaser must account for what he received from such other corporation. Treadwell *v.* Clark, 114 N. Y. App. Div. 493 (1906). This decision was affirmed on appeal and it was held that where a certificate of stock is stolen from a pledgee and the transfer on the back is insufficient in that the pledgor's name was written not at the end of the transfer but at the beginning, the pledgor may by a bill in equity redeem the stock from a person who purchased it from the thief. A suit in equity lies inasmuch as an act is involved as to the amount due and the dividends received. The ten-years statute of limitations applies, there being no acquiescence or unreasonable delay. Treadwell *v.* Clark, 190 N. Y. 51 (1907). Where the vendor of stock sends the certificates endorsed in blank to a supposed bank by mail, and the vendee, who has organized the bank for fraudulent purposes, thereby obtains possession of the certificates and sells them without the draft attached to the stock being paid, a *bona fide* purchaser of the certificates is protected. Beckwith *v.* Galice, etc. Co., 93 Pac. Rep. 453 (Ore. 1908). In Montana a strange decision was rendered that a purchaser of a certificate of stock endorsed in blank, the vendor not being the original owner, was not a *bona fide* purchaser. Barker *v.* Montana, etc. Co., 89 Pac. Rep. 66 (Mont. 1907). As to the English rule, see § 325, *supra*, and § 412, *infra*.

1 Broadway Bank *v.* McElrath, 13 N. J. Eq. 24 (1860); Matthews *v.* Massachusetts Nat. Bank, 1 Holmes, 396 (1874); s. c., 16 Fed. Cas. 1113; Bridgeport Bank *v.* New York & N. H. R. R., 30 Conn. 231 (1861); Kortright *v.* Buffalo Com. Bank, 20 Wend. 91 (1838); aff'd, Commercial Bank *v.* Kortright, 22 Wend. 348 (1839); Otis

B. METHOD OF REGISTERING A TRANSFER OF STOCK.

§ 381. *Registry an important part of a transfer of stock.*—The effect of obtaining a registry or neglecting to obtain a registry of the transfer on the corporate books, immediately after purchasing a certificate of stock, has given rise to much litigation and much apparent confusion. A registry of the transfer is important in two respects: First, as regards the rights of the purchaser in reference to the corporation; second, in regard to the rights of the purchaser as to third persons who are either creditors of the old registered stockholders or have claims upon the stock in question. So far as the corporation is concerned, it is bound to recognize only the registered stockholder.[1] To him is accorded the right to vote, draw dividends, and exercise the general right of stockholdership. The unregistered purchaser of stock cannot claim such rights. All the cases agree in this result of a neglect to register a transfer. As regards the rights of third persons, however, the courts of the different states vary widely in their opinions. Generally the question arises by reason of an attachment or execution levied by a creditor of the transferrer against the stock standing on the corporate books in the name of the transferrer, who has already sold and assigned the certificate of stock to another. As a general rule, it may be said that a purchaser of a certificate of stock is usually protected as fully without a registry on the corporate books as he would be by a registry, so far as subsequent attachments and most other possible equities against the stock are concerned.[2] This is the rule in New York and most of the states. In some other states, a contrary rule prevails. In Massachusetts, Illinois, New Hampshire, and elsewhere, statutes have changed the old rule so that it now accords with that of New York.[3] It is to be borne in mind also that a lien in behalf of the corporation may attach after transfer of the cer-

v. Gardner, 105 Ill. 436 (1883); Mount Holly, etc. Co. *v.* Ferree, 17 N. J. Eq. 117 (1864); Prall *v.* Tilt, 28 N. J. Eq. 479 (1877); Leavitt *v.* Fisher, 4 Duer, 1, 20 (1854). An unrecorded pledgee of stock is not entitled to be notified of proceedings for a consolidation with another company. A corporation is not liable to an unrecorded pledgee of its stock, even though a consolidation is brought about and the new stock issued to the pledgor thereby depriving the pledgee of the value of the stock held in pledge, the corporation having acted in good faith. Cleveland City Ry. *v.* First Nat. Bank, 68 Ohio St. 582 (1903).

[1] Registry herein means not only an actual registry, but also a request to the corporation to allow registry, where improperly refused by it. See § 382, *infra*.

[2] These various questions are considered in chs. XXI, *supra*, and XXVII, *infra*.

[3] This statute is referred to in § 488, *infra*.

tificate and before registration thereof.[1] It is unreasonable for a stockholder owning twenty-five shares in one certificate, to demand that the corporation issue twenty-five share certificates of one share each in exchange therefor.[2]

§ 382. *Formalities of making registry—Transfer book and stock ledger not necessary.*—The customary method of registering a transfer of stock on the corporate books is simple. The registered stockholder, or his attorney in fact, whose name is written in the blank power of attorney, applies to the corporate officer having charge of the transfer books, and requests a registry of the transfer to a person designated by a name written in the form of transfer. Books of transfer are kept for purposes of registering, and upon such an application and the surrender of the old certificate the old stockholder or his attorney makes the registry and a new certificate is issued.[3]

Any suitable registry or stock list, or formal entry on the corporate books, suffices. No special book need be kept for that purpose.[4] Where the stock book of the corporation is locked up and cannot be reached, the directors may adopt a new stock book and minute book, and make transfers of stock.[5] Where the company does not keep a transfer book, but has only a certificate of stock book, the transfer of stock is complete when the owner of stock transfers the certificate on the back and delivers it to the secretary in order that a new certificate may be issued to the transferee and the new certificate is made out.[6] In fact the usefulness of a transfer book

1 See ch. XXXI, *infra.* Inasmuch as by the laws of England an English corporation may amend its by-laws so as to give it a lien on stock which will be prior to any existing unregistered pledge or assignment of the certificates of stock, an American pledgee or holder of such certificates of stock is bound by such by-law. Hudson, etc. Co. *v.* Warner & Co., 99 Fed. Rep. 187 (1900).

2 Schell *v.* Alston Mfg. Co., 149 Fed. Rep. 439 (1906).

3 Burrall *v.* Bushwick R. R., 75 N. Y. 211 (1878); Green Mount, etc. Co. *v.* Bulla, 45 Ind. 1 (1873). See also § 375, *supra.*

4 "All that is necessary, when the transfer is required by law to be made upon the books of the corporation, is that the fact should be appropriately recorded in some suitable register or stock list, or otherwise formally entered upon its books. For this purpose the account in a stock ledger, showing the names of the stockholders, the number and amount of the shares belonging to each, and the sources of their title, whether by original subscription and payment or by derivation from others, is quite suitable, and fully meets the requirements of the law." National Bank *v.* Watsontown Bank, 105 U. S. 217 (1881).

5 *Re* Argus Co., 138 N. Y. 557 (1893).

6 Chemical Nat. Bank *v.* Colwell, 132 N. Y. 250 (1892). A stockholder is liable by statute on stock where he has merely transferred the certificate and no effort has been made to complete the transfer on the corporate

may well be doubted, and unless the statutes require it there is a strong argument in favor of abolishing it. Probably the transfer book, and the power of attorney on the back of certificates of stock, and the provision in the certificate of stock that it can be transferred on the books of the company only in person or by duly authorized attorney, might be abolished without harm. In these days a sale and assignment of the *certificate* of stock should be sufficient to warrant a corporation making a transfer on its corporate

books; but where there is no transfer book, and the certificates are merely canceled and new ones issued, this is sufficient to effect a transfer on the corporate books. Plumb *v.* Bank of Enterprise, 48 Kan. 484 (1892). Where the corporation keeps a stock-certificate book but no transfer book, a transfer on the back of a certificate, which is then canceled and pasted back in the certificate book, and a new certificate issued to the transferee, is a sufficient transfer to constitute a transferee a stockholder. He may vote at elections, and an assignment by the corporation on the direction of officers elected by such a transferee is valid. Such a transfer is valid also, although a by-law provided that before selling his stock a stockholder must offer it to other stockholders for purchase. American Nat. Bank *v.* Oriental Mills, 17 R. I. 551 (1891). A certificate-of-stock book is sufficient to show stockholdership, if there are no transfer or stock books, even though the statute requires the latter to be kept. Knowles *v.* Sandercock, 107 Cal. 629 (1895). A mere memorandum of a sale of stock, made by the corporation in the certificate book, was held a sufficient transfer to sustain a lien in Bank of Commerce *v.* Bank of Newport, 63 Fed. Rep. 898 (1894). Where the corporation keeps no stock ledger, a transfer is sufficiently registered when the old certificate is surrendered, a new one issued, and the new name entered on the subscription list. Stewart *v.* Walla Walla, etc. Co., 1 Wash. St. 521 (1889). Where no stock or transfer books are kept, although the statute requires them, and the certificate of stock is so kept that upon a transfer the old certificates of stock are not pasted back on to the tubs corresponding thereto, the transferrer may be liable for subsequent debts, even though a new certificate was issued to the transferee and the stub opposite thereto stated from whom the stock was transferred. Herrick *v.* Wardwell, 58 Ohio St. 294 (1898). Under the New York statute a holder of unpaid stock is not relieved from liability by a transfer of the same unless such transfer is registered in a stock book; and it is held that even though no stock book is kept by the corporation, yet, if the transferrer was an officer of the company and partially responsible for not having such book kept, he cannot set up the defense that no such book was kept, especially where there is evidence of bad faith in the transfer. Beals *v.* Buffalo, etc. Co., 49 N. Y. App. Div. 589 (1900). Where a corporation keeps a stock certificate book, but no regular stock book, the former controls as to the right to vote. Matter of Utica, etc. Co., 115 N. Y. App. Div. 821 (1906). Memoranda upon the stubs of the certificate-of-stock book are not admissible in evidence the same as by statute a stock transfer book is admissible. Geneva, etc. Co. *v.* Steele, 111 N. Y. App. Div. 706 (1906). Even though the statute requires transfer books to be kept, yet the certificate-of-stock book is sufficient. *In re* Election, etc., 65 Atl. Rep. 849 (N. J. 1907).

books upon the presentation of the old certificate so assigned. T fact is that the transfer on the transfer book is a mere repetition the transfer on the back of the certificate of stock, and as the sto ledger can be posted directly from the canceled certificates of stoc the transfer book might well be abolished. A stock journal mig be convenient to show the daily transfers. The certificate-of-sto book, the stock journal and stock ledger would then correspo to the day-book, journal and ledger in ordinary bookkeeping. B in these days, when it is the rule to issue certificates of stoc and a transfer thereof transfers the equitable title to the sto itself in all the states, and the legal title in most of the stat every legal and equitable right can be preserved as well witho a transfer book and power of attorney as with them. The practic result would be the saving of transfer books and much bookkeepin Many small corporations in these days do not keep any transf book at all, and yet they experience no difficulty in transferri stock. Of course where the statutes of a state, as in New Jerse require the keeping of a transfer book, the above suggestions cou not be adopted. A demand for registry of a transfer of stock shou be made upon the principal officer or clerk at the office of the corp ration. When so made it is sufficient.[1] The method of regist may be regulated by the by-laws of the corporation. Thus, a by-la that the stock shall be transferable by indorsement in writing, ma in the presence of the cashier or two other witnesses, has been su tained as valid, and is complied with only by the presence and si nature of the cashier or of the witnesses.[2] So, also, of a by-la requiring registry in the presence of the president and secretary

1 "It is sufficient for him to apply at the bank during the usual hours of business and make his demand upon the officers and clerks who may be in attendance there; and, in case they are not authorized to transact that particular business, they must either refer him to the proper officer in the bank or procure the attendance of such officer, or of the board of directors, if necessary, without any unreasonable delay. . . . In the absence of any proof to the contrary, it may be fairly presumed that the principal officer or clerk in attendance at the bank, during the usual hours of business, is authorized to permit such a transfer when proper." Commercial Bank *v.* Kortright, 22 Wend. 348, 351 (1839); Case *v.* Bank, 100 U. S. 4 (1879), where application to t cashier was held to be proper; M Murrich *v.* Bond Head Harbor Co., Up. Can. Q. B. 333 (1852), where t application was to the secretar Goodwin *v.* Ottawa, etc. Ry., 13 U. C. P. 254 (1863), where an applicati to secretary and treasury was su tained; Green Mount, etc. Co. *v.* Bul 45 Ind. 1 (1873), where the appli tion was to the president. Presen tion of the certificate of stock, du indorsed, to the person in charge the office of the corporation is a su cient demand of transfer. Dunn Star F. Ins. Co., 19 N. Y. Week. D 531 (1884).

2 Dane *v.* Young, 61 Me. 160 (187

the company.[1] But a by-law requiring the assent of the president of the corporation to the registry of a transfer would be in restraint of trade and void.[2] It is legal for a corporation to enact a by-law requiring stockholders to pay a small fee on making transfers of their stock upon the corporate books.[3] A delivery of certificates to the corporation, and a mere request to the corporate officers to make the transfer, is not a complete registry until the entry is actually made,[4] excepting as to liability,[5] attachments,[6] and liens.[7]

The fact that the registry clerk marks on the instrument of transfer the words "received for record" does not constitute a registry.[8] A memorandum on the stock book that the stock has been transferred as collateral security is sufficient to give the transfer precedence over an attachment.[9] It has been held that, where the corporation has a branch registry office in another state, a registry in the branch office is not an effectual registry until it has been reported and entered in the books of the main office of the corporation.[10] It has been held in Iowa that where an Iowa cor-

1 Planters', etc. Ins. Co. *v.* Selma Sav. Bank, 63 Ala. 585 (1879).

2 Sargent *v.* Franklin Ins. Co., 25 Mass. 90 (1829). See also § 622, *infra.*

3 Giesen *v.* London, etc. Mortg. Co., 102 Fed. Rep. 584 (1900). It is unreasonable for a stockholder owning twenty-five shares in one certificate, to demand that the corporation issue twenty-five share certificates of one share each in exchange therefor. Mitchell *v.* Alston Mfg. Co., 149 Fed. Rep. 439 (1906).

4 Brown *v.* Adams, 5 Biss. 181 (1870); s. c., 4 Fed. Cas. 350. Nor will a mere entry of credit to the transferee, on the treasurer's books, suffice. Marlborough Mfg. Co. *v.* Smith, 2 Conn. 579 (1818).

5 See § 258, *supra.*

6 See § 490, *infra.* Under the Iowa statute a transfer of stock is not effective as against creditors, even though a request has been made to the corporation to transfer the stock, if such transfer has not been made, and even though the corporation attached to the stub of the certificate an acknowledgment of the assignment of the certificate, and even though the attaching creditor knew of such request. Perkins *v.* Lyons, 111 Iowa, 192 (1900).

7 See § 532, *infra.*

8 Northrop *v.* Newtown, etc. Co., 3 Conn. 544 (1821); Northrop *v.* Curtis, 5 Conn. 246 (1824). But a memorandum entered on the stub in the stock book opposite to the certificate issued, that that certificate has been transferred, is a sufficient registry as against attaching creditors of the transferrer. Fisher *v.* Jones, 82 Ala. 117 (1887). A mere letter from the transferee to the corporation that he has purchased the certificate is insufficient, even though such letter is pinned to the transfer book. Newell *v.* Williston, 138 Mass. 240 (1885).

9 Moore *v.* Marshalltown, etc. Co., 81 Iowa, 45 (1890).

10 Pinkerton *v.* Manchester, etc. R. R., 42 N. H. 424 (1861). A will giving all personal property in the United Kingdom to one party and all personal property in South Africa to another party, gives to the former legatee shares of stock in a South African corporation, where such corporation has a transfer office in London as well as in South Africa, and the certifi-

poration keeps its stock books in Boston, a transfer on such books in Boston is not effective as against subsequent attachments on the stock in Iowa, unless a book is kept in Iowa showing all transfers as required by the statutes of Iowa.[1] If the corporation does not keep books for the registry of transfers of stock, a mere notice to the corporation that a transfer has been made constitutes a registry.[2] But if the statute or charter requires a transfer to be made on the corporate books, no registry is possible until such books are obtained and opened.[3] If the corporation never issues certificates of stock, the stockholder cannot demand them.[4] If the corporation cannot allow the registry on account of an injunction, it is nevertheless bound to respect the rights of a transferee who gives notice to it of the transfer.[5] The issue of a new certificate of stock is not essential to the completeness of a registry of the transfer.[6] The officers have a reasonable time, after a transfer has been requested in which to find out whether the transfer is in order.[7] If the corporation delays unreasonably in allowing a registry, it is liable in damages to the applicant for registry.[8]

cates themselves are on deposit in London; but bonds issued by a South African Company will not pass to the London legatee, even though such bonds are on deposit in London. *Re* Clark, [1904] 1 Ch. 294.

1 Perkins *v.* Lyons, 111 Iowa, 192 (1900).

2 Crawford *v.* Provincial Ins. Co., 8 U. C. C. P. 263 (1859); Agricultural Bank *v.* Wilson, 24 Me. 273 (1844), holding that a transfer on the books of a corporation of stock for which certificates had not been issued is sufficient to pass the property in the stock, and a valid consideration for a note given in payment.

3 McCourry *v.* Doremus, 10 N. J. L. 245 (1828).

4 Thorp *v.* Woodhull, 1 Sandf. Ch. 411 (1844). See §§ 61, 192, *supra.*

5 Purchase *v.* New York Exch. Bank, 3 Rob. (N. Y.) 164 (1865).

6 First Nat. Bank *v.* Gifford, 47 Iowa, 575 (1877); Chouteau Spring Co. *v.* Harris, 20 Mo. 382 (1855).

7 Ireland *v.* Hart, [1902] 1 Ch. 522.

8 Sutton *v.* Bank of England, 1 Car. & P. 193 (1824), where the bank delayed longer than one day, the customary time, and refused to give any reason therefor; Catchpole *v.* Ambergate, etc. Ry., 1 El. & B. 111 (1852), where, by reason of the delay, the stock was forfeited, notice of forfeiture going to the old stockholder. See also Healey, Companies Law 3d ed., p. 93. Although the directors are entitled to reasonable time to decide whether to make a transfer, yet if they had already made up their minds, the measure of damages for refusal is the price of the stock on the day when the application was made. *Re* Ottos, etc. Mines, [1893] 1 Ch. 618. Even though the transfer agent of a corporation refuses to make the transfer until a decision is had as to taxation, and it turns out that there was no tax, and in the meantime the stock declines in value yet the transfer agent is not liable in damages, it being the agent of the corporation and not of the stockholders, and it being a non-feasance for which the agent is not liable to third parties. Dunham *v.* City Trust Co. 115 N. Y. App. Div. 584 (1900), app' Denny *v.* The Manhattan Co., 2 Denio 115 (1846). Where the corporation

The instrument of transfer must be in proper form.[1] Unless the old stockholder, or his duly authorized attorney, offers to make the registry, the corporation may refuse to allow it.[2] The power of attorney must run from the previous registered stockholder, and not from an intermediate unregistered transferee of the certificate.[3] Transfers under bankruptcy or insolvent laws are to be registered like voluntary transfers.[4] In England a written acceptance of the stock by the transferee is required.[5]

delays over thirty days in transferring stock, and in the meantime a resolution to wind up the company and reconstruct it was passed in a way that it could not have been passed if such transfer had been made, the court will, under the English statute, allow the transferee to vote as though the transfer had been made at once. *Re* Sussex Brick Company, [1904] 1 Ch. 598.

1 Queen *v.* General Cemetery Co., 6 El. & B. 415 (1856), holding that the deed of transfer, where a deed is necessary, must be properly drawn. See also Société Générale *v.* Walker, L. R. 11 App. 20 (1885).

2 Mechanics' Banking Assoc. *v.* Mariposa Co., 3 Rob. (N. Y.) 395 (1865). Where the name of the attorney to make the transfer on the back is filled into the blank, such attorney must personally apply to the corporation to make the transfer; otherwise the corporation is not liable for refusal to allow the transfer. Kjellman *v.* Scandia Fish Co., 128 Ill. App. Rep. 544 (1906).

3 Dunn *v.* Commercial Bank, 11 Barb. 580 (1852).

4 Dutton *v.* Connecticut Bank, 13 Conn. 493 (1840); State *v.* Ferris, 42 Conn. 560 (1875).

5 Ortigosa *v.* Brown, 47 L. J. (Ch.) 168 (1878). The Joint-stock Companies Act of 1856 required such an acceptance. The act of 1862, repealing the act of 1856, prescribed that transfers should be made as was customary, unless the by-laws prescribed otherwise. Hence, in the absence of by-laws, the written acceptance is held to be customary and necessary. In England, where a transfer of stock is made by first applying to the company, and having the company certify that the certificate of stock had been lodged with the company, and then the money is paid, it is held that the party purchasing the stock on the faith of this certificate of the company cannot hold the company liable, although it turns out that the vendor was not entitled to the stock, and consequently, the whole capital stock being already issued, that the transfer could not be made. The court held that the certification was *ultra vires* and hence not enforceable. Bishop *v.* Balkis Consol. Co., L. R. 25 Q. B. D. 77, 512 (1890), the court, however, dissenting from the view that the certification was *ultra vires*, but holding that the certification did not warrant the title nor the validity of the various documents. The mode of transferring stock on the corporate books in England is described in Shepherd *v.* Harris, [1905] 2 Ch. 310 and it was held that a trustee who joins with his co-trustee, a stock broker, in selling the stock as authorized, is not liable for his co-trustee defaulting with the proceeds and forging the note and stock receipt. In England shares of the capital stock cannot be transferred without the production of the certificate, where the certificate recites on its face that no transfer can be registered without its production, and hence the company is liable to a pledgee of the certificate, even though he does not apply for a transfer until after the

A mere notice to the corporation that an assignment has been made is not equivalent to a transfer.[1] Where, however, the transferee giving such notice does not obtain registry because the corporation refuses, for any reason, to make the registry, the mere notice must be borne in mind by the corporation, and the rights of the applicant preserved by it, as regards future registries.[2] The Arkansas statute requiring transfers of stock to be recorded with the county clerk does not apply to a pledge of stock.[3] Where by statute no transfer of stock on the corporate books shall be legal until a statement of such transfer has been filed with the secretary of state, the transferrer remains liable on the stock until such statement is filed with the secretary of state.[4] Where corporate officers, who are authorized to sign an issue of certificates of stock, sign them in blank and entrust them to the chief executive officer to be filled in and delivered to persons, who surrender certificates for transfer, and he fills in his own name and then pledges the certificate for a personal loan to himself, the pledgee, if *bona fide*, is protected and may hold the corporation liable for the market value of similar stock.[5]

§ 383. *Formalities of registry may be waived by the corporation.*—The corporation may waive the formalities connected with a

owner has transferred the shares to a third person, without producing the original certificate. Rainford *v.* Keith, etc. Co., Ltd., [1905] 2 Ch. 147, rev'g [1905] 1 Ch. 296. See also § 360, *supra.*

1 Stockwell *v.* St. Louis Mer. C. Co., 9 Mo. App. 133 (1880). A mere oral notice by a third party that a stockholder had transferred his stock to a designated person does not relieve the former from his liability on the subscription, no formal transfer having been made, the stock having been issued at twenty cents on the dollar. Vermont, etc. Co. *v.* Declez, etc. Co., 135 Cal. 579 (1902). Where a bank knows that a stockholder has pledged his certificate of stock, the bank cannot claim a lien upon such stock for a debt incurred to the bank subsequently by the pledgor of the stock, even though the stock is not transferred on the books, and even though the statute requires that transfers should be made only on the books of the bank. But the fact that the pledgor was the cashier of the bank is not notice to the bank, nor is the fact that the president knew of the pledge notice to the bank where he took no active part in the management of the bank and was not acting for the bank when he learned of the pledge. Curtice *v.* Crawford, etc. Bank, 110 Fed. Rep. 830 (1901). A statutory lien does not take precedence over a pledge, notice of which had been given to the corporation before the debt was incurred, even though the transfer was not registered on the corporate books. White River, etc. Bank *v.* Capital, etc. Co., 77 Vt. 123 (1904). See § 523, *infra.*

2 See § 258, *supra*, and §§ 383, 490, 532, *infra.*

3 Batesville, etc. Co. *v.* Myer, etc. Co., 68 Ark. 115 (1900).

4 Henley *v.* Myers, 93 Pac. Rep. 168 (Kan. 1907). See also ch. XV, *supra.*

5 American Exchange Nat. Bank *v.* Woodlawn Cemetery, 120 N. Y. App. Div. 119 (1907). See also § 293, *supra.*

registry of transfer, and when it does so the transferee becomes a stockholder as completely as though registry had been regularly made.[1] Frequently the waiver arises by placing the transferee's name on the list of stockholders, although no formal registry has been had.[2] Even a charter requirement that the consent of the directors to a registry of transfer shall be obtained may be waived by the corporation.[3] The corporation, by paying dividends to an unregistered transferee of stock, thereby waives the formalities of registry.[4] When the corporation refuses to allow a registry for

1 Richmondville Mfg. Co. *v.* Prall, 9 Conn. 487 (1833); Clowes *v.* Brettell, 11 M. & W. 461 (1843); Sadler's Case, 3 De G. & S. 36 (1849); Chambersburg Ins. Co. *v.* Smith, 11 Pa. St. 120 (1849); Walters's Case, 3 De G. & S. 149 (1850); Bain *v.* Whitehaven, etc. Ry., 3 H. L. Cas. 1 (1850); Wills *v.* Murray, 4 Exch. 843 (1850); Yelland's Case, 5 De G. & Sm. 395 (1852); Powis *v.* Harding, 1 C. B. (N. S.) 533 (1857); Henderson *v.* Royal British Bank, 7 El. & B. 356 (1857); Daniell *v.* Royal British Bank, 1 H. & N. 685 and note (1857); East Gloucestershire Ry. *v.* Bartholomew, L. R. 3 Exch. 15 (1867); Ind's Case, L. R. 7 Ch. App. 485 (1872); Weber *v.* Fickey, 52 Md. 500, 516 (1879); s. c., 47 Md. 196; Home Stock Ins. Co. *v.* Sherwood, 72 Mo. 461 (1880); Isham *v.* Buckingham, 49 N. Y. 216 (1872). If the corporation issues a new certificate to a *bona fide* pledgee without the surrender of the old certificate it thereby waives the by-law requiring such surrender. Richardson *v.* Longmont, etc. Co., 19 Colo. App. 483 (1904). Where a party about to take stock in pledge inquires of the corporation as to its value, and as to whether there was any lien upon the stock, and no lien is claimed, and he then takes the stock in pledge and causes an indorsement thereof to be made on the stub of the stock book of the corporation, the corporation cannot thereafter claim a lien as against him; and, moreover, a subsequent transfer of the stock by the pledgor to the corporation as security for a debt due from him to it does not take precedence over the first pledge, the certificates themselves having been transferred to the first pledgee, but not transferred on the books. Des Moines, etc. Co. *v.* Des Moines, etc. Bank, 97 Iowa, 668 (1896). See also §§ 258, 260, 262, 382, *supra*, and §§ 490, 532, *infra*.

2 Upton *v.* Burnham, 3 Biss. 431, 520 (1873); s. c., 28 Fed. Cas. 831, 833; Yelland's Case, 5 De G. & Sm. 395 (1852).

3 *Ex parte* Walton, 26 L. J. (Ch.) 545 (1857). Likewise where the by-laws contain such a provision. Chambersburg Ins. Co. *v.* Smith, 11 Pa. St. 120 (1849), holding also that an oversight, whereby the attorney who makes the registry omits to sign the registry, is immaterial. A transferee is liable on an unpaid subscription where the transfer has been recorded on the books, even though the transferee did not comply with a by-law requiring the names of transferees to be submitted to the board of directors and the approval of such board and requiring transferees to sign the by-laws. The corporation may waive such requirements. People's, etc. Bank *v.* Rickard, 139 Cal. 285 (1903).

4 Cutting *v.* Damerel, 88 N. Y. 410 (1882). Where a person buys certificates of stock in a national bank, the certificates being indorsed in blank, and the bank makes a memorandum in the certificate-of-stock book that it had been transferred to him, and sends him dividends, he is liable

reasons other than those connected with the mere formalities of registry, or for reasons not given to the applicant, it waives its right to insist on them, and cannot afterwards claim that the applicant did not conform to such technicalities.[1] A failure, however, on the part of the corporation to notify the transferee of a refusal to allow registry is no waiver of such registry.[2]

§ 384. *Either the transferrer or the transferee may apply to the corporation for a registry of transfer.*—A person who appears on the corporation books as the holder of stock, but who in fact has sold the stock, has a right to have his transfer recorded on the corporate books, thereby releasing him from liability on the stock.[3] The vendor may request the corporation to register the transfer, and the corporation may make it at his request upon the certificate of stock being delivered up for cancellation. If the vendee refuses to cause registry to be made, the vendor may bring suit in a court of equity to compel the registry of the transfer.[4] It has been held also that an intermediate vendor of the stock, whose name has never appeared on the corporate books, may likewise compel a registry to be made.[5] After an ultimate vendee has been registered, the orig-

thereon, although no transfer of the certificate is made on the corporate books, and although he bought the stock for the cashier of the bank and was merely a nominal holder. He is not such a trustee as is exempt from liability under the National Bank Act. Horton *v.* Mercer, 71 Fed. Rep. 153 (1895).

1 Quoted and approved in Richardson *v.* Longmont, etc. Co., 19 Colo. App. 483 (1904). State *v.* McIver, 2 S. C. 25 (1870); Bond *v.* Mt. Hope Iron Co., 99 Mass. 505 (1868), holding that the corporation must put the refusal on the ground of non-conformity with formalities at the time of the application, and cannot afterward raise such. Chouteau Spring Co. *v.* Harris, 20 Mo. 382 (1855); Robinson *v.* New Berne Nat. Bank, 95 N. Y. 637 (1884), where the court said: "The requirement of a registry, existing only for its own protection and convenience, must be deemed waived and non-essential when it wrongfully refuses to obey its own rule." Where the corporation fails to keep a stock register as required by statute, a purchaser of stock who sends it to the corporation for transfer is protected the same as though it had been regularly transferred on a stock register. Central, etc. *v.* Smith, 95 Pac. Rep. 307 (Col. 1908).

2 Gustard's Case, L. R. 8 Eq. 438 (1869).

3 "The purchase was in itself authority to the vendor to make the transfer. . . . A court of equity will compel a transferee of stock to record the transfer, and to pay all calls after the transfer. . . . If so, it is clear that the vendor may himself request the transfer to be made." Webster *v.* Upton, 91 U. S. 65, 71 (1875). "If a subsequent transfer of the certificate be refused by the bank, it can be compelled at the instance of either of them." Johnston *v.* Laflin, 103 U. S. 800, 804 (1880).

4 Wynne *v.* Price, 3 De G. & S. 310 (1849). See also Bermingham *v.* Sheridan, 33 Beav. 660 (1864); Eustace *v.* Dublin, etc. Ry., L. R. 6 Eq. 182 (1868).

5 Paine *v.* Hutchinson, L. R. 3 Ch. App. 388 (1868).

inal vendor cannot have an intermediate vendee and vendor registered as the stockholder.[1] The corporation may register the transfer, even against the wishes of the transferee.[2] The transferee also has a right to apply for and compel a registry of the transfer of stock to himself.[3]

C. RIGHTS AND DUTIES OF THE CORPORATION IN ALLOWING OR REFUSING REGISTRY.

§ 385. *Corporation may require proof of identity; also of genuineness of signature, etc.*—When a transfer of stock is presented to the corporation for registry, if the corporation is in doubt as to the identity of the person presenting it, whether he be the stockholder already registered on the books or the attorney of such, the corporation may require proof of such identity.[4] The officers have a reasonable time, after a transfer has been requested, in which to find out whether the transfer is in order.[5] If they are in doubt as to the competency of the transferrer to sell the stock,[6] legal proof of such competency must be given. If the applicant for registry

1 Shaw *v.* Fisher, 5 De G., M. & G. 96 (1855).

2 Upton *v.* Burnham, 3 Biss. 520, 25 (1873); s. c., 28 Fed. Cas. 833, 835.

3 Norris *v.* Irish Land Co., 8 El. & 3. 512 (1857); Daly *v.* Thompson, 10 M. & W. 309 (1842); Johnson *v.* Laflin, Dill. 65 (1878); s. c., 13 Fed. Cas. '58; s. c., 103 U. S. 800; Hill *v.* Pine River Bank, 45 N. H. 300 (1864); Presbyterian Cong. *v.* Carlisle Bank, 5 Pa. St. 345 (1847); Mechanics' Bank . Seton, 1 Pet. 299 (1828); Arnold . Suffolk Bank, 27 Barb. 424 (1857); Sargent *v.* Franklin Ins. Co., 25 Mass. 0 (1829); Cushman *v.* Thayer Mfg. Co., 76 N. Y. 365 (1879). But the omplaint must be full and accurate n its averments. Edwards *v.* Sonoma Valley Bank, 59 Cal. 136 (1881). Where a contract does not merely pledge stock, but gives the creditor he legal title and unlimited power f disposition, the creditor may by uit in equity compel the company to llow a transfer, and the transferrer eed not be made a party to the suit. Skinner *v.* Fort Wayne, etc. R. R., 8 Fed. Rep. 55 (1893).

4 Telegraph Co. *v.* Davenport, 97 U. S. 369 (1878); Davis *v.* Bank of England, 2 Bing, 393 (1824), where the court says the corporation "may take reasonable time to make inquiries, and require proof that the signature to a power of attorney is the writing of the person whose signature it purports to be;" Bayard *v.* Farmers', etc. Bank, 52 Pa. St. 232 (1866).

5 Ireland *v.* Hart, [1902] 1 Ch. 522. Even though the transfer agent of a corporation refuses to make the transfer until a decision is had as to taxation, and it turns out that there was no tax, and in the meantime the stock declines in value, yet the transfer agent is not liable in damages, it being the agent of the corporation and not of the stockholders, and it being a non-feasance for which the agent is not liable to third parties. Dunham *v.* City Trust Co., 115 N. Y. App. Div. 584 (1906), app'g Denny *v.* The Manhattan Co., 2 Denio, 115 (1846). See also § 382, *supra.*

6 See §§ 318, 319, *supra.*

applies as the attorney of the registered stockholder, the corporation may require satisfactory evidence of the genuineness of the latter's transfer, or may require the presence of the stockholder himself.[1] A corporation cannot refuse to transfer stock to a person on the ground that a trustee in bankruptcy has been appointed of his estate.[2]

§ 386. *Corporation cannot refuse registry on account of the motive of the transferrer or transferee in the transaction.*—The corporation has nothing to do with the motive or purpose of the vendor or vendee of the stock.[3] It can refuse a registry only when there is doubt as to the legal right of the applicant to have such registry. It cannot refuse on the ground that the transfer would injure the corporation, nor on the theory that the object of the transfer is to increase the votes of the transferee.[4] A bank, however, may refuse to allow a transfer of its stock to another bank where the latter has purchased the same in violation of its charter.[5] Where all the stockholders agree to a consolidation, but before it is carried out one of them sells his stock, the purchaser, if he knew of the agreement, is bound by it, but is entitled to a transfer of the stock to himself on

1 See notes, § 385, *supra;* and §§ 365–370, *supra.*

2 Sutton *v.* English, etc. Co., [1902] 2 Ch. 502.

3 State *v.* McIver, 2 S. C. 25 (1870); People *v.* Paton, 5 N. Y. St. Rep. 316 (1887); s. c., 20 Abb. N. C. 195. See also §§ 391, 736, *infra.* But a transfer, merely nominal, to obtain for the transferee certain special privileges, such as free admission to a place of amusement, may be a fraud on other stockholders and will be set aside. Academy of Music's Appeal, 108 Pa. St. 510 (1885). Equity will not compel a corporation to register a transfer of stock when the purpose of the transfer is to obtain the control of the corporation and wreck it. Gould *v.* Head, 41 Fed. Rep. 240, 248 (1890). In an action to compel the unincorporated Standard Oil "trust" to transfer on its books trust certificates which the plaintiff has purchased, the defendants, who allege that the plaintiff is a competitor of the trust and purchased the certificates in order to break up the trust and compel it to buy the plaintiff out, may be compelled to give a bill of particulars. Rice *v.* Rockefeller, N. Y. Daily Reg., May 29, 1888. The plaintiff in this case finally succeeded. (134 N. Y. 174—1892.) Where a corporation is sued for damages for a refusal to transfer stock, the company cannot set up that the plaintiff acquired his stock by an illegal gambling contract, there being nothing to show that the prior owner objected or made any claim upon the company; nor is it any defense that the stock was held as collateral security for a debt which was barred by the statute of limitations, that defense being personal to the debtor. Miller *v.* Houston, etc. Ry., 55 Fed. Rep. 366 (1893). The mere fact that a man purchases stock through his brother as his agent, and allows the stock to stand in his brother's name and thereby gives him credit, is not fraud on the part of the former. Shields *v.* City Nat. Bank, 138 N. C. 185 (1905).

4 Moffatt *v.* Farquhar, L. R. 7 Ch. D. 591 (1878).

5 Franklin Bank *v.* Commercial Bank, 36 Ohio St. 350 (1881).

the books.[1] A corporation cannot refuse to transfer stock on the ground that the vendor had agreed with others not to sell his stock.[2] In England the directors are by charter often given a discretionary power to refuse a transfer.[3]

§ 387. *Corporation may interplead between two claimants to stock.*—The task imposed upon a corporation in determining whether to refuse or to allow a registry of stock is a difficult and dangerous one. It is easy to avoid the risk of forgery or of failure of the applicant to identify himself. But circumstances frequently are such that the corporation dare not allow registry to either of two parties, each of whom claims to be the sole and absolute owner of the stock, and each of whom claims the right of registry or notifies the corporation not to register the other claimant as a stockholder. These cases arise on various occasions, but most often where the stock has been attached or sold on execution by the transferrer's creditors before the transferee has obtained registry; or where, by the fraud of the old stockholder's agent, the certificate has passed into the hands of a *bona fide* purchaser; or where, by a breach of trust, an executor or administrator, or trustee or guardian, has sold the trust stock and appropriated the proceeds; or under other states of fact wherein there are two claimants of the stock, each having rights which can be clearly ascertained only by litigation. It is not incumbent on the corporation to decide between these conflicting parties and rights.[4] Such a requirement would expose it to unreasonable risks and compel it to assume the functions of a court.

1 Senn *v.* Union, etc. Co., 115 Mo. App. 685 (1906).

2 Sylvania, etc. R. R. *v.* Hoge, 59 S. E. Rep. 806 (Ga. 1907).

3 See Healey, Companies Law, 3d ed., p. 90. Directors cannot refuse to allow a transfer on account of hostility to the transferee, even though the transfer does not set out the address of the transferrer or the particular number of the share transferred, the transferrer having only one share. *Re* Letheby, etc. Ltd. [1904] 1 Ch. 815. Where the directors are authorized by the articles of incorporation to reject a transfer of stock on the ground that they do not approve of the transferee, "the discretionary power is of a fiduciary nature and must be exercised in good faith; that is, legitimately for the purpose for which it is conferred. It must not be exercised corruptly, or fraudulently, or arbitrarily, or capriciously, or wantonly. It may not be exercised for a collateral purpose. In exercising it the directors must act in good faith in the interest of the company and with due regard to the shareholder's right to transfer his shares, and they must fairly consider the question of the transferee's fitness at a board meeting." It is not a sufficient reason that the transferee is not a member of a particular family, and the directors will be ordered to make the transfer. *Re* Bell, 65 L. T. Rep. 245 (1891). See also § 622, *infra.*

4 The discussion of the duty of the corporation in various circumstances is given under chapters devoted to them. See also § 363, *supra.*

Where there is a reasonable doubt as to the facts involved or as to the respective rights of the claimants of the stock, and the corporation is sued by one of the claimants for refusing to allow a registry by him, the corporation may interplead, and thus compel the claimants to ascertain their rights through the medium of a court of justice.[1] A similar interpleader may be made where the corpora-

1 Merchants' Nat. Bank *v.* Richards, 6 Mo. App. 454 (1879); aff'd, 74 Mo. 77; State Ins. Co. *v.* Gennett, 2 Tenn. Ch. 100 (1874); Leavitt *v.* Fisher, 4 Duer (N. Y.), 1 (1854). In Lovell *v.* Jacobs, 150 N. Y. 84 (1896), a trust company, acting as depositary for stock which had been sold on certain conditions, sustained a bill of interpleader, the vendor having claimed that the stock should not be delivered and the vendee claiming the contrary. In Equity Gas Light Co. *v.* McKeige, 139 N. Y. 237 (1893), where a bailee of stock was sued by one of the claimants for the return of the stock, the court said: "The defendant may ordinarily protect himself by bringing suit in the nature of a bill of interpleader, making the different claimants parties." Where by will the widow is given a life interest in the personalty, and certain stock was transferred to her and she transfers to one of the life tenants such stock, retaining the right to the dividends during her life, and upon her death the other life tenants claim their interest, the corporation may interplead as between them, even though it issued a new certificate in the name of such life tenant, but retained the certificate itself. Dickinson *v.* Griggsville Nat. Bank, 209 Ill. 350 (1904). A corporation interpleaded between a purchaser of bank stock at an execution sale and an alleged *bona fide* purchaser of the stock from a judgment debtor, in the case of M'Donald *v.* First, etc. Bank, 116 Fed. Rep. 129 (1902). In the case of American Press Assoc. *v.* Brantingham, 75 N. Y. App. Div. 435 (1902), the corporation interpleaded between two claimants for certain stock. Where the real owner of stock brings suit against a transferee of that stock who has obtained a new certificate therefor and succeeds in the suit, and in the meantime the defendant has assigned the stock to a third party, the corporation may institute suit and interplead between the successful claimant of the stock and the transferee of the stock from the defendant. The defendant in the former suit need not be joined as a party in the latter suit. The purchaser of the certificate may be enjoined from transferring the same, and may be compelled to deposit the certificate with the clerk of the court. American, etc. Assoc. *v.* Brantingham, 57 N. Y. App. Div. 399 (1901). If the court decides that the interpleader is properly filed by the corporation herein, it generally on a motion dismisses the proceeding with costs to the corporation, and the court also decides between the defendants if the case is ready as between them. If not ready, it directs an action or an issue, or a reference to a master, to ascertain contested facts, as may be best suited to the nature of the case: "or the court may leave it to the defendants to prepare the case between them as they may be advised, which would be the effect of a general order to interplead." State Ins. Co. *v.* Gennett, 2 Tenn. Ch. 100 (1874), citing, as cases on above rules of practice, East, etc. Co. *v.* Littledale, 7 Hare, 57, 62 (1848); Martinius *v.* Helmuth, 2 Ves. & B. 412, note (1817); Horton *v.* Baptist Church, 34 Vt. 309, 317 (1861); Rowe *v.* Matteson, 7 N. J. Eq. 131 (1848); Crawford *v.* Fisher, 1 Hare, 436, 441

ion is sued for dividends which are claimed by two opposing parties.[1]

There is some doubt and considerable difficulty in laying down rules as to when a corporation may safely claim a right to refuse

(1842); Condict *v.* King, 13 N. J. Eq. 375, 383 (1861); Hendrickson *v.* Shotwell, 1 N. J. Eq. 595 (1802); City Bank *v.* Bangs, 2 Paige, 570 (1831); Angell *v.* Hadden, 16 Ves. Jr. 202 (1809).

In State Ins. Co. *v.* Gennett, 2 Tenn. Ch. 82 (1874), the court also said: "The law is that the mere pretext of a conflicting claim is not sufficient; the court must be able to see from the facts stated that there is a question to be tried." A corporation which for a long time was abandoned and which is unable to tell who its stockholders are may file a bill in equity to ascertain who its stockholders are and to cancel illegal certificates and determine the rights of conflicting claims to the stock. Geneva, etc. Co. *v.* Steele, 111 N. Y. App. Div. 706 (1906). In England, by section 35 of the Companies Act, 1862 (25 & 26 Vict., c. 89), a corporation may interplead between two claimants of stock, and need not pay costs. *Re* Kimberley, etc. Min. Co., 58 L. T. Rep. 305 (1888). An interpleader was sustained in Bangor, etc. Co. *v.* Robinson, 52 Fed. Rep. 520 (1892). Where a judgment creditor levies on stock standing in the name of a dummy for the debtor, the corporation may practically interplead between such creditor and an alleged *bona fide* holder of the stock. A court of equity has jurisdiction in order to decree a transfer. Spencer *v.* James, 10 Tex. Civ. App. 327 (1895). In Langston *v.* Boylston, 2 Vesey, Jr. 101 (1793), where a bailee of bonds was sued by the bailor for conversion for not delivering up the bonds to the latter, although attachments had been levied on them, the bailee sustained a bill of interpleader. In Cady *v.* Potter, 55 Barb. 463 (1869), a corporation sustained its bill of interpleader as between a person to whom it had issued stock on a transfer without a surrender of the old certificate and a person to whom it afterwards issued the stock on a surrender of the old certificate. The author himself, in the year 1897, maintained, in the New York supreme court, a suit of interpleader by a corporation as between two claimants of stock, together with an injunction against the prosecution of a suit at law commenced by one of the claimants against the corporation for damages for refusal to transfer the stock. A broker cannot interplead between his customer and an indorser of the customer's note, in regard to stocks deposited with the broker by the customer, even though the administrator of the indorser claims that he has an interest in such stock. Post *v.* Emmett, 40 N. Y. App. Div. 477 (1899). A person holding stock in escrow under an option agreement may interplead between the parties in interest if they make conflicting claims. Walker *v.* Bamberger, 17 Utah, 239 (1898).

1 Salisbury Mills *v.* Townsend, 109 Mass. 115 (1871); Todd *v.* Diamond State Iron Co., 8 Houst. (Del.) 372 (1889). Quere, as to whether an action for dividends can be maintained before the right of the claimant to the stock is established. Hughes *v.* Vermont Copper Min. Co., 72 N. Y. 207 (1878). Where stock stands in the name of a person as trustee, and another person claims that the trustee is holding it for him as pledgee, and both parties claim the dividend, the corporation may interplead. Page, etc. Co. *v.* F. H. Prince & Co., 67 Atl. Rep. 401 (N. H. 1907). See also § 538, *infra.*

to act, and to compel the claimants to litigate between themselves before it allows a registry to either. The policy of the law doubtless is to go very far in allowing the corporation to refuse to incur responsibility by taking action. Where, however, the rights of one claimant are reasonably clear, the corporation should suspend action for a reasonable time within which the contesting party may commence suit; and if no such action is brought it should allow a registry by the first-named claimant.[1] Any other rule would enable any person to practically deprive a stockholder of the possession of his stock temporarily, by simply notifying the corporation that he claims the stock.[2] Where, however, the corporation has allowed one claimant to register his transfer, or has recognized him as a stockholder, the right of the corporation to interplead is gone.[3] It cannot afterwards remove the name of the registered stockholder, especially where such stockholder has acted in reliance upon such

[1] State *v.* McIver, 2 S. C. 25 (1870). A corporation cannot interplead as between stockholders for the purpose of determining the ownership of stock, there having been no claim made upon it in regard to registry or in regard to dividends. It must be shown also that the company has not acted in a partisan manner as between the different claimants. Hinckley *v.* Pfister, 83 Wis. 64 (1892). If the corporation allows a transfer to be made during the pendency of a suit between two claimants therefor, and the corporation has notice, it is not liable to the successful party, who is thereby deprived of the stock, there having been no injunction *pendente lite.* Hawes *v.* Gas, etc. Co., 12 N. Y. Supp. 924 (1891). An interpleader may be proper even though no suit has been actually commenced against the corporation. See Story's Eq. Juris., § 808; Daniell, Ch. Pl. & Pr., pp. 1561, 1564, notes. In New York, under the Code of Civil Procedure, an *order* for interpleader can only be granted after a suit has been commenced against the corporation. Buffalo Grape Sugar Co. *v.* Alberger, 22 Hun, 349 (1880). As to the proper allegations, see Crane *v.* Macdonald, 118 N. Y. 648 (1890), involving a *suit.* A corporation cannot refuse to transfer stock to a person on the ground that a trustee in bankruptcy has been appointed of his estate. Sutton *v.* English, etc. Co., [1902] 2 Ch. 502.

[2] *Ex parte* Sargent, L. R. 17 Eq. 273 (1874). Where the pledgee presents the stock to the corporation for transfer, but the pledgor forbids the transfer, and thereafter the stock goes down, the pledgee may hold the pledgor liable for loss caused by interfering with the transfer. Hooper *v.* Herts, [1906] 1 Ch. 549.

[3] Dalton *v.* Midland Ry., 12 C. B. 458 (1852); Mt. Holly, etc. Co. *v.* Ferree, 17 N. J. Eq. 117 (1864). If the party has favored one of the two parties, as by voluntarily agreeing with the sheriff to recognize an execution, an interpleader will not lie. Cromwell *v.* American Loan, etc. Co., 57 Hun, 149 (1890). See also American Tel., etc. Co. *v.* Day, 20 J. & S. (N. Y.) 128 (1885). A corporation cannot refuse to transfer stock on the ground that the vendor fraudulently induced the company to issue the stock to him, where the company has been guilty of laches in not seeking a remedy before the transfer. The vendee in this case was a director. American, etc. Co. *v.* Bayless, 91 Ky. 94 (1891).

registry.[1] It may, however, bring suit to recover back the stock.[2] Where a claimant of stock has instituted suit against the stockholder of record and also the corporation to obtain the stock, it is the duty of the corporation not to pay any further dividends to the stockholder of record until the suit is decided, and it is liable if it does pay.[3]

§ 388. *Corporation must obey mandate of court ordering registry and issue of new certificates.*—The authorities on this proposition of law are few in number, but they are decisive in protecting the corporation from liability where it proceeds under mandate of a court. Thus, where a decree is obtained commanding the corporation to register a transfer, the corporation is protected in obeying the decree, even though it is reversed on appeal, there having been no stay of proceedings.[4] Under the statutes of California, however, even though stock is distributed by executors in accordance with a decree of distribution, and the distributees sell the stock and it is transferred on the books of the company, nevertheless, if

1 Ward *v.* Southeastern Ry., 2 El. & El. 812 (1860); Hart *v.* Frontino, etc. Co., L. R. 5 Exch. 111 (1870); Cohen *v.* Gwynn, 4 Md. Ch. 357 (1848). Unless there clearly is a clerical mistake and the issue is to the wrong party. Smith *v.* North Am. Min. Co., 1 Nev. 423 (1865). The corporation is liable for such mistakes. Harrison *v.* Pryse, Barn. Ch. 324 (1740).

2 See § 367, *supra.* Where the president claims certain unissued stock as assignee of a contractor who was entitled to it, and another person also claims it as assignee of the contractor, and the president issues the stock to himself without authority of the board of directors, the corporation may institute a suit to compel him to give it up, and in such suit the court will determine who is entitled to such stock. Lakewood Gas. Co. *v.* Smith, 62 N. J. Eq. 677 (1902).

3 McCord *v.* Nabours, 109 S. W. Rep. 913 (Tex. 1908).

4 Chapman *v.* New Orleans, etc. Co., 4 La. Ann. 153 (1849). See also Purchase *v.* New York Exch. Bank, 3 Rob. (N. Y.) 164 (1865). But when the court directs the corporation to issue a certificate to the life tenant of stock, the corporation is still bound to notify a purchaser of that certificate that it represents a life interest only; otherwise the corporation is liable to the remainderman. Caulkins *v.* Gaslight Co., 85 Tenn. 683 (1887). A corporate officer is guilty of contempt if he refuses to obey an order of court requiring him to make certain transfers of stock upon the surrender of the old certificates. King *v.* Barnes, 113 N. Y. 476, 655 (1889). Upon an appeal from final judgment an interlocutory judgment ordering the transfer of stock from a trustee to the party entitled to the same will not be enforced, provided the party is allowed to vote thereon. Potter *v.* Rossiter, 109 N. Y. App. Div. 32 (1905). An English court in appointing a person to transfer stock which stands in the name of a person who has been ordered to transfer it but who has neglected or refused to do so, will not require a bond of indemnity to the corporation, because the corporation is protected even if the order should turn out to have been erroneous. Savage *v.* Norton, 98 L. T. Rep. 382 (1907).

the decree is reversed on appeal, the transfers are void and the company is liable for dividends paid in the meantime to such purchasers.[1] Cases herein may arise also where the registered stockholder alleges that he has lost his certificate, and the court compels the corporation to issue to him a new one;[2] also where an attachment or execution has been levied, the old certificate of stock being outstanding.[3] There is a limit, however, to the power of courts in these matters. If the whole capital stock has been issued and the certificates therefor are outstanding, a court cannot order the issue of other certificates, unless the decree at the same time practically nullifies a corresponding outstanding certificate.[4] A person holding a certificate of stock issued by order of the court after an execution sale, is entitled to attend meetings, and his transferee who has presented the stock for transfer, and who also has a proxy from the transferrer, is entitled to attend the meetings and may recover damages for assault if he is ejected from the meeting. The company cannot defend on the ground that the execution sale was invalid, and that the stock had been canceled.[5] A bill in equity may be filed by a citizen of New Jersey and a foreigner to have stock in a New Jersey corporation, then held by foreigners, awarded to complainants and new certificates issued to the latter. Pending the suit the court may appoint a receiver of the stock and may enjoin transfer. Service on the defendant foreigners may be made by publication.[6]

§ 389. *Remedies of a transferee of stock against the corporation for refusal to allow registry.*—Where, for any reason, the corporation refuses to allow the registry of a transfer of stock, when it is the duty and obligation of the corporation to allow it, the transferrer or the transferee who applies for registry may, in general, pursue one of three remedies. He may apply to a court of law for a *mandamus* to the corporation to compel it to open its books and allow the registry; or he may bring a suit in equity, praying that

1 In a suit by the executors to recover such dividends the purchasers need not be made parties. Ashton *v.* Zeila Min. Co., 134 Cal. 408 (1901). See also Ashton *v.* Heggerty, 130 Cal. 516 (1900).

2 See §§ 358–362, *supra.*

3 See § 489, *infra.*

4 See § 284, *supra.* Where stock is deposited with a trustee for purposes of reorganization, and transferable certificates are issued therefor by the trustee, a claimant of stock which another person has deposited, and for which such other person has the trustee's certificate, cannot compel the trustee to deliver up the stock until the trustee's certificate is returned, even though the party holding it is a party defendant. Bean *v.* American Loan, etc. Co., 122 N. Y. 622 (1890).

5 Noller *v.* Wright, 138 Mich. 416 (1904).

6 Sohege *v.* Singer Mfg. Co., 68 Atl. Rep. 64 (N. J. 1907). See also § 363, *supra.*

the corporation be decreed to allow the registry, or to pay him damages if registry is impossible; or he may sue the corporation at law for damages, on the ground that by its refusal it has been guilty of a conversion of his stock.[1] The officers cannot be held personally liable.[2]

§ 390. *Remedy by mandamus.*—The authorities are in irreconcilable conflict on the question whether a *mandamus* lies to compel a corporation to allow a registry on its books of a transfer of stock. The weight of authority holds very clearly that the *mandamus* will not lie.[3] This rule is based largely on the historical origin of the

1 Quoted and approved in Herbert, etc. Bank *v.* Bank of Orland, 133 Cal. 64 (1901), and in Real Estate, etc. Co. *v.* Bird, 90 Md. 229 (1899).

2 See § 392, *infra.*

3 The leading case in this country is Shipley *v.* Mechanics' Bank, 10 Johns. 484 (1813), where the court said: "The applicants have an adequate remedy, by a special action on the case, to recover the value of the stock if the bank have unduly refused to transfer it. There is no need of the extraordinary remedy by *mandamus* in so ordinary a case. It might as well be required in every case where trover would lie. It is not a matter of public concern, as in the case of public records and documents; and there cannot be any necessity, or even a desire, of possessing the identical shares in question." *Ex parte* Fireman's Ins. Co., 6 Hill (N. Y.), 243 (1843); People *v.* Parker Vein Coal Co., 10 How. Pr. 543 (1854); State *v.* Rombauer, 46 Mo. 155 (1870); State *v.* St. Louis, etc. Co., 21 Mo. App. 526 (1886); Rex *v.* London Assur. Co., 1 Dowl. & R. 510 (1822); s. c., 5 B. & Ald. 899; Stackpole *v.* Seymour, 127 Mass. 104 (1879); Rex *v.* Bank of England, 2 Doug. 524 (1780); Curry *v.* Scott, 54 Pa. St. 270, 276 (1867); Gray *v.* Portland Bank, 3 Mass. 364, 381 (1807); State *v.* Guerrero, 12 Nev. 105 (1877); People *v.* Miller, 39 Hun, 557 (1886); aff'd, 114 N. Y. 636; Baker *v.* Marshall, 15 Minn. 177 (1870), where the stock had already been issued to another; Wilkinson *v.* Providence Bank, 3 R. I. 22 (1853); Kimball *v.* Union Water Co., 44 Cal. 173 (1872); Birmingham F. Ins. Co. *v.* Commonwealth, 92 Pa. St. 72 (1879), where the court says, that, even if the courts "were inclined to enlarge the remedy, it could not be done in a case where the right is disputed, where no public interest is involved, where no reason is shown for a transfer of a specific and favorite thing, and where the remedy by action is fully adequate;" Townes *v.* Nichols, 73 Me. 515 (1882), where the court vigorously says: "All the authorities declare that the remedy by *mandamus* cannot be resorted to in a case like this, unless the legal right of the petitioner to the possession of the thing sought for is clear and unquestionable. If there be doubt as to what his legal right may be, involving the necessity of litigation to settle it, *mandamus* must be withheld. *Mandamus* is the right arm of the law. Its principal office is, not to inquire and investigate, but to command and execute. It is not designed to assume a part in ordinary lawsuits or equitable proceedings. It is properly called into requisition in cases where the law has been settled, or in cases where questions of law or equity cannot properly and reasonably arise. Its very nature implies that the law, although plain and clear, fails to be enforced and needs its assistance." See also Rex *v.* Worcester, etc. Nav. Co.,

writ of *mandamus*, and on the theory that the stock of a private corporation has no peculiar value, and may be readily obtained in open market or fully compensated for in damages.[1] There is a strong line of decisions, however, which holds that a *mandamus* does lie to compel a corporation to allow a registry of a transfer of stock, particularly where the corporation has no good and suffi-

1 Man. & R. 529 (1828); Regina *v.* Liverpool, etc. Ry., 21 L. J. (Q. B.) 284 (1852); Murray *v.* Stevens, 110 Mass. 95 (1872), where the court said, in refusing a *mandamus* to compel a registry of stock: "Without undertaking to lay down an invariable rule on the subject, we think it must be said that this process was not attended and is not well adapted for the trial of mere questions of property;" State *v.* Warren Foundry, etc. Co., 32 N. J. L. 439 (1868), where a previous transfer had been registered, although possibly in fraud of creditors; Freon *v.* Carriage Co., 42 Ohio St. 30 (1884), refusing a *mandamus*, although it is said "that this stock has no market value, that the corporation is doing a growing and profitable business, that its good-will enhances the value of the stock, and that by reason of these things damages will not be an adequate remedy. These facts do not change the rule. They are elements in assessing damages which may be fully ascertained in an action at law." See also Pomeroy, Eq. Jur., § 1412; State *v.* People's Bldg. etc. Assoc., 43 N. J. L. 389 (1881); State *v.* Timkin, 48 N. J. L. 87 (1886); Tobey *v.* Hakes, 54 Conn. 274 (1886), refusing a *mandamus* on the corporate secretary; Bank of State *v.* Harrison, 66 Ga. 696 (1881). See also Lindley, Company Law, pp. 79, 811, 812, 6th ed. *Mandamus* does not issue to compel a corporation to transfer stock when there is no written transfer of the certificate and another party claims it. Burnsville Turnp. Co. *v.* State, 119 Ind. 382 (1889). See also Durfee *v.* Harper, 22 Mont. 354 (1899). *Mandamus* does not lie to compel a corporation to transfer stock. People *v.* Brandis Mfg. Co., N. Y. L. J., Dec. 11, 1889. *Mandamus* does not lie against the Bank of England to compel it to register a transfer of stock to an individual and a corporation jointly. Law Guarantee, etc. Soc. *v.* Bank of England, L. R. 24 Q. B. D. 406 (1890). *Mandamus* is not the proper remedy to compel the issue of a certificate of stock. State *v.* Carpenter, 51 Ohio St. 83 (1894). *Mandamus* does not lie to compel a company to transfer stock, even though the right is clear, there being an adequate remedy at law or in equity. Clarke *v.* Hill, 132 Mich. 434 (1903). Under the statutes of Georgia it is held that *mandamus* does not lie to compel a transfer of stock, unless the transfer is connected with a judicial sale; and even though a sale is made by a trustee appointed by a court and he has been authorized to sell the stock, yet this is not sufficient to sustain *mandamus*. Terrell *v.* Georgia, etc. Co., 115 Ga. 104 (1902). Under the latest decisions of the federal courts, it seems that *mandamus* does not lie in the federal court as an independent proceeding. Large *v.* Consolidated Nat. Bank, 137 Fed. Rep. 168 (1905); Rosenbaum *v.* Bauer, 120 U. S. 450 (1887). Where by statute a transfer must be in accordance with the by-laws, the purchaser of stock cannot compel a transfer by *mandamus* unless he alleges that the by-laws were complied with. Butterfly, etc. Co. *v.* Brind, 91 Pac. Rep. 1101 (Colo. 1907).

1 Quoted and approved in State *v.* Jumbo, etc. Min. Co., 94 Pac. Rep. 74 (Neb. 1908).

cient reason for refusing the registry.[1] Perhaps the strongest argument against granting a *mandamus* for this purpose lies in the fact that by a bill in equity not only can a registry be specifically decreed and ordered by the court, but the rights of the corporation and of all of the claimants may be fully and finally heard and disposed of.

§ 391. ***Remedy by suit in equity.***—This is the surest, most complete, and most just remedy for compelling a corporation to register a transfer of stock, and for adjusting the various conflicting

[1] People *v.* Goss, etc. Co., 99 Ill. 355 (1881); State *v.* First Nat. Bank, 89 Ind. 302 (1883); Green Mount, etc. Co. *v.* Bulla, 45 Ind. 1 (1873); People *v.* Crockett, 9 Cal. 112 (1858); State *v.* McIver, 2 S. C. 25 (1870); State *v.* Cheraw, etc. R. R., 16 S. C. 524 (1881); Cooper *v.* Dismal Swamp, etc. Co., 2 Murph. (N. C.) 195 (1812); Norris *v.* Irish Land Co., 8 El. & Bl. 512 (1857); Regina *v.* Carnatic Ry., L. R. 8 Q. B. 299 (1873); Crawford *v.* Provincial Ins. Co., 8 U. C. C. P. 263 (1859); Goodwin *v.* Ottawa, etc. Ry., 13 U. C. C. P. 254 (1863), holding also that the *mandamus* may run to the corporation itself without specifying any officers, and that an evasive answer by them is equivalent to a refusal to register. It has been held that *mandamus* will issue to aid the sheriff in transferring stock sold on an execution sale. This rule, however, would work harshly in states where the purchaser of the outstanding certificate may have some rights. Where such a possibility exists the *mandamus* should be denied. State *v.* First Nat. Bank, 89 Ind. 302 (1883); Bailey *v.* Strohecker, 38 Ga. 259 (1868); Durham *v.* Monumental, etc. Co., 9 Oreg. 41 (1880). *Cf.* § 489, *infra.* *Mandamus* will lie to compel the corporation to transfer the stock on its books where any other record would be inadequate because there is no market value for the stock, and because the company has fraudulently transferred its property for the purpose of injuring the value of the stock. The *mandamus* will lie although a suit is pending in equity to accomplish the same purpose. Slemmons *v.* Thompson, 23 Oreg. 215 (1892). *Mandamus* lies to compel a corporation to transfer stock sold under levy of execution. It may be granted as a common-law remedy or as a remedy ancillary to the suit. Hair *v.* Burnell, 106 Fed. Rep. 280 (1900). Where the purchaser of stock at execution sale applies for a *mandamus* to compel the corporation to transfer the stock to him, and the owner of the stock intervenes and claims that the debt on which the stock was sold had been paid, and asks for a delivery of the certificates to the owner, the case may be tried in equity. Croft *v.* Colfax, etc. Co., 113 Iowa, 455 (1901). Where the subscriber to stock makes the final payment thereon and directs the corporation to issue the certificate to one to whom he has sold it and then countermands the order, the purchaser will be granted a mandamus commanding the corporation to issue the certificate to him. Scherk *v.* Montgomery, 81 Miss. 426 (1903). Where the corporation has no reason for refusing transfer *mandamus* lies. State *v.* Consumers', etc. Co., 115 La. 782 (1905). *Mandamus* will not issue to compel a corporation to issue to a purchaser treasury stock which he has purchased, even though he has paid for the same, unless the stock has some peculiar and special value different from other similar stock in that company, or unless the control of the corporation is at issue. The

rights or claims of other parties.[1] It is a remedy applicable to almost all cases arising under a refusal of the corporation to allow

legal right to the stock must also be clear. State *v.* Jumbo, etc. Min. Co., 94 Pac. Rep. 74 (Neb. 1908).

1 Quoted and approved in Real-Estate, etc. Co. *v.* Bird, 90 Md. 229 (1899); Cushman *v.* Thayer Mfg. Co., 76 N. Y. 365 (1879); Walker *v.* Detroit Transit Ry., 47 Mich. 338 (1882); Iasigi *v.* Chicago, etc. R. R., 129 Mass. 46 (1880); Mechanics' Bank *v.* Seton, 1 Pet. 299 (1828); Wilson *v.* Atlantic, etc. R. R., 2 Fed. Rep. 459 (1880); Middlebrook *v.* Merchants' Bank, 3 Keyes (N. Y.) 135 (1866); Buckmaster *v.* Consumers' Ice Co., 5 Daly, 313 (1874). Where a certificate of stock is stolen from a pledgee and the transfer on the back is insufficient in that the pledgor's name was written not at the end of the transfer but at the beginning, the pledgor may by a bill in equity redeem the stock from a person who purchased it from the thief. A suit in equity lies inasmuch as an account is involved as to the amount due and the dividends received. The ten-years statute of limitations applies, there being no acquiescence or unreasonable delay. Treadwell *v.* Clark, 190 N. Y. 51 (1907). In Rice *v.* Rockefeller, 134 N. Y. 174 (1892, reversing 9 N. Y. Supp. 866), a court of equity compelled the trustees of a trust to transfer on their books trust certificates which had been purchased in open market by a person who then applied to the trustees for a transfer. The court based its decision on the similarity of such trust certificates to stock certificates, and said: "The denial of the right to transfer upon the books is not consistent with the transferable quality of the shares, which imports that the purchaser taking an assignment of them in a duly formal manner has the right to become a transferee within the meaning of the agreement upon which the trust was formed. . . . In such case it is within the equitable power of the court to compel such transfer to be made." The court held also that it was immaterial that the purchaser who applied for the transfer was hostile to and a competitor of the trust. The court said that although it would have been legal in the beginning to have vested a discretion in the trustees as to allowing transfers, yet that, such discretion not having been reserved, it could not be exercised by the directors. See also White *v.* Price, 39 Hun, 395 (1886); aff'd, 108 N. Y. 661 (1888); Iron R. R. *v.* Fink, 41 Ohio St. 321 (1884), the court saying that the power of equity to decree a registry is well settled. As regards the pleadings, see Burrall *v.* Bushwick R. R., 75 N. Y. 211 (1878). See also § 579, *infra*. A suit to determine title to stock and to have the outstanding certificate canceled and a new one issued is in equity and need not be tried before a jury. Noble *v.* Learned, 87 Pac. Rep. 402 (Cal. 1906). A purchaser of stock at an execution sale may file a bill against an alleged transferee of the stock and the corporation to have the conflicting rights ajudicated. Howard *v.* Corey, 126 Ala. 283 (1900). In an action against the secretary of a corporation to compel him to register a transfer of stock, the corporation is not a necessary party. Gould *v.* Head, 41 Fed. Rep. 240 (1890).

The federal courts have jurisdiction of a suit in equity brought by a citizen of one state to compel a corporation of another state to transfer on its books certain shares of stock which the complainant purchased from a citizen of the same state as the defendant. Jewett *v.* Bradford, etc. Co., 45 Fed. Rep. 801 (1891). If the holder of a certificate of stock has applied for transfer and been re-

a registry of transfer. The case will be decided on equitable principles, however, and a transfer will not be decreed if it involves bad faith.[1] The corporation itself is of course a necessary and in fact the chief defendant where stock has been presented for transfer, which has been refused.[2] In a suit in equity by the claimant of stock against other parties, claiming the stock, the corporation is a proper but not a necessary party defendant, in order that a transfer of the stock may be had upon the corporate books.[3] A somewhat sim-

fused, he may sue for the dividend before bringing a suit in equity to obtain a transfer of his stock. Hill v. Atoka, etc. Co., 21 S. W. Rep. 508 Mo. (1893). This case arose again in 124 Mo. 153. An agreement of the holder of a majority of the stock that he will retain control is no defense by the corporation to an action by the receiver of such stockholder to transfer the stock on the corporate books. Weller v. Pace Tobacco Co., 25 N. Y. Week. Dig. 531 (1886). A suit in equity lies to compel a corporation to transfer stock on its books. Arbuckle v. Spice Co., 11 Ohio Circuits, 726 (1901). A pledgee of a certificate of stock is not bound by an agreement of all the stockholders to surrender to the corporation a part of their stock, which part is to be then considered preferred stock, and is to be sold by the corporation for the purpose of paying corporate debts. Although all the other stock has had this agreement stamped on the certificates, yet the corporation cannot insist that the purchaser of the stock so pledged shall allow the same agreement to be stamped on the new certificate issued to such purchaser. The court will order a transfer free from the agreement. Campbell v. American Zylonite Co., 122 N. Y. 455 (1890). Even though the charter of an irrigation company provides that no one shall hold stock, except an owner of land to the amount of one acre for each share of stock held by him, yet where the stock is sold for non-payment of assessments the purchaser at such sale is entitled to a transfer on the corporate books, although he owns no land. The purchaser may file a bill in equity to determine his rights. The court found it unnecessary to pass on the question as to whether such a restriction as to the stock is legal. Spurgeon v. Santa Ana, etc. Co., 120 Cal. 71 (1898). A bill in equity lies to compel a corporation which has declared a stock dividend to stockholders of record on July 1st, to deliver such stock dividend to a purchaser on July 6th whose purchase included such dividend. Rose v. Barclay, 191 Pa. St. 594 (1899).

1 Regina v. Liverpool, etc. Ry., 21 L. J. (Q. B.) 284 (1852). *Cf.* Rice v. Rockefeller, 134 N. Y. 174 (1892). See also § 386, *supra*, and § 736, *infra*.

2 In a suit to compel the issue of certificates of stock to a transferee it must be alleged that a transfer has been made on the books or that the company should have made such transfer. Lacaff v. Dutch, etc. Co., 31 Wash. 566 (1903). See also the cases in this section generally.

3 See § 338, *supra;* also Tanner v. Gregory, 71 Wis. 490 (1888); Kendig v. Dean, 97 U. S. 423 (1878); Budd v. Munroe, 18 Hun, 316 (1879), the latter case holding also that the corporation may recover costs against a codefendant who is defeated in the suit; Johnson v. Kirby, 65 Cal. 482 (1884). In a suit by a purchaser of a certificate of stock in a bank to compel the bank to transfer the same on its books, the cashier is not a necessary party defendant, and if the president is made a party defendant, the decree

ilar suit in equity is involved where the purchaser of stock files a bill in equity against the vendor for specific performance of the contract.[1] The relief usually demanded is in the alternative, being either for a registry of the transfer or damages in lieu thereof.[2] A

ordering the transfer may be directed to him. Johnson *v.* Hume, 138 Ala. 564 (1903). A state court may decree that national bank stock standing in the name of one person belongs to another person. The bank is not necessarily a party defendant. *In re* Fisher's Estate, 128 Iowa, 18 (1905). Wnere a vendor claims that by mistake he has transferred more stock than was agreed, and causes the corporation to refuse transfer, a suit lies by the vendee against the corporation and the vendor to obtain transfer and dividends. Wilson *v.* Wyoming, etc. Co., 129 Iowa, 16 (1905). In a suit against a subsidiary company to obtain, among other things, a transfer to the receiver of the parent company of the stock which such parent company holds in the subsidiary company, the subsidiary company is a necessary party defendant. Conklin *v.* United States, etc. Co., 123 Fed. Rep. 913 (1903). A promoter may maintain a bill in equity against another promoter to compel the latter to deliver stock due by contract to the former, in connection with the organization of the company, and the corporation is a proper party defendant in order to obtain a transfer. Howison *v.* Baird, 145 Ala. 683 (1905). A court will not at the instance of a pledgee order a transfer to be recorded on the books to the pledgee as pledgee, and giving the pledgor the right to vote the stock, inasmuch as this would complicate the title as between the corporation and its stockholders and interfere with the business of the corporation. American, etc. Co. *v.* Pacific, etc. Co., 34 Wash. 10 (1904). In such cases the corporation is but nominally concerned in the result of the suit. It cannot appeal from the judgment when both of the real parties in interest are satisfied and do not appeal. Board of Liquidation *v.* New Orleans Water-works Co., 39 La. Ann. 202 (1887). If the complainant is a citizen of the same state as the corporation, one of the parties defendant, another defendant cannot remove the case into a United States court. Crump *v.* Thurber, 115 U. S. 56 (1885). Where a corporation has not yet issued stock as called for by a contract, a claimant of such stock may bring suit in the state where the corporation was organized to obtain the stock, even though the other claimant is a non-resident. Jennings *v.* Rocky Bar, etc. Co., 29 Wash. 726 (1902). Where the title to stock is litigated in a suit in equity and an officer of the corporation is a party defendant, being interested in the transaction, the court may compel him in that suit to transfer the stock on the corporate books, even though the corporation is not a party to the suit. Durfee *v.* Harper, 22 Mont. 354 (1899). A corporation by the action of its board of directors and consent of all of its stockholders may agree that a certain percentage of its profits shall be paid annually to a person for services already rendered by him. In a suit by him to enforce such agreement and asking an injunction against any sales of stock, except with notice of such agreement, stockholders are necessary parties defendant. Such an agreement is not an exclusion of future boards of directors from the management of the company. Dupignac *v.* Bernstrom, 76 N. Y. App. Div. 105 (1902).

1 See §§ 337, 338, *supra.*

2 Quoted and approved in State *v.* Carpenter, 51 Ohio St. 83 (1894). "A bill in equity may be maintained by a *bona fide* purchaser of stock against

preliminary injunction is often obtained in connection with such a suit.[1] If all the stock has already been issued, equity has no power to compel a further issue.[2] Laches or the statute of limitations may

the corporation to compel a transfer of the stock upon the corporate books." The bill may be in the alternative for a transfer of the stock or for damages, and, if the company has already issued its whole capital stock, damages will be granted. Birmingham Nat. Bank *v.* Roden, 97 Ala. 404 (1892). In a suit against a corporation to compel it to issue stock to the plaintiff or else pay the value thereof, the proper form in judgment is an order to issue the stock. A money judgment should be entered only after proof of the corporation's failure to comply with the main order. Consolidated, etc. Co. *v.* Huff, 62 Kan. 405 (1901). Where a corporation refuses to issue the stock to a subscriber, he may file a bill in the alternative to compel the issue of the shares or the payment of their value with damages. If during the pendency of the suit the company becomes insolvent, the court can give him damages payable *pro rata* out of the assets of the corporation. *Re* Reading Iron Works, 149 Pa. St. 182 (1892). See § 61, *supra.*

1 See § 579, *infra*, and § 363, *supra.* In a suit to recover stock an injunction is more readily granted than in a suit to recover other kinds of personal property. Currie *v.* Jones, 138 N. C. 189 (1905). Where a stockholder has delivered his stock to the directors to be divided into smaller certificates, and the directors claim that it was agreed that a part of the stock should be sold for the benefit of the corporation, the stockholder may have a preliminary injunction against such sale pending his suit to compel delivery of the stock. Bedford *v.* American, etc. Co., 51 N. Y. App. Div. 537 (1900). Where a corporation refuses to transfer stock, the purchaser may file a bill in equity to compel such transfer, and may make the vendor a party thereto, an injunction against any sale by him being asked. Thornton *v.* Martin, 116 Ga. 115 (1902). A court will enjoin a party from voting upon or disposing of his stock in a corporation *pendente lite*, where the plaintiffs show that they transferred the stock to the defendant on the latter's agreement not to sell the same, except with the consent of the former, and that when he did sell the stock three-fourths of the proceeds should belong to the former, and it appearing further that the defendant had given the stock to his sister without consideration. Weston *v.* Goldstein, 39 N. Y. App. Div. 661 (1899). Where stock is tied up by an injunction which is afterwards vacated, and in the meantime the stock depreciates in value, the loss can be recovered from the enjoining party if the stocks could and would have been sold before the depreciation if they had not been so tied up. But if such stocks are in pledge, and the pledgor does not pay the loan while the stocks are so tied up, no damages can be recovered. Fourth Nat. Bank, etc. *v.* Crescent, etc. Co., 52 S. W. Rep. 1021 (Tenn. 1897). Under the statutes of California, even though stock is distributed by executors in accordance with a decree of distribution, and the distributees sell the stock and it is transferred on the books of the company, nevertheless, if the decree is reversed on appeal, the transfers are void and the company is liable for dividends paid in the meantime to such purchasers. In a suit by the executors to recover such dividends the purchasers need not be made parties. Ashton *v.* Zeila Min. Co., 134 Cal. 408 (1901). See also § 330, *supra.*

2 Smith *v.* North Am. Min. Co., 1 Nev. 423 (1865); and see § 284, *supra.*

also be a bar.[1] A citizen of Alabama cannot maintain in the courts of Alabama a suit to enjoin non-residents from transferring stock in a non-resident corporation where the defendants are not personally served within the state.[2] But a South Carolina corporation may be sued in New Hampshire by a purchaser of a certificate of stock to compel a transfer thereof on the books of the company.[3] Where a decree directs the transfer of certain stock in the distribution of an estate and the corporation makes such transfer, and thereafter the decree is reversed on appeal, the executors may bring suit to have the transfer canceled.[4]

§ 392. *Remedy by an action for damages.*—An action at law for damages is an old and well-established remedy of a stockholder

1 Even though the pledgee eight years after the pledge was made obtained judgment for the amount due, yet if for twenty-two years he takes no further action, he cannot compel the corporation to transfer the stock to him unless the pledgor is made a party, the stock not having been transferred in the meantime. Wadlinger *v.* First Nat. Bank, 209 Pa. St. 197 (1904). A corporation may be compelled by a purchaser of stock to transfer the stock on its books, especially where the real and prospective value of the stock depends upon the future development and management of the company, and delay in bringing the suit is no bar, if not unreasonable, and if the company has not been prejudiced. Westminster Nat. Bank *v.* New England, etc., 73 N. H. 465 (1906). In New York the ten-year statute of limitations runs against an equitable action against the corporation for a transfer of the certificates on its books from the time when the outstanding certificate was issued. Ryder *v.* Bushwick R. R., 10 N. Y. Supp. 748 (1890); aff'd, 134 N. Y. 83. In Ware *v.* Galveston City Co., 146 U. S. 102 (1892), the bill of a claimant of stock against the company to hold it liable for allowing a transfer of the stock in fraud of his rights was barred by laches, the suit having been brought thirty-five years after the cause of action had accrued. *Cf.* § 392, *infra.* The holders of full-paid stock cannot be assessed on such stock even under a reorganization agreement of the majority of the stockholders. Where, however, for four years the stockholder does not object, and then applies for a transfer of his stock, a court of equity may refuse to grant the transfer, but may give him damages for the value of his stock at the time of the demand of transfer, together with interest. Gresham *v.* Island City Sav. Bank, 2 Tex. Civ. App. 52 (1893). Delay in bringing a suit in equity against a corporation to compel a transfer of stock is not a bar if it is short of the statute of limitations. Barker *v.* Montana, etc. Co., 89 Pac. Rep. 66 (Mont. 1907). *Cf.* Treadwell *v.* Clark, 190 N. Y. 51 (1907).

2 Rucker *v.* Morgan, 122 Ala. 308 (1899). See also note 1, p. 974, *supra.*

3 Westminster Nat. Bank *v.* New England, etc., 73 N. H. 465 (1906). *Cf.* § 327, *supra.*

4 Ashton *v.* Heggerty, 130 Cal. 516 (1900). See also Ashton *v.* Zeila Min. Co., 134 Cal. 408 (1901). See also §§ 330, 338, *supra.* Where, in accordance with a judgment, stock is delivered and the party receiving it sells it and thereafter the judgment is reversed, such stock cannot be recovered back from the transferee. Thaxter *v.* Thain, 100 N. Y. App. Div. 488 (1905).

who has applied to the corporation for a registry of a transfer and has been refused.[1] The form of the action may vary, and may sound in tort or contract.[2] Conversion lies against a corporation at the instance of a purchaser of certificates of stock for refusal to transfer the stock on the books of the company.[3] The common-law action of trover is a proper remedy.[4] Where the transferee of certificates of stock in a bank presents them to the cashier of the bank for transfer, and the cashier and a director delay transfer until a debt of the transferrer to the bank becomes due, and then in behalf of the bank levy an attachment on the stock for such debt, the transferee may hold the bank and the cashier and such director liable in trover for conversion of the stock, and it is no defense that the transfer of the certificate was made to defraud creditors.[5] But a transferee cannot hold the transfer agent liable in damages, for refusal to allow the transfer, inasmuch as his remedy is against the principal, the corporation itself.[6] For the refusal of the president to sign a certificate of stock, the remedy of the person entitled

1 Quoted and approved in State *v.* Jumbo, etc. Min. Co., 94 Pac. Rep. 74 (Neb. 1908). Hussey *v.* Manufacturers', etc. Bank, 27 Mass. 415 (1830); Helm *v.* Swiggett, 12 Ind. 194 (1859). Cases supporting this rule abound in all the states. They will be found together with others in ch. XXXV, *infra.* Even in England, if the company has completed a transfer upon its books and then repudiates the transfer on the ground that it had prior to that time transferred the same stock to others, the company is liable in damages to the party to whom the last transfer was made. Tomkinson *v.* Balkis Consol. Co., [1891] 2 Q. B. 614. A corporation is liable in damages for refusing to allow a transfer of the stock where such refusal is unjustifiable. Doty *v.* First Nat. Bank of Larimore, 3 N. Dak. 9 (1892). If the company illegally refuses to transfer stock it is a conversion. Rio Grande Cattle Co. *v.* Burns, 82 Tex. 50 (1891). An action on the case lies, wherein the measure of damages is the value at the time of refusal to transfer. See § 575, *infra.* In a suit against a corporation for refusing to transfer stock, the fact that the certificates had been lost since the refusal need not be alleged. Blair Co. *v.* Rose, 26 Ind. App. 487 (1901). Where the corporation illegally refuses a transfer it is liable for the value of the stock at the time of the demand and refusal. Bank of Culloden *v.* Bank of Forsyth, 120 Ga. 575 (1904). A corporation is not liable for refusing a transfer of stock when the only damage from the refusal was to call attention to the fact that an assessment had been levied on the stock. Penfold *v.* Charlevoix, etc. Bank, 140 Mich. 126 (1905).

2 See ch. XXXV, *infra.*

3 See ch. XXXV, *infra.* Where the purchaser of a certificate of stock sends it to the corporation for transfer and the secretary replies that the corporation has a lien on the stock, the corporation is not liable for a conversion of the stock, no demand for the return of the certificate being shown. Cummins *v.* People's, etc. Assoc., 61 Neb. 728 (1901).

4 Ralston *v.* Bank of California, 112 Cal. 208 (1896).

5 Hine *v.* Commercial Bank, etc., 119 Mich. 448 (1899).

6 Denny *v.* Manhattan Co., 2 Den. 115 (1846); aff'd, 5 Den. 639.

to the stock is against the corporation and not against him.[1] A transferee's action upon the case for damages, instead of in trover for conversion, against the corporation for refusal to register the transfer, entitles him to nominal damages only, unless he proves special damage.[2] Where the corporation has been held liable for conversion, it cannot then tender the stock back to the stockholder and avoid the payment of the damages.[3] The statute of limitations runs only from the time when a demand for registry was made.[4]

1 Cooley *v.* Curran, 54 N. Y. Misc. Rep. 572 (1907).

2 McLean *v.* Charles, etc. Co., 96 Mich. 479 (1893). On this subject, see ch. XXXV, *infra.* In a suit against a corporation for refusal to transfer stock on its books, "the rule of damages is the highest intermediate value of the stock between the time of conversion and a reasonable time after the owner has received notice of the conversion to enable him to replace the stock." A general allegation of damage is sufficient, inasmuch as the plaintiff is entitled to nominal damages anyway. Blair Co. *v.* Rose, 26 Ind. App. 487 (1901).

3 Carpenter *v.* American, etc. Assoc., 54 Minn. 403 (1893). The purchaser may hold the corporation liable in damages for conversion for a refusal to transfer the stock on books. His damage is the value of the stock at the time of demand with interest to the date of trial, and after suit is commenced the corporation cannot stop it by offering to transfer. Dooley *v.* Gladiator, etc. Co., 109 N. W. Rep. 864 (Iowa 1906). If the corporation illegally refuses to allow a registry, but afterwards does allow it, the corporation is not liable in damages for the decline of the market value of the stock in the meantime. Skinner *v.* City of London M. Ins. Co., L. R. 14 Q. B. D. 882 (1885).

4 Cleveland, etc. R. R. *v.* Robbins, 35 Ohio St. 483 (1880); Iron R. R. *v.* Fink, 41 Ohio St. 321 (1884). *Cf.* § 391, *supra.*

CHAPTER XXIII.

RULES FOR CORPORATIONS IN REGARD TO REFUSING OR ALLOWING REGISTRIES OF TRANSFERS OF STOCK.

§ 393. *Purpose of the chapter.*—It is proposed in this chapter, as a continuation of the last, and as a recapitulation of the various rights, liabilities, and duties of the corporation in refusing or allowing a registry of a transfer of stock, to state briefly the rules which prevail herein. The standpoint taken is that of the corporation. The minute and particular application of the general rules governing this subject are not stated here at length; but an effort has been made to give, in systematic order, certain directions which will enable a corporation, when in doubt as to whether to allow or refuse a registry, to decide the question intelligently and safely.

§ 394. *Right to refuse until the transferrer pays the unpaid subscription price.*[1]—A corporation cannot refuse to register a transfer of stock merely because the subscription price has not been fully paid in, unless the charter or the statutes of the state expressly give that right. Nor can it refuse registry, even though a call for part of the subscription price has been made, is due, and remains unpaid. It must allow registry, but may continue to hold the transferrer liable for the call. The corporation has no lien on the stock for the subscription price, nor has it a right to restrict transfers until calls or parts of the subscription price not yet called are paid. The

[1] See ch. XV, *supra*.

policy of the law is to favor the right of transfer, and no impediments by the corporation are allowed to restrict that right. As regards parts of the subscription not yet called in, the transferrer is released from and the transferee assumes the liability. As regards calls made before the application for registry, but not yet due, the transferrer is liable, but, it seems, not the transferee. As regards calls made before the application and due before such, the transferrer and not the transferee is liable. As regards calls made after the application the transferee alone is liable. In some states, however, a different rule prevails, and by statute the transferrer, if he is the original subscriber, is liable until the whole subscription is paid.

§ 395. *Whether the corporation may refuse to register a transfer to an irresponsible transferee.*[1]—Greater difficulty is experienced in finding a working rule on this subject. On one point, however, all the authorities agree. If the corporation is insolvent, or in such a state of decline that insolvency seems inevitable, the corporation may refuse to allow a registry of transfer from a responsible to an irresponsible insolvent transferee. The policy of the law is to protect corporate creditors, even at the expense of restricting the right of transfer. The above rule applies not only where the subscription is unpaid, but also where it has been paid and only a statutory liability exists. Where, however, the corporation is solvent, and a stockholder applies for a registry of transfer from himself to an irresponsible transferee, it seems that the corporation cannot refuse to make the registry.

§ 396. *Corporation may refuse to register as transferees persons who are incompetent to contract.*[2]—If the transferee of a certificate of stock is an infant or person of unsound mind, the corporation may refuse to register such transferee as a stockholder. The reason of the rule is that such persons would not be obliged at law to respond to the obligations of a stockholder, and consequently are not entitled to its privileges. With married women at the present day the law is different. At common law they were incompetent to become stockholders, as is an infant at the present time. But the statutes of all the states have substantially removed these disabilities, and enabled a married woman to transact business as a *feme sole,* so far as her separate estate is concerned. She may become a stockholder in a corporation, but cannot bind her husband's estate for the liabilities of such stockholdership.

§ 397. *Trustees, executors, guardians, agents, pledgees.*[3]—In registering a transfer to a trustee, executor, or guardian, the corpora-

1 See ch. XV, *supra.* 2 See ch. XIV, *supra.* 3 See ch. XIV, *supra.*

tion may be required to register the transferee as holder in his official capacity. A trustee who purchases or receives stock to hold in trust for the benefit of another may, it seems, require the corporation to register the transfer and issue new certificates to himself in his own name as "trustee." In England the rule appears to be different. The reason of this rule is that the liability of a trustee on stock is in many of the states different from that of a complete owner of the stock, and also because, where stock is held by a trustee as such, it is the duty of the corporation to refuse to allow the trustee to sell and register a sale of the stock unless the instrument creating the trust authorizes such sale. So also an executor or administrator or guardian may compel the corporation to place his official title after his name in the stock registry. Pledgees, however, and agents have not this right. The corporation may, but is not obliged to, write the word "pledgee" after the transferee's name either in the stock registry or on the certificate. Such is the rule, for the reason that the corporation is not obliged to protect the rights of the pledgor, nor to recognize the pledgeeship of the transferee. The same rule applies to transferees who take as agents of the transferrer.

§ 398. *Sales of stock by executors or administrators.*[1]—A corporation may with safety, and in fact is obliged to, allow a domestic executor or administrator to register a transfer of the sale of stock belonging to the estate upon presentation by the executor or administrator of the letters testamentary or letters of administration. The executor or administrator may then register a transfer of the stock to himself as executor or administrator, or directly from the name of the deceased to a purchaser from the executor; or from the deceased to the executor, and then from the executor to the purchaser. One executor may sell and register a transfer of the stock. The corporation is not bound to inquire whether it is necessary that the sale be made in order to pay the debts of the estate, nor to see to it that the executor actually applies the proceeds of the sale to that purpose. Where, however, the corporation has actual knowledge through its officers that a breach of trust is contemplated by the executor, it is bound to refuse registry, and will be liable to the estate for neglecting so to do. So, also, where such a long time has elapsed between the taking out of the letters and the sale by the executor that the latter has become practically a trustee, the corporation must use the same precaution as in sales by a trustee. In the case of specific legacies of stock, the corporation need not protect them, but may allow the executor to transfer the

1 See ch. XIX, *supra.*

stock into his own name as executor, since he may need it to pay debts, and the corporation is not bound to investigate such questions. In England it is held that the corporation is liable for allowing a transfer by foreign executors without payment of an inheritance tax.

§ 399. *Sales by trustees.*[1]—A trustee who holds stock belonging to the trust estate has no right to sell and transfer such stock unless he is expressly authorized so to do by the instrument creating the trust. Consequently the law imposes upon the corporation the duty of refusing to allow a trustee to transfer the stock unless he clearly has a right so to do. If the corporation neglects this duty it is liable to the trust estate, and, in case of a breach of trust by the trustee, may be compelled to replace the stock or pay damages. If the trustee has an express power given to him to sell, the corporation may allow him to make the transfer. If no such power is given, the corporation must refuse. The trustee is bound to reasonably satisfy the corporation of his right, but the corporation cannot permanently retain the papers submitted to it for that purpose.

§ 400. *Sales by guardians.*[2]—A guardian has a right to change the investment of the funds in his charge, and consequently has a right to sell stock held by him in his official capacity. Accordingly, the corporation may allow him to register a transfer of stock held by him as guardian, and cannot require the guardian to obtain an order or decree from a court authorizing such transfer. An order or decree is often obtained by the guardian, however, for his own protection, and is to be commended. In New York the rights and duties of guardians are regulated by statute, and other states have similar statutes.

§ 401. *Forgery of transfer.*[3]—A corporation is bound and required to detect a forgery whereby the name of the owner of a certificate of stock is signed to it and a transfer made which the corporation is requested to register. The stockholder in whose name the old certificate was made out, and whose name was forged to the transfer, may hold the corporation liable if it fails to detect the forgery and allows a registry of the forged transfer. He may compel it to replace the stock or pay damages. This rule is due to the fact that the corporation is a custodian of the books whereby a stockholder obtains his rights of stockholdership, and it cannot deprive him of these rights by allowing others to take them from him by the aid of the corporation and without his consent. It is in the power of the corporation to require the presence of the transferrer

[1] See ch. XIX, *supra*. [2] See ch. XIX, *supra*. [3] See ch. XXI, *supra*.

at the time of registry, or at least clear proof that the signature is genuine. The corporation, however, has recourse over against the person who applied for registry on the forged transfer, however innocent the latter may be. He is held to have impliedly represented that the transfer was genuine.

§ 402. *Corporation must require a surrender of the outstanding certificate.*[1]—If a corporation permits a registry of a transfer of stock, and issues new certificates to the transferrer without requiring a surrender of the old certificate, it assumes a dangerous position, and one which it is not obliged to assume. If the certificate which is not delivered up is in the hands of a *bona fide* purchaser for value and without notice, he may hold the corporation liable for allowing a registry of transfer to another without requiring a delivery of the certificates. It is negligence and a breach of duty on the part of the corporation to allow a registry without a surrender of the old certificate. It generally refuses to do so, as is its duty, and is sustained by the law in its refusal. There are occasions, however, where the law compels the corporation to register the transfer without a surrender of the old certificate. When so compelled to do, the corporation cannot be held liable by the purchaser of the outstanding certificate, but he must seek his remedy against others. Such compulsory registry, excusing the corporation, may exist in cases of alleged loss of the old certificate, a decree of a court compelling the registry, and, under the latter, an attachment or execution against the stock.[2]

§ 403. *Alleged loss of the old certificate.*[3]—According to the rule of nearly all the states, a corporation is not obliged to issue a new certificate of stock to the owner of an old one, which he alleges he has lost, unless such person gives to the corporation a sufficient bond of indemnity to protect it against liability in case it turns out that the old certificate was not lost but was sold and passed into *bona fide* hands. In New York this rule is fixed by statute. The corporation is liable to the holder of the outstanding certificate, if it is outstanding, and consequently should be protected against that liability by a bond from the applicant for registry. In Louisiana a statutory advertisement is made and a bond of indemnity dispensed with. But in the other states the court compels the loser to give a bond, varying in amount according to the amount of the stock and the clearness of the proof of loss.

§ 404. *Attachment or execution.*[4]—Nearly all the states have laws whereby shares of stock are rendered subject to levy of at-

[1] See ch. XXI, *supra*.

[2] But see § 489, *infra*.

[3] See ch. XXI, *supra*.

[4] See ch. XXVII, *infra*.

tachment and to sale on levy of execution. When an execution sale, or an attachment followed by an execution sale, takes place in the state where the corporation exists, the purchaser at such sale generally has not the outstanding certificate, but nevertheless demands registry of himself as stockholder in accordance with the law authorizing the attachment and execution. In the meantime the judgment debtor whose stock is thus attached or sold under an execution generally may have sold his certificate of stock to a *bona fide* purchaser for value. If it happens that both parties claim the stock, the duty and privilege of the corporation is plain. It may refuse to decide between them, and when sued by either may interplead and compel the claimants to settle the right between them in the courts. But frequently it happens that the corporation does not know whether the judgment debtor has sold the outstanding certificate or not. By the law of most of the states, if such certificate was sold before the attachment or execution was levied, the purchaser would be protected, and the corporation would be liable to him for registering as a stockholder the purchaser at the execution sale. Accordingly, in that case, it is the duty of the corporation to refuse to register the purchaser at the execution sale. It cannot afford to take the risk, and is not obliged to take it. If the court then compels it to make the registry of transfer to the execution purchaser, the court will also, probably, compel such purchaser to give a bond of indemnity to protect the corporation. If such a bond is not required by the court, the corporation must nevertheless obey the decree. What rights the purchaser of the outstanding certificate would then have, has not as yet been passed upon by the courts.

§ 405. *Decree of a court that certificates be issued.*[1]—A corporation must of course obey the decree of a court that it issue a certificate of stock to a specified person. But a court will rarely resort to such an extreme remedy where it is probable or possible that there may be an outstanding certificate in the hands of an innocent holder representing the same shares. As a principle of law the court has no power to decree such an issue ordinarily, since the whole capital stock has been issued, and its decree amounts practically to an order to make an overissue of stock. Generally the court decrees damages to be paid, or directs the corporation to purchase stock for the purpose of reissuing it to the specified party. This occurs frequently where the corporation has unjustly deprived a person of his stock. A different class of cases arises where the corporation has refused to allow a registry be-

[1] See ch. XXII, *supra*.

cause the outstanding certificate is not surrendered. Such cases include those of alleged loss of certificate, an execution sale of the stock, and, possibly, a suit in equity at the domicile of the corporation to recover from another stock which the complainant claims. A decree in such a suit in most states would be ineffectual to deprive of his rights one who purchased from the defendant his certificate of stock before the decree was rendered. It would accordingly be a harsh decree that compelled the corporation to register the successful complainant as a stockholder. The corporation should not be compelled to assume the risk of being sued by the purchaser of the outstanding certificate. The complainant should be compelled to give a bond of indemnity, or else be content with a personal judgment against the defendant. The demands of trade and of the investing public require that the safety of a purchaser of a certificate of stock should be assured, except against attachments, execution sales or decrees duly obtained and notified to the corporation before the *bona fide* purchaser received the certificate of stock.

§ 406. *Theft of certificates indorsed in blank.*[1]—The corporation has a duty to perform as regards certificates of stock which have been stolen from the owner who held them indorsed in blank.

If the owner notified the corporation of the theft it must refuse to register a transfer to a purchaser of such stolen certificate. Since the owner's negligence may have estopped him from reclaiming the stock, the corporation may refuse to recognize either party as a stockholder, where there is a reasonable question of negligence, and when sued by either may interplead. If the corporation allowed a registry before it was notified of the theft, it is difficult to see on what principle it is to be held liable to the owner. Such a case seems not yet to have arisen. If notified of the theft before anything is learned concerning the whereabouts of the certificate, the case is to be treated the same as when the certificate is alleged to have been lost.

§ 407. *Interpleader by the corporation.*[2]—Whenever there are two or more conflicting claims made to stock, and demands are made on the corporation to allow registry, it is the privilege of the corporation, if there is a reasonable legal doubt as to the rights of the parties, to refuse to register either party, and, when sued by one, to interplead and compel the parties to contest the matter between themselves in the courts. The law does not oblige the corporation to turn itself into a court of justice and decide the rights of the parties. The corporation, however, cannot interplead if it

1 See ch. XXI, *supra*.

2 See ch. XXII, *supra*.

has already committed itself by registering one of the claimants as the stockholder. Nor can the corporation resort to an interpleader where one of the claimants is clearly wrong. The right of interpleader and the power of the corporation to refuse to register a transfer until compelled to do so by the courts, where an outstanding certificate is not surrendered, constitute the two most effective safeguards of the corporation in allowing or refusing registry.

§ 408. ***Restrictions by corporation on stockholder's right to sell or transfer.***[1]—The law has uniformly and decisively discountenanced and overruled all attempts of a corporation to prevent the sale and transfer of its stock by the stockholder. Such attempted restrictions are generally made by means of by-laws. Thus, a by-law requiring the consent of the directors or other corporate officers to a transfer, or a by-law requiring the stockholder, when he sells, to sell his stock to specified persons, is null and void. Restrictions may be created by a contract mutually agreed to by the stockholders, but cannot be imposed upon them by the majority of the stockholders nor by the board of directors. When, however, such restrictions are created by the charter, they are valid, since they arise with the corporation and stock itself. Thus, in England, the charter frequently authorizes the directors to refuse a registry unless the transferee is satisfactory to them. Even here, however, the directors must be reasonable in the use of their discretion. In this country the most frequent restriction created by charter is that of a lien for debts due to the corporation from the transferrer.

§ 409. *Lien of the corporation.*[2]—The charters of many corporations contain an express provision that the corporation may refuse to allow a stockholder to register a transfer of his stock until he has paid any and all debts which he may at that time owe to the corporation. Such a lien need not be stated in the certificate of stock. While it may not be created generally by a by-law, yet certain phrases in charters have been held to uphold a lien that is declared and made effectual by a by-law. Where the lien exists the corporation may refuse to allow a registry of transfer of any stock owned by the debtor until all debts due from him to the corporation are paid, whether due or not due, including, it seems, unpaid subscriptions. It does not apply, however, to debts due from a transferee of the certificate who never obtained registry or appeared as a stockholder on the corporate books. Nor does it apply to debts due from the registered stockholder, but incurred after the corporation was given notice that he had sold his stock to another. The corporation may waive its lien and allow registry without the

1 See ch. XXXVII, *infra*.

2 See ch. XXXI, *infra*.

debts of the old stockholder being paid. A registry without requiring payment is a waiver in itself.

§ 410. *Formalities of registry which the corporation may insist upon.*[1]—Where, as is ordinarily the case, the owner of stock has sold it by signing the transfer and power of attorney on the back of the certificate, leaving the names of the transferee and of the attorney blank, the corporation may require the names of the transferee and of the attorney to be filled in before it allows a registry. If it is in doubt as to the genuineness of the signature of the former owner of the certificate, it may require his presence or reasonable proof that he actually made the signature. It cannot compel the transferrer to be present, but may require the presence of the attorney authorized to make the registry. The registry itself is generally made by a corporate officer as attorney. A surrender of the old certificate is required, and new certificates in the name of the transferee are issued. The by-laws may prescribe that the registry shall be in the presence of certain corporate officers. If the corporation does not keep a transfer book or stock book, a surrender of the old certificate and the issue of a new one is sufficient to constitute a transfer and registry. The applicant may inquire of the corporate officer in charge for the registry clerk, and is not bound to ascertain the individual himself. The corporate registry may be on its ledger without any issue of certificate. If it keeps no registry at all, mere notice to it of a transfer constitutes a legal registry. The corporation has no right to delay registry unreasonably for the purpose of obtaining advice or for any other reasons. It may require that the power of attorney run directly from the former registered stockholder and not from an intermediate one. A written acceptance of the stock by the transferee cannot be insisted on by the corporation. The formalities of registry may be waived by the corporation, and any act which indicates that it considers a transferee to be a stockholder is effectual to make him such so far as the corporation is concerned, though no registry was had.

Either the transferrer or the transferee or an intermediate unregistered transferee may apply to the corporation for the purpose of obtaining a registry. The corporation cannot refuse it merely because of the motive of the transferrer or of the transferee in making the sale and transfer. Whenever the corporation refuses to allow a registry the applicant may sue it for damages, or he may go into a court of equity and ask that the corporation be decreed to allow registry or to pay damages in lieu thereof. A few

[1] See ch. XXII, *supra*.

cases hold that he may compel registry by a *mandamus* against the corporation, but the weight of authority holds otherwise. In the notes below are given the rules of a great railroad corporation on this subject,[1] and it will be noticed that particular attention is

[1] 1. Give the name of the transferee *in full*, without abbreviation of any kind.

2. If the transferee be a woman, give her title, Mrs. or Miss.

3. Prefixes and affixes, such as Judge, Major, Hon., Rev., Doctor, M.D., LL.D., should not be used.

4. In transferring to a married woman use her own christian name, NOT *that of her husband with Mrs. prefixed.*

5. Avoid using diminutives, always give full christian name.

6. If the transferee be a minor, so state in the transfer, thus: "A. B., a Minor," and give guardian's name and address. Avoid, if possible, transferring to minors.

7. Shares of a minor are transferable only by the guardian, who must exhibit a certificate of appointment.

8. Do not transfer to a trustee, agent or attorney who is not appointed by an instrument in writing. If properly appointed, give words in the transfer briefly descriptive of the trust, or the nature of the instrument creating it.

9. In transferring to a society or institution, make sure that it has authority to hold and transfer stock. Transfers by officers of societies, institutions or corporations must be accompanied by proper evidence of their power to act in the premises.

10. In transfers by trustees, if there be more than one, *all must sign.* In all cases the instrument creating the trust must be exhibited.

11. Shares of an *intestate* are transferable by the administrator, who must exhibit a proper certificate of appointment.

12. Shares of a *testate* are transferable by the executor, who must exhibit a certified copy of the will and certificate of appointment. Copies of wills will be returned after inspection.

13. Trustees, attorneys, agents, administrators, executors and guardians should not transfer directly to themselves.

14. Always give full post-office addresses of transferees, with post-office box, or street and number.

15. In case of change of name by marriage, send certificate to the undersigned, having made transfer on the back of it to the *new* name, signing the transfer thus:—"A. B. C., *now* Mrs. A. B. D.," and a new certificate will be returned.

16. If a certificate is lost, give immediate notice to the undersigned. A certain trust company's suggestions are as follows:

1. Transfers of stock should be executed either (1) by the *stockholder in person*, or (2) by a *duly authorized attorney*, and certificate should be surrendered to the transfer agent.

2. The *full legal name* and *full address* of transferee, number of *shares transferred* and *date* should be written in spaces provided on back of certificate, but space for name of *attorney* should be left *blank*. *Full first name* is always desired. "*Mrs.*" and "*Miss*" may be used when necessary. *Abbreviations*, prefixes and suffixes such as "Rev.," "Lieut.," "M.D.," etc. should not be used.

3. The *signature* must correspond with the name as written on the face of the certificate in every particular, without alteration or enlargement, and should be witnessed. Signatures unknown to the transfer agent should be properly guaranteed. Usually (1) the guarantee of an officer of a banking institution, or (2) the guarantee of a member of either the New York or Boston Stock Exchange, or (3) an

called to transfers by or to married women, trustees, executors, administrators and corporations.

acknowledgment before a notary public, is sufficient.

4. In transfer to a *married woman* use her own christian name, not that of her husband with Mrs. prefixed. In case new certificate is desired by reason of *change of name by marriage*, old certificate should be signed as follows: "Mrs. Mary B. Smith, formerly Mary B. Jones;" transfer completed to Mrs. Mary B. Smith, as noted in suggestion No. 2, signature acknowledged before a notary public, and certificate surrendered to transfer agent for exchange. Transfers should not be made directly from husband to wife, or from wife to husband.

5. Transfers to a *minor* should also give guardian's name as follows: "John Smith (minor), under guardianship of Wm. Jones." Transfers from a minor can be made only by a guardian appointed by the court, who must exhibit a properly certified copy of his appointment.

6. *Administrators, agents, attorneys, executors, guardians or trustees* should not transfer directly to themselves individually.

7. In *transfers to trustees*, the trust must be fully described by a reference to the will or indenture under which trust is created and the name of beneficiary given if possible. In *transfers from trustees*, all must sign, and transfer must be accompanied by a copy of instrument, properly certified, showing authority of trustees to sell or transfer. Trustees appointed by the court must exhibit both certified copy of instrument and certified copy of court appointment.

8. In transfers executed by an *attorney*, the original power of attorney (or notarial copy of the same) must be left on file. Authority to transfer stock must appear in the instrument, and evidence is required that signature is genuine and power of attorney is in force.

9. Transfers by *administrators* must be accompanied by copy of appointment certified by probate court.

10. Transfers by *executors or administrators with the will annexed* must be accompanied by copy of will and copy of court appointment, both certified by probate court.

11. Transfers from *associations, societies or corporations* must be executed by duly authorized officers only, under seal when necessary, and accompanied by properly certified copy of vote or copy of by-laws authorizing transfer.

12. Prompt notice of any *change of address* should be sent to transfer agent. State name of company in which stock is held.

13. *Lost certificates* should be reported to transfer agent immediately. Describe certificates fully.

CHAPTER XXIV.

NON-NEGOTIABILITY OF STOCK AND DANGERS INCURRED IN THE PURCHASE OF CERTIFICATES OF STOCK.

A. NON-NEGOTIABILITY.

§ 411. *Nature and kinds of negotiable instruments.*—Negotiable instruments at the present day are promissory notes, bills of

exchange, checks, bank-notes, bonds of the United States, of states, of foreign governments, of cities and counties and municipalities generally,[1] certificates of deposit, interest coupons, and bonds of corporations.[2] Bills of lading have only a quasi-negotiability.[3] These different instruments, however, are not necessarily negotiable, but are so only when in writing; when containing an unconditional promise or order to pay; when the payment is to be in money only; when the amount is certain; when it is payable to a specific person, and not in the alternative; when it is payable at a certain time; when it contains words such as "to A. or order," or "to bearer," or their equivalent; and when delivery has been duly made. If the instrument is lacking in any one of these qualities, it falls back into the category of non-negotiable — that is, merely assignable — instruments. Again, a holder of one of the above-named negotiable instruments can have the benefit of its negotiability only when he has purchased it in good faith, for value, before the instrument was due, and without notice of the equitable rights of previous holders or makers; that is, he must be a *bona fide* holder.[4] When all these elements of negotiability and ownership co-exist, the advantage of negotiability over non-negotiability is this: that the holder of the instrument is entitled to the face value thereof, and his right cannot be affected, decreased, or defeated by any facts or equities between previous holders which would defeat the security as between them, unless it be void for usury or other original cause.

§ 412. *Certificates of stock are not negotiable instruments, but have been given many of the elements of negotiability in America — In England they are not negotiable in any sense.* —It is very clear, and it is well established, that certificates of stock are not negotiable instruments.[5] A certificate of stock is not a promise or order to pay money, nor has it any of the essentials of a negotiable in-

[1] Warrants issued by a municipality are transferable, but not negotiable. Watson *v.* City of Huron, 97 Fed. Rep. 449 (1899).

[2] Daniel, Neg. Inst., 3d ed., book VI; Dos Passos on Stock Brokers, ch. IX. As to bonds of corporations, see ch. XLVI, *infra.*

[3] Pollard *v.* Reardon, 65 Fed. Rep. 848 (1895). See also Bank of Batavia *v.* New York, etc. R. R., 106 N. Y. 195 (1887). In Oregon by statute warehouse receipts are made negotiable. Anderson *v.* Portland, etc. Co., 37 Oreg. 483 (1900).

[4] As to who is a *bona fide* holder, see § 293, *supra*, and § 767, *infra.*

[5] Certificates of stock are not negotiable. Hammond *v.* Hastings, 134 U. S. 401 (1890). "Certificates of stock are not securities for money in any sense; much less are they negotia securities." Mechanics' Bank *v.* New York, etc. R. R., 13 N. Y. 599, 627 (1856); Farmers' Bank *v.* Diebold, etc. Co., 66 Ohio St. 367 (1902); Barstow *v.* Savage Min. Co., 64 Cal. 388 (1883); Clark *v.* American Coal Co., 86 Iowa, 436 (1892). Weaver *v.* Barden, 49 N. Y. 286, 288 (1872), says

strument. Moreover, it has been repeatedly decided by the courts that a certificate of stock is not negotiable, and no custom of trade or of brokers can give to it that character. Nevertheless the New York court of appeals has well said that while certificates of stock are not negotiable in form and represent no debt and are not securities for money, yet "the courts of this country, in view of the extensive dealing in certificates of shares in corporate enterprises, and the interest, both of the public and of the corporation which

that a certificate of stock has none of the qualities of commercial or negotiable paper. Leitch *v.* Wells, 48 N. Y. 585, 613 (1872), says: "Since the decision of the case of McNeil *v.* Tenth Nat. Bank, . . . certificates of stock, with blank assignments, and powers of attorney attached, must be nearly as negotiable as commercial paper." Weyer *v.* Second Nat. Bank, 57 Ind. 198, 208 (1877), says: "The difference between a promissory note and a certificate of bank stock is so wide and marked that a rule of law governing the transfer of the former is by no means applicable to the latter." Sewall *v.* Boston Water-power Co., 86 Mass. 277 (1862), says: "The authorities cited show that a certificate of stock is not a negotiable instrument, and without any authorities it is apparent that it has not a negotiable character." To same effect, Mandelbaum *v.* North Am. Min. Co., 4 Mich. 465, 473 (1857), holding, however, that by statute in that state certificates of stock are practically negotiable. Shaw *v.* Spencer, 100 Mass. 382 (1868), says: "It is clear that a certificate of stock transferred in blank is not a negotiable instrument. . . . No commercial usage can give to such an instrument the attributes of negotiability." Sherwood *v.* Meadow Valley Min. Co., 50 Cal. 412 (1875); Bridgeport Bank *v.* New York, etc. R. R., 30 Conn. 231, 275 (1871), holding that "the certificate accompanied by the assignment and power of attorney thus executed in blank has, perhaps, a species of negotiability, although of a peculiar character, but one necessary to the public convenience." In First Nat. Bank *v.* Lanier, 11 Wall. 369, 377 (1871), the court said that although certificates of stock are "neither in form or character negotiable paper, they approximate to it as nearly as practicable." Brinkerhoff-Farris, etc. Co. *v.* Home Lumber Co., 118 Mo. 447 (1893). In a recent case in Maryland an important distinction is drawn between the rights of a *bona fide* purchaser and a *bona fide* pledgee. It is held that the usual form of transfer on the back of certificates of stock signed by the stockholder with the name of the transferee left blank does not protect a *bona fide* pledgee. The pledgee is chargeable with notice of all the facts and equities. Under this decision it would seem to be necessary to enlarge the terms and form of the usual assignment and power of attorney on the back of certificates of stock. German Sav. Bank *v.* Renshaw, 78 Md. 475 (1894), a case wherein a broker holding stock on a margin repledged it at a bank. Compare § 432, *infra*. In Hampton, etc. R. R. *v.* Bank, 48 S. C. 120 (1897), where a railroad had issued stock and bonds to a finance company for money to be paid in the future, and the finance company had not paid the money, but on the contrary had pledged some of the stock to a bank, the court held that the bank was bound to take notice of a provision in the charter to the effect that no sale of stock should relieve an original owner from his obligations to the company, and hence was not protected as pledgee.

issues them, in making them readily transferable and convertible, have given to them some of the elements of negotiability."[1]

In England an entirely different rule prevails. Certificates of stock in that country are merely evidences of ownership of stock, and this muniment of title is not negotiable nor quasi-negotiable. The purchaser of it is not protected against equities involved in the title of prior owners of the certificate. Only a transfer on the corporate books shuts off those equities. Indeed, this rule is insisted upon in England so rigidly that not even the certificates of stock issued by American corporations and held by Englishmen are given the quasi-negotiability of the American law.[2] It has

1 Knox *v.* Eden Musée Co., 148 N. Y. 441 (1896), rev'g 74 Hun, 483. The New York court of appeals has held that where certificates of stock issued by a New Jersey corporation are within the state of New York, an attachment may be levied upon them and the interest of the owner or pledgor therein sold, such certificates being a property right within the state. Simpson *v.* Jersey City, etc. Co., 165 N. Y. 193 (1900), the court distinguishing the case of Plimpton *v.* Bigelow, 93 N. Y. 592 (1883), on the ground that the certificates of stock in that case were not within the state. The court said: "Certificates of stock are treated by business men as property for all practical purposes. They are sold in the market and they are transferred as collateral security for loans, and they are used in various ways as property. They pass by delivery from hand to hand and they are the subject of larceny." In Masury *v.* Arkansas National Bank, 93 Fed. Rep. 603 (1899), the court said: "It is a well known fact that stock certificates frequently circulate in places far remote from the home of the corporation by which they were issued, that in all commercial centers they are commonly transferred from hand to hand like negotiable paper, and that they are hypothecated for temporary loans by a simple indorsement and delivery thereof, the latter being perhaps the most common use to which such securities are put. In the great majority of cases when stock is merely pledged for a loan, no record of the transfer is made on the books of the corporation, and in the judgment of laymen the making of such a record seems to be a needless formality. The trend of modern decisions has been to encourage the free circulation of stock certificates in the mode last indicated, on the theory that they are a valuable aid to commercial transactions, and that the public interest is best subserved by removing all restrictions against their circulation, and by placing them as nearly as possible on the plane of commercial paper." Where no certificates of stock have been issued, a purchaser of a subscriber's right to the stock is not protected as a purchaser of a certificate of stock is protected. Manchester St. Ry. *v.* Williams, 71 N. H. 312 (1902). See also § 374, *supra.* Where all the stockholders agree to a consolidation, but before it is carried out one of them sells his stock, the purchaser, if he knew of the agreement, is bound by it, but is entitled to a transfer of the stock to himself on the books. Senn *v.* Union, etc. Co., 115 Mo. App. 685 (1906). *Cf.* Campbell *v.* American Zylonite Co., 122 N. Y. 455 (1890), holding that the unregistered transferee was not bound by the agreement of the transferrer that certain other shares should be preferred as to dividends.

2 The English courts refuse to fol-

recently been held in England, however, that a certificate of fully paid up stock running to "bearer" was negotiable, and if stolen and

low the American rule in regard to the practical negotiability of certificates of stock transferred in blank, although such certificates of stock are issued by an American corporation. Hence where the English owner of such certificates delivered them to a broker to forward to America for a transfer, and the broker fraudulently sold them for his own purposes to other persons, it was held that no title was conveyed to such other persons, and that the American law did not apply. The court said, however, that there was sufficient in the case to put the purchasing party upon notice. Colonial Bank *v.* Cady, L. R. 15 App. Cas. 267 (1890); Williams *v.* Colonial Bank, L. R. 38 Ch. D. 388 (1888); Dodds *v.* Hills, 2 H. & M. 424 (1865); Roots *v.* Williamson, L. R. 38 Ch. D. 485 (1888). In England, even if the secretary by mistake delivers the old certificates back to the transferrer and he pledges them, the pledgee is not protected, the basis of this decision being that the proximate cause of the loss was the transferrer and not the secretary, but in England the transfers are made by instruments separate from the certificates. Longman *v.* Bath, etc. Ltd., [1905] 1 Ch. 646. Where an assignee for the benefit of creditors demands from the assignor certificates of stock which he owns, but he does not deliver them, and the assignee then notifies the company, he is entitled to the stock as against a broker to whom the assignor subsequently delivers the certificates to sell. Peat and Moss *v.* Clayton and others, [1906] 1 Ch. 659. In England certificates of stock indorsed in blank convey title by estoppel to a *bona fide* purchaser when the transfer need not be by deed under seal. Rumball *v.* Metropolitan Bank, L. R. 2 Q. B. D. 194 (1877), where a broker committed a breach of trust. The court said the stockholder "is in the position of a person who has made a representation, on the face of his scrip, that it would pass with a good title to any one on his taking it in good faith and for value, and who has put it in the power of his agent to hand over the scrip with this representation to those who are induced to alter their position on the faith of the representation so made." *Ex parte* Sargent, L. R. 17 Eq. 273 (1874); *Re* Barned's Banking Co., L. R. 3 Ch. App. 105 (1867). But this is generally not the case. Ortigosa *v.* Brown, 47 L. J. (Ch.) 168 (1877); and France *v.* Clark, L. R. 22 Ch. D. 830 (1883), gives no protection to the *bona fide* purchaser until he is registered. See also Shropshire, etc. Co. *v.* Queen, L. R. 7 H. L. 496 (1875); Briggs *v.* Massey, 42 L. T. 49 (1880). See also §§ 325, 361, 377, *supra.* See Easton *v.* London J. S. Bank, L. R. 34 Ch. D. 95 (1886). Even in England, if a broker transfers stock in breach of trust to a bank, and the bank afterwards, at his request, transfers the stock to another person, the bank being ignorant of his agency, is not liable to the principal for the value of the stock. Marshall *v.* National, etc. Bank, 66 L. T. Rep. 525 (1892). As between the trustee in bankruptcy of a defaulter and the party to whom the defaulter has transferred shares of stock without a transfer on the corporate books, the latter is entitled to the stock. *Re* Dodds, 64 L. T. Rep. 476 (1891). In Moore *v.* Northwestern Bank, [1891] 2 Ch. 599, the rules of the company provided that, when certificates were sent in for transfer, the particulars should be entered in a book which must be brought before the directors for approval and be signed by three members of the board, after which the registry of transfer was completed. The real owner of the certificates was permitted to reclaim them before approval by the directors,

then sold to a *bona fide* holder for value without notice, the latter might compel the company to pay subsequent dividends to him in respect to such a share warrant.[1]

§ 413. *The term "quasi-negotiability," as applied to certificates of stock, throws little light upon the subject.*[2]—It is little satisfaction to the court, the practitioner, the student, or the owner of stocks to be told that certificates of stock have a quasi-negotiability. This term has been coined to describe the character of certain things which can be understood only by a study and knowledge of the characteristics of the thing described. Especially is this true of certificates of stock. The information sought is not whether the certificate is quasi-negotiable, but whether the holder of it is protected under different states of fact and circumstances. He who intends to purchase such certificates wishes to know what dangers or risks he incurs by the purchase. The practitioner is interested, not in the general character of the instrument, but in the law as applicable to his particular case. Many of the cases concede to certificates of stock a quasi-negotiability; but it is extremely doubtful whether such discussions do not confuse any understanding of the character of such an instrument more than they explain it.

§ 414. *The distinction between the "legal" and the "equitable" title in the transfer of certificates of stock is unsatisfactory.*—Many of the cases involving the rights of a transferee of stock discuss and

the court saying that the notice thus given to the company gave the court seisin for purposes of adjudication. In Simmons *v.* London J. S. Bank, [1891] 1 Ch. 270, the court held that a bank to whom a broker had pledged stocks belonging to his customer was not a *bona fide* purchaser under the facts in that case, and consequently was not protected, even though a *bona fide* purchaser might have been. Although in England an unregistered transferee of stock is not protected against another transfer which is registered, yet he is protected where he lodged his transfer with the corporate secretary, and the latter accepted it for transfer before the second transfer was made. Nanney *v.* Morgan, L. R. 35 Ch. D. 598 (1887). In the case of Donaldson *v.* Gillot, L. R. 3 Eq. 274 (1866), the pledgee of one who held the transferee as if they were nego- was not protected, since the pledgor had purchased as agent and had fraudulently taken title in his own name. This would not be good law in this country, where the failure to have the transfer registered has no effect on the pledgee's rights under such circumstances.

1 Webb, etc. Co. *v.* Alexander, etc. Co., Ltd., 93 L. T. Rep. 339 (1905).

2 Daniel, Neg. Insts., § 1708, says: "The phrase 'quasi-negotiable' has been termed an unhappy one, and certainly it is far from satisfactory, as it conveys no accurate, well-defined meaning. But still it describes better than any other short-hand expression the nature of those instruments which, while not negotiable in the sense of the law merchant, are so framed and so dealt with as frequently to convey as good a title to the transferee as if they were negotiable."

treat the subject from the point of view that the transferee is protected in his ownership when the legal title passes to him, but is not so protected when only the equitable title passes. Unfortunately it happens that, under the same state of facts, one court will hold that only the equitable title passes; another that the legal title passes; and a third court will hold that both the legal and the equitable titles pass. The result is confusion, doubt, and difficulty, with little light as to the real status of certificates of stock.[1]

[1] "In reaching this conclusion we have not thought it necessary to consider the supposed distinction between the legal and the equitable title, or to determine whether the title of the executors is the one or the other. The distinction belongs appropriately to the law of real estate; and, though it has been extended to personalty, the application with regard thereto has been less extensive; and the distinction itself is less significant. For in many cases—as, for example, in the case of money received in trust or for the use of another—courts of law recognize the equitable as the legal title; and, even where the distinction obtains, the equitable is regarded as the true owner by courts of equity. Hence, in this state, where the courts exercise both jurisdictions, the question as to the nature of the title sued upon is generally immaterial, or, rather, it is material only to the question of the nature of the action, whether legal or equitable, and to the question of parties." Ashton *v.* Zeila Min. Co., 134 Cal. 408 (1901). Such also seems to be the view taken in Lowell on Transfer of Stock (1884), pp. 104, 105, where the learned author says: "It is often supposed, for example, that the right of a creditor to seize stock which has been sold before it is transferred upon the books depends on the passing of the legal title; but we shall attempt to prove that the legal title has in reality no effect upon the matter." The same authority shows the confusion resulting from this distinction of the legal from the equitable title in the following note to page 103: "That the legal title passes before the transfer on the books. In the following cases this is made part of the *ratio decidendi:* Ross *v.* Southwestern R. R., 53 Ga. 514, 532 (1874); Merchants' Nat. Bank *v.* Richards, 6 Mo. App. 454, 463 (1879); aff'd, 74 Mo. 77 (1881); Carroll *v.* Mullanphy Sav. Bank, 8 Mo. App. 249, 252 (1880); Scripture *v.* Francestown Soapstone Co., 50 N. H. 571 (*semble*); McNeil *v.* Tenth Nat. Bank, 46 N. Y. 325 (1871); Leitch *v.* Wells, 48 N. Y. 585 (1872); Smith *v.* American Coal Co., 7 Lans. 317 (1873); Noyes *v.* Spaulding, 27 Vt. 420 (1855); Cherry *v.* Frost, 7 Lea (Tenn.) 1 (1881). In the following cases the same principle was laid down *obiter:* State *v.* Leete, 16 Nev. 242, 250 (1881); Eastman *v.* Fiske, 9 N. H. 182 (1838); New York, etc. R. R. *v.* Schuyler, 34 N. Y. 30, 80 (1865); Grymes *v.* Hone, 49 N. Y. 17 (1872); Johnson *v.* Underhill, 52 N. Y. 203 (1873); Holbrook *v.* New Jersey Zinc Co., 57 N. Y. 616 (1874); Cushman *v.* Thayer Mfg. Co., 76 N. Y. 365 (1879); and see Purchase *v.* Exchange Bank, 3 Rob. (N. Y.) 164 (1865). . . . That the legal title does not pass until transfer on the books. In the following cases this principle is made a part of the *ratio decidendi:* Union Bank *v.* Laird, 2 Wheat. 390 (1817); Lowry *v.* Commercial, etc. Bank, Taney, 310 (1848); s. c., 15 Fed. Cas. 1040; Brown *v.* Adams, 5 Biss. 181 (1870); s. c., 4 Fed. Cas. 350; Williams *v.* Mechanics' Bank, 5 Blatchf. 59 (1862); s. c., 29 Fed. Cas. 1376; Becher *v.* Wells, etc. Co., 1 Fed.

§ 415. *The only method of treatment of the subject seems to be by inquiring under what facts the holder or purchaser is protected.*— The court, the practitioner, the purchaser, or the holder of certificates of stock wishes to know what liability and what dangers are incurred by the purchase and ownership of a certificate of stock. It becomes important for him to ascertain whether forgery or theft; or improper registry by the corporation; or breach of trust by a trustee, executor, or agent formerly holding that particular stock; or fraud whereby a former owner was deprived of that same stock; or legal proceedings, such as attachment, execution, *mandamus,* and decrees of the court; or any other fact or equitable right between former owners of the stock which he purchases, can affect him, a *bona fide* purchaser for value and without notice of those rights. These questions cannot be solved or answered by any general rules or theories, since certificates of stock have a law, an origin, and a nature different from other kinds of securities. The fact that a registry of transfer is required to be made on the corporate books adds further complication to the rights of a holder. General rules derived from and applicable to other instruments or securities cannot, with any certainty, clearness, or satisfactory results, be applied

Rep. 276 (1880); Marlborough Mfg. Co. *v.* Smith, 2 Conn. 579 (1818); Northop *v.* Newtown, etc. Turnp. Co., 3 Conn. 544 (1821); Oxford Turnp. Co. *v.* Bunnel, 6 Conn. 552 (1827); Dutton *v.* Connecticut Bank, 13 Conn. 493 (1840); Vansands *v.* Middlesex County Bank, 26 Conn. 144 (1857); Coleman *v.* Spencer, 5 Blackf. 197 (1839); Helm *v.* Swiggett, 12 Ind. 194 (*semble*) (1859); Weyer *v.* Second Nat. Bank, 57 Ind. 198 (1877); Fisher *v.* Essex Bank, 71 Mass. 373 (1855); Boyd *v.* Rockport Steam Cotton Mills, 73 Mass. 406 (1856); Blanchard *v.* Dedham Gas Light Co., 78 Mass. 213 (1858); McCourry *v.* Suydam, 10 N. J. L., 245 (1828); . . . Stebbins *v.* Phœnix Ins. Co., 3 Paige, 350 (1832); Mechanics' Bank *v.* New York, etc. R. R., 13 N. Y. 599 (1856); New York, etc. R. R. *v.* Schuyler, 38 Barb. 534 (1860); Lockwood *v.* Mechanics' Nat. Bank, 9 R. I. 308, 331, 335 (1869). In the following cases the same doctrine is laid down *obiter:* Black *v.* Zacharie, 3 How. (U. S.) 483 (1845); U. S. *v.* Cutts, 1 Sumn. 133 (1832); s. c., 25 Fed. Cas. 745 (this was, however, a case of government debt, not of corporate stock); Planters', etc. Ins. Co. *v.* Selma Sav. Bank, 63 Ala. 585 (1879); Otis *v.* Gardner, 105 Ill. 436 (*semble*) (1883); and see Kellogg *v.* Stockwell, 75 Ill. 68 (1874); People's Bank *v.* Gridley, 91 Ill. 457 (1879); Bruce *v.* Smith, 44 Ind. 1 (1873); State *v.* First Nat. Bank, 89 Ind. 302 (1883); Shaw *v.* Spencer, 100 Mass. 382 (1868); Sibley *v.* Quinsigamond Nat. Bank, 133 Mass. 515 (1882); White *v.* Salisbury, 33 Mo. 150 (1862); Boatmen's Ins. Co. *v.* Able, 48 Mo. 136 (1871); . . . Conant *v.* Seneca County Bank, 1 Ohio St. 298 (1853); U. S. *v.* Vaughan, 3 Binn. (Pa.) 394 (*semble*) (1811); Bank of Commerce's Appeal, 73 Pa. St. 59 (1873); Fraser *v.* Charleston, 11 S. C. 486 (*semble*) (1878)." As to the reason for the distinction between the legal and equitable title, see 1 University Law Rev. 218 (1894).

to certificates of stock. They should be considered by themselves. The future character and status of certificates of stock will be much clearer, better, and more satisfactory to the investing public if the law governing them be formed on its own basis.

§ 416. *The particular rules protecting a bona fide purchaser of certificates of stock are based on estoppel.*—Nearly all of the rules whereby a purchaser of stock is protected against the rights of previous holders grow out of the fact that such previous holder or holders have enabled persons to sell the stock, and consequently are estopped from claiming that they did not intend so to do.[1] This law of estoppel protects the purchaser against not only the rights of previous holders, but against the claims of the corporation itself.[2] Indeed, to such an extent has the law of estoppel been applied to protect a *bona fide* purchaser of stock, that, excepting in cases of certificates transferred in blank and lost or stolen without negligence on the part of the owner, a *bona fide* purchaser is protected now in almost every instance where he would be protected if he were purchasing a promissory note or other negotiable instrument.[3] To such an extent has the law of estoppel been applied to protect a *bona fide*

1 Wood's Appeal, 92 Pa. St. 379, 390 (1880); McNeil *v.* Tenth Nat. Bank, 46 N. Y. 325, 329 (1871); Weaver *v.* Barden, 49 N. Y. 286, 288 (1872); Moore *v.* Metropolitan Nat. Bank, 55 N. Y. 41, 47 (1873); Mount Holly, etc. Co. *v.* Ferree, 17 N. J. Eq. 117 (1864); Walker *v.* Detroit Transit Ry., 47 Mich. 338, 347 (1882). See also Fatman *v.* Lobach, 1 Duer, 354 (1852); Moodie *v.* Seventh Nat. Bank, 3 W. N. Cas. 118 (1876); Matthews *v.* Massachusetts Nat. Bank, Holmes, 396 (1884); s. c., 16 Fed. Cas. 1113. The agreement of a stockholder to surrender his stock in liquidation of an unpaid assessment is without consideration, and does not bind a purchaser of the certificate. Hill *v.* Atoka, etc. Co., 21 S. W. Rep. 508 (Mo. 1893). Other phases of this case are passed on in 124 Mo. 153.

2 Many instances of the liability of the corporation on certificates of stock which it has issued, and which have been sold or pledged to an innocent person for value, are given in chs. XVII, XIX, XXI, XXII, XXIII, *supra*, and ch. XXVI, *infra*. The purchaser, however, is not *bona fide*, unless he actually parted with the consideration before he knew of defects as to the stock. See § 767, *infra*, as to *bona fides*, and Hayden *v.* Charter Oak, etc. Park, 63 Conn. 142 (1893).

3 Quoted and approved in Cincinnati, etc. Ry. *v.* Citizens' Nat. Bank, 56 Ohio St. 351 (1897). The supreme court of Maryland in the case of Real Estate, etc. Co. *v.* Bird, 90 Md. 229 (1899), after quoting the above, commented thereon as follows: "Without intending to unite in the prophecy of the learned author as to what may yet be done, the fact is that courts have felt called on, *ex necessitate rei*, to free certificates of stock from many of the burdens that most non-negotiable instruments are required in law to carry. If a negotiable instrument is, as has been said of it by a distinguished jurist, 'a courier without luggage,' a certificate of stock in the form now usually followed might at least be said to be 'a courier without much luggage.'"

purchaser of stock that he is protected now in almost every instance where he would be protected if he were purchasing a promissory note or other negotiable instrument. The courts are steadily extending the application of the law of estoppel herein, and in the course of time it is possible that certificates of stock may become more negotiable than negotiable instruments themselves.[1] Thus the New York court of appeals has recently held that where certificates of stock issued by a New Jersey corporation are within the state of New York, an attachment may be levied upon them and the interest of the owner or pledgor therein sold, such certificates being a property right within the state.[2] Again, even though in anticipation of an increase of the capital stock the stockholders agree among themselves to waive their prior right to subscribe for such increased capital stock, yet a *bona fide* purchaser of a certificate of stock prior to such increase is not bound by such agreement and may claim his *pro rata* share of the increased capital stock at par.[3] And again, where four shares of stock are transferred to a person by the corporation to qualify him as a director, and he agrees to return the same to the corporation when ceasing to be a director, but thereafter and before he ceases to be a director he agrees with the indorsers of his note that they shall have the stock as collateral security, they are protected, even though the stock was actually delivered to them after they had notice of the first agreement, it being shown, however, that they had no notice of such agreement at the time they became sureties.[4] Where no certificates of stock have been issued, a purchaser of a subscriber's right to the stock is not protected as a purchaser of a certificate of stock is protected.[5]

1 Quoted and approved in O'Mara *v.* Newcomb, 88 Pac. Rep. 167 (Colo. 1906), the court saying also: "And while it is true that certificates of stock are not negotiable paper, and the statement that they are semi-negotiable has been criticised as tending to confusion, it is nevertheless true that the courts are so steadily and consistently extending the application of the law of estoppel to certificates of stock that, as said by Mr. Cook, in the course of time it is possible that they may become more negotiable than negotiable instruments themselves."

2 Simpson *v.* Jersey City, etc. Co., 165 N. Y. 193 (1900), the court distinguishing the case of Plimpton *v.* Bigelow, 93 N. Y. 592 (1883), on the ground that the certificates of stock in that case were not within the state. The court said: "Certificates of stock are treated by business men as property for all practical purposes. They are sold in the market and they are transferred as collateral security for loans, and they are used in various ways as property. They pass by delivery from hand to hand and they are the subject of larceny."

3 Real Estate, etc. Co. *v.* Bird, 90 Md. 229 (1899).

4 Dueber, etc. Co. *v.* Daugherty, 62 Ohio St. 589 (1900).

5 Manchester St. Ry. *v.* Williams, 71 N. H. 312 (1902).

B. DANGERS INCURRED IN PURCHASING STOCK.

§ 417. *Liabilities, risks, and rights of one who owns or purchases a certificate of stock.*—It is proposed to state separately and in detail the liabilities on the subscription price and by statute incurred by one who owns or purchases a certificate of stock; also the risks or dangers incurred by a purchase of stock as affected by the rights of previous holders of that stock; also a few of the rights of an owner or purchaser of a certificate of stock as regards the general incidents appertaining to stockholdership. These subjects are discussed in full in other parts of this work, and consequently the authority for rules laid down herein must be sought for in those parts. The purpose here is to state succinctly and in language free from technical phraseology the position occupied by a *bona fide* purchaser of a certificate of stock.

§ 418. *Liability on unpaid par value, that is, the unpaid subscription price of the stock.*[1]—In general the purchaser of a certificate of stock is immediately liable on the subscription price of the stock so far as it has not been paid by previous holders of the stock purchased and has not been called by the corporation. The transferrer is bound to pay all calls made before the transferee purchases. If the transferee does not immediately register his transfer on the corporate books, he is liable to pay to the transferrer such calls as are made after the transfer and which the corporation compels the latter to pay. The transferee who buys stock supposing it to be full paid is not liable for uncalled and unpaid parts of the subscription, even though the certificate is silent as to whether the par value of the stock has been paid in or not. Especially is this the rule where the certificate states that the stock is paid-up stock, or the transferee, before purchasing, inquires of the corporation and is told that the stock is paid up. He may purchase in reliance thereon, and cannot afterwards be held liable, even though the stock turns out not to have been fully paid up.

§ 419. *Forfeiture for non-payment of calls.*[2]—Where the corporation is given by its charter or by statute the right to forfeit and sell stock for non-payment of the subscription price when called in by the corporation, a notice to the stockholder of the intended forfeiture is always required. This notice, however, is given always to him who appears by the corporate registry to be the stockholder. Accordingly, a transferee or owner of stock who has not obtained a registry of his transfer on the corporate books is liable to lose his stock by a forfeiture for non-payment of calls, and may

[1] See ch. XV, *supra*.

[2] See ch. VIII, *supra*.

lose it without knowledge of the call or forfeiture, unless he appears on the registry of the corporation as the owner of the stock.

§ 420. *Statutory liability.*[1]—The liability by statute of a purchaser of certificates of stock to corporate creditors, in addition to the subscription price which is treated of above, exists in a great many cases. In the first place this liability may not exist at all against any one, either transferrer or transferee. It rarely exists in the case of railroad corporations. Where the statutory liability exists, the liability of a purchaser of stock is as follows: If the transferee immediately registers his transfer on the corporate books, he becomes at once liable by statute for debts of the corporation contracted after such registry, and the transferrer is not liable thereon. The transferee may or may not be liable on corporate debts contracted before he purchased, according to the words of the statute creating the liability. The transferrer is liable on corporate debts contracted after he sold the stock but before the transfer was registered. In the latter case the transferrer has recourse to the transferee.

§ 421. *Liability where the purchaser has the transfer made to a nominal holder.*[2]—Where a person purchases stock and takes it in the name of a "dummy," the stock never having been registered in the name of the real owner, the latter is not liable on such stock, according to the English rule. In America a contrary rule prevails, and the courts hold him liable on the ground that he is a principal, and as such is liable as an undisclosed principal for the acts of his agent, the "dummy."

§ 422. *No liability for assessments after the par value of the stock has been paid in.*[3]—By well-established principles of law stockholders are liable on their stock only to the extent of the unpaid par value of the stock, unless the statute expressly provides otherwise. Neither the directors, nor all the other stockholders combined, in corporate meeting assembled or otherwise, can compel a dissenting stockholder to pay any more money into the corporation or subject him to further liability on his stock. Nor can the legislature, subsequently to his purchase of the stock, pass a law increasing his liability, unless the power to alter or amend the charter is reserved to it, in which case such a law would be constitutional.

§ 423. *Liability when stock was issued for property.*[4]—Shares of stock may be issued under an agreement that payment is to be

1 See ch. XII, *supra*.

2 See §§ 253, 265, *supra*.

3 See ch. XIII, *supra*.

4 See chs. II and III, *supra*.

made in labor, services, material, or contract work. If so issued, and the labor or material received by the corporation is fairly equal in value to the par value of the stock, both the original holder and the transferee of such stock take it as full-paid stock, and cannot be held liable for any further amount, even though the value of the property turns out subsequently to have been overestimated but was made in good faith. Where, however, the property is intentionally overvalued and stock is issued for it, the persons originally receiving the stock are liable to have the transaction set aside, the value of the property or work done credited to them, and the real value of the stock, not necessarily the par value, charged to them, or be compelled to return the stock. As to the transferees the case may be different. If they purchased with notice of the fraud they are not protected; but if they purchased without notice or knowledge that the property was intentionally overvalued, but supposed that the stock was issued as paid up by payment in property or work taken at a *bona fide* value, or if they have no knowledge of how the stock was paid for, but take it as paid-up stock, they may retain the stock, and are not liable for any further amount thereon.

§ 424. *Liability as partners by reason of defective incorporation or for other reasons.*[1]—Where a supposed corporation has not been duly incorporated, or where a corporation for that business is not provided for, the supposed corporation has been held to be but a partnership, and all the stockholders held liable as partners. But a failure to file the articles of association, or to sign and publish them, or the omission from them of any of the essential facts required to be stated, does not ordinarily defeat the attempted incorporation and render the stockholders liable as partners. Again, the stockholders are, in some jurisdictions, liable to be held to be partners, as regards creditors of the enterprise, where the corporation organizes in one place and proceeds to do all its business in another place. In most such cases, however, the corporation has been recognized and upheld, and the stockholders protected in their limited liability. The latter class of decisions is the stronger, and certainly more to be commended and followed. In any case a transferee is not liable for all precedent debts of the concern, but only for those incurred subsequently to the registry of his transfer.

§ 425. *Danger of corporate lien.*[2]—Frequently corporations are given by charter or statute a lien on a stockholder's stock for debts due from him to the corporation. When such lien exists, a pur-

1 See ch. XIII, *supra*.

2 See ch. XXXI, *infra*.

chaser of the certificate in open market buys subject to the risk that the one from whom he buys owes the corporation a debt, and that the corporation will not allow the transferee of the certificate to obtain a registry until such debt is paid. In many of the states the lien of the corporation cannot be created by by-law. Generally it exists by reason of a provision of the charter. When it does legally exist it extends to all debts owed by the last registered stockholder, whether the debt be due or not due, and includes uncalled parts of the subscription price of the stock. It does not, however, apply to debts due from one who has bought and sold the certificate without appearing on the registry as a stockholder. The corporation may waive the lien, and a registry without insisting on the lien is such a waiver. The lien of the corporation extends to debts incurred by the transferrer after the transfer, but before the corporation is notified thereof.

§ 426. *Overissued stock.*[1]—The capital stock of a corporation is fixed by statute. There is no power in the corporation itself to increase that amount. It can be done only by a legislative enactment. Accordingly, if the corporation issues certificates of stock when the whole capital stock has already been issued, the new issue, if an equivalent amount of outstanding certificates is not surrendered, is an overissue, and is void. Any issue of stock in excess of the amount of the capital stock as fixed by the charter is null and void. The purchaser of such certificates, however, is not without his remedy. His certificate is so much waste paper, and he is not a stockholder; but he may sue the corporation for damages and recover to the extent of his injury. The purchaser may also sue the corporate officers who participated in the issue of the spurious stock, and may recover damages. He cannot, however, hold an innocent transferrer liable. The latter, if he knew nothing of the overissue, is not to be held as a guarantor of the validity of the stock which he sells.

§ 427. *Danger that transferrer or previous holder is an infant, married woman, or lunatic.*[2]—A purchase of stock from an infant is a dangerous investment. When the infant comes of age he may elect to disaffirm, and may hold the transferee liable for the stock. There is less danger, however, in accepting a transfer of stock from an infant who has previously purchased the stock which he sells. This previous purchase, and also his sale of the stock, are technically voidable acts; but after the stock has passed from his control the law disregards the doubtful medium of title, and considers the pur-

[1] See ch. XVII, *supra*.

[2] See §§ 66, 67, 250, 308, 310, 318, 319, *supra*.

chaser from the infant as the legal stockholder. As regards married women, the common law allowed the husband to sell her stock after he had reduced it to possession by registering it in his own name on the corporate books. In modern times, however, the right of a married woman to hold and convey personal property as though unmarried has been established in most states by statute. Her right to sell shares of stock owned by herself exists where she may sell other personal property similarly owned, and this right depends upon the law and statutes of her domicile. A purchase of stock from a lunatic is void.

§ 428. *Purchase of stock by or from a corporation.*[1]—In England a corporation cannot purchase shares of its own capital stock. In this country there is a difference of opinion as to the law. The statutes governing the corporation, however, sometimes prohibit such purchases. Such is the case with national banks. In any case, however, whether the corporation purchased the stock legally or illegally, a purchaser of the same stock from the corporation itself is not affected by the invalidity of the title of the corporation. Again, it is a general rule, both in England and America, that one corporation has no right to purchase stock in another corporation. Sometimes the statutes allow such purchases, but more often expressly provide to the contrary by prohibiting them. Nevertheless, whatever rule applies to a purchase by a corporation of stock in another corporation, the law is very clear that a purchaser of such stock from the corporation is protected in his purchase. The unauthorized act of the corporation in purchasing has nó effect upon the legality of its sale of the stock.

§ 429. *Purchase from joint owners, partners, and agents.*[2]—One joint owner cannot sell stock standing in the name of two or more as joint owners. One partner may sell and convey stock standing in the partnership name. As regards purchases of stock from agents, greater difficulty occurs. If the purchaser does not know that the vendor is selling as an agent, but supposes he is buying stock owned by the person with whom he is dealing, the purchaser is always protected. The same rule, after considerable doubt and discussion, has been established, even though the purchaser knows that the agent is selling as agent. The sale is valid, and the purchaser is protected, provided he has no reason to suspect that the agent is selling in fraud of the owner's rights or in contradiction of his orders.

§ 430. *Purchase of stock at sheriff's execution sale, or from assignee in bankruptcy, or for benefit of creditors.*[3]—A purchase of

1 See ch. XIX, *supra*. 2 See ch. XIX, *suprà*. 3 See ch. XXVII, *infra*.

stock at an execution sale by the sheriff is a dangerous investment. Almost always the judgment debtor has already sold and transferred his certificates of stock to a *bona fide* purchaser. If such *bona fide* purchaser has registered the transfer on the corporate books before the attachment or execution is levied, the purchaser at the execution sale gets nothing. If no such registry has been made, but the judgment debtor sold and transferred the certificate before the levy of attachment or execution, in most of the states, including New York, such a purchaser takes title and the execution purchaser none. In Connecticut and a few other states a contrary rule prevails. If, however, the judgment debtor sells the certificate after the attachment or execution is levied, the purchaser takes no title—the execution purchaser is entitled to the stock. A purchaser of stock from an assignee in bankruptcy or insolvency, or for the benefit of creditors, takes a good title if he obtains the certificates of stock. If, however, the insolvent has sold such certificates to another, the latter is entitled to the stock.

§ 431. *Purchase from a pledgee.*[1]—A pledgee of stock has no right to sell or repledge the stock held as collateral by him, unless the pledgor agreed that he might do so. If, however, the pledgee sells or repledges the stock to one who takes it in good faith, for value, and without notice of the fact that he is dealing with a pledgee of the stock, such a *bona fide* purchaser is protected. He is protected absolutely, and can keep the stock if he purchased it. If, however, he merely took it in pledge from the pledgee, he is obliged to give up the stock to the real owner, where the latter tenders to the repledgee the amount of the debt owed by the pledgee to the repledgee, for which the stock was given as security. Where, however, a person buys or takes in pledge stock from one who makes known the fact that he is holding the stock as pledgee, the former is not a *bona fide* purchaser. Moreover, he is not a *bona fide* holder where he would not be a *bona fide* holder of a promissory note transferred under similar circumstances, as, for instance, where he loans the money at an usurious rate of interest; or where he knows that the person with whom he is dealing is but an agent, and is pledging his principal's stock. In all these cases, where the purchaser or pledgee of stock is not a *bona fide* holder, the real owner and original pledgor of the stock may reclaim his stock from the repledgee, or purchaser from the pledgee, where the original pledgor could recover it from the first pledgee. The repledgee or purchaser from the pledgee in such a case stands in the shoes of the first pledgee, and has no better rights than the latter.

[1] See ch. XIX, *supra*, and ch. XXVI, *infra*.

§ 432. *Pledgee is protected in the same way as purchaser of stock.* [1] —The rules contained in this chapter explain the rights, dangers, and liabilities incurred by the purchaser of stock. The same rules prevail for the most part in favor of one who receives stock in pledge. A purchaser and a pledgee are treated in the cases as being similarly protected or similarly not protected. There is, however, one important exception to this rule. If a person who is about to take stock from another knows that the latter is disposing of the stock as an agent, the former may purchase the stock and be protected, but cannot take it in pledge and be similarly protected. An agent to sell is not an agent to pledge. Another exception to the similarity of position of the vendee and pledgee of stock is that by statute, frequently, the latter is not liable on stock where the former is liable.

§ 433. *Danger of purchasing from an executor, administrator, or guardian.* [2]—There is practically little danger incurred in purchasing stock from any one of these. It is the duty and right of the executors or administrators to sell the personal property and convert it into money. As regards guardians, they have the right to change the funds from one investment to another, unless a statute prescribes otherwise. Accordingly, a purchaser of stock from any one of those is protected in his purchase, even though he knows that his vendor is selling in his official capacity. If, however, the vendee knows that a breach of trust is involved or contemplated, he is not a *bona fide* purchaser and is not protected. All the executors or administrators need not join in a sale of the stock owned by the estate. A sale and transfer by one is sufficient.

§ 434. *Purchase from a trustee.* [3]—An entirely different rule prevails as regards stock held by a trustee as trustee. A purchaser of stock which he knows the vendor holds as belonging to a trust estate is bound to ascertain whether, by the instrument creating the trust, the trustee has a power to sell. If he has no such power, and the vendee knows that he is buying trust-estate stock, the latter is not protected, but is a party to any breach of trust that may be involved by the sale. If, however, the purchaser has no notice or knowledge that his vendor is selling trust stock, the former is a *bona fide* purchaser to that extent. He is not bound to know that the stock is trust-estate stock, and consequently he is protected in his purchase. Any facts that would put an ordinarily intelligent man on inquiry as to whether the stock belongs to a trust estate is

[1] See chs. XIX, *supra*, and XXVI, *infra*.

[2] See ch. XIX, *supra*.

[3] See ch. XIX, *supra*.

notice, and prevents the purchaser from claiming to be a *bona fide* purchaser. Thus, such a notice is held to be given by the fact that on the face of the certificate of stock, and following the name of the stockholder, the word "trustee" or equivalent words are written.

§ 435. *Sale by vendor to another purchaser without delivery of certificate of stock.*[1]—A purchaser of certificates of stock has no reason to fear that the vendor can sell the stock to another person and thereby defeat the rights of the purchaser with the certificates. If the purchaser without certificates does not obtain registry on the corporate books, he obtains nothing as against a *bona fide* purchaser of the certificates, even though the latter's transaction was subsequent in time to the former. If, however, the former obtains registry on the corporate books, the corporation is at fault, and is liable to the purchaser with the certificates. The corporation must either issue new certificates to the latter or pay damages.

§ 436. *Danger of forgery.*[2]—Forgery cannot be the source of a good title to any chose in action, whether a promissory note, bond and mortgage, or a certificate of stock. Consequently a purchaser of stock takes the risk that some previous owner of the stock, whose name appears on the certificate either as the registered owner or as transferee, was deprived of his title by forgery. If the forgery has been made, the purchaser cannot claim or hold the stock, although he had no actual knowledge of the forgery. He, however, has recourse to his vendor, and may compel him to repay the amount paid for the stock. Where, however, the forgery was committed prior to the last *registered* transfer of that stock, a *bona fide* purchaser from or subsequent to the last *registered* holder of that stock is protected. All rights and equities to particular shares of stock are cut off by a registry and sale of the new certificates. The party whose name was forged has recourse then only to the corporation, or to the party obtaining registry, or to previous holders. This limitation to the dangers incident to the purchase of stock extends to other rights and wrongs as well as to a case of forgery, and is of great importance in protecting a *bona fide* purchaser of stock.

§ 437. *Loss or theft of certificates indorsed in blank.*[3]—It is extremely doubtful whether a purchaser of a certificate of stock which was indorsed in blank, and which has been lost by the owner and found by another who sells it, or which has been stolen by the latter, would be protected in his purchase, even though he buys in good faith. In a case of negotiable paper, such a purchaser would, of

[1] See ch. XXI, *supra*. [2] See ch. XXI, *supra*. [3] See ch. XXI, *supra*.

course, be protected. But probably the purchaser of the certificate of stock would not be. No case holds that he would be protected, while many hold that he would not. If the real owner was guilty of gross negligence, perhaps the purchaser from the thief or finder of the certificate indorsed in blank would be protected. In one case this question of negligence was submitted to the jury. Again, sometimes a person sells stock without delivering the certificate, the vendor telling the vendee that the certificates have been lost. Such a title is very precarious. The purchaser should refuse to buy until new certificates are issued by the corporation to the vendor,—an issue which the corporation will make upon a suitable bond of indemnity being given to it by the person who alleges a loss. If the purchaser does not take this precaution he buys subject to having his title defeated by another purchaser who obtained the certificates which are alleged to have been lost.

§ 438. *Danger that a previous holder has been deprived of that same stock by fraud.*[1]—Shares of stock are the same as other kinds of property, in that a person who has been deprived of his stock by fraud cannot follow the stock and take it from the hands of a *bona fide* purchaser for value. The remedy of the defrauded person is for damages against the person defrauding him, or for a retransfer of the stock, if the latter still holds it, together with an injunction against the transfer of the latter. But if the person obtaining the stock by fraud sells it, even in violation of an injunction, the *bona fide* purchaser for value and without notice is protected. The defrauded party may, however, sue the person defrauding him in the state of the corporation, and, by an attachment or execution, obtain the stock if it has not passed into *bona fide* hands. Such a danger, however, is the ordinary danger of an attachment or execution. A *lis pendens* of a suit involving stock never charges the vendor of the stock with notice, as is the case of a *lis pendens* affecting real estate. Cases of fraud in the sale of stock frequently arise in cases of sales by agents and an appropriation of the proceeds; also when fraudulent representations are made to the vendor.

§ 439. *Statute of frauds.*[1]—The statute of frauds requires that sales of personal property exceeding in value a certain amount, generally fifty dollars, shall be valid and enforceable only when the property is partly or wholly delivered, or partly or wholly paid for at the time of the sale, or the terms of the sale are reduced to writing. In this country a sale of stock must conform to this statute. Generally the sale is made by a delivery of the certificate in-

[1] See ch. XX, *supra.*

dorsed in blank. Such a sale constitutes a delivery, and is legal, and is not void by the statute of frauds. The statute applies both to sales of stock which are considered as completed and to sales which are to be completed in the future.

§ 440. *Gambling sales of stock.*[1]—A gambling sale or contract to sell stock is void absolutely, and cannot be enforced. As a matter of practical experience, however, it is difficult to prove that a stock sale is a gambling sale. It is such only when both the vendor and vendee intend, not to actually have a delivery of the stock, but to wait and see whether the stock rises or falls in the market, and then to settle the contract by the loser paying the loss. An intent by one of the parties that there shall be no delivery will not make the sale a gambling one. It must be the intent of both.

§ 441. *Method of assigning a certificate of stock.*[2]—A certificate of stock is generally assigned by the owners signing the blank transfer and power of attorney on the back of the certificate. The transfer gives title to him whose name is afterwards filled into the blank transfer thus signed. The blank power of attorney is for an entirely different purpose. It enables the person whose name is filled in to register the transferee as a stockholder in the corporate books. Generally the power of attorney is filled in with the name of a clerk or agent of the transferee, or a clerk of the corporation who has charge of the registry books. After the registered holder has signed the transfer, leaving the transferee's name in blank, the certificate passes from hand to hand until some holder cares to fill his name into the blank. He may then obtain registry, or he may execute another transfer and sell the certificate. Transfers need not be under seal in this country. In England, by statute, they generally are required so to be.

§ 442. *Registry of transfer.*[2]—A registry of transfer is made by surrendering an old certificate of stock to the corporation, making an entry of the transfer on the corporate registry and taking from the corporation a new certificate issued in the name of the transferee. The object of obtaining the registry is to obtain a right to vote, to receive dividends, and various other incidental stockholders' rights; also to cut off corporate liens and the rights of third parties who may attach or claim the stock. If there is a reasonable legal doubt as to the right of the applicant to obtain registry, the corporation may refuse it, and thus obtain the protection of being compelled to make it by legal proceedings. If two parties claim the stock, each denying the right of the other, the

1 See ch. XX, *supra*.

2 See ch. XXII, *supra*.

corporation may interplead, provided there is a reasonable legal doubt as to who is entitled to the stock. If the corporation improperly refuses to register a transfer when requested, the applicant may have his remedy in damages, but in most states cannot have a *mandamus*.

§ 443. *Purchaser not affected by rights of holders of that stock back of the last registry.*[1]—This rule is peculiar to stock certificates, and cuts off rights even of a former owner who has been deprived of the stock by forgery. The person who obtains a registry first, after the illegal act has been done, is not protected by this rule. But his *bona fide* purchaser of the new certificates and all subsequent purchasers are protected, and cannot be compelled to give up the stock to the prior owner who was deprived of it illegally.

§ 444. *Summary.*—It will be seen by a review of the sections of this chapter, that the dangers of loss incurred by the purchase of a certificate of stock are not serious or numerous; and it is well that such is the result. Perhaps the most striking industrial feature of modern times is the accumulation of personal property, and the investment of that property, not in landed estates, but in the stocks and bonds of corporations. Such investments are made not alone by capitalists, but by thousands whose savings have no other satisfactory mode of disposition. In fact, it is curious to note how the different kinds of property have a different relative importance in the course of time. Five hundred years ago real estate was the only property that brought wealth and standing to its owner. Personal property was of little consequence, and not much of it was in existence. But during the past two hundred years personal property has risen to the ascendency. The banker, merchant, manufacturer, and capitalist have become wealthier than the land-owner. The banker millionaire is greater and more powerful than the nobility. Land, the old source of centralized wealth, inordinate power, caste privileges and hereditary rights, no longer maintains its preeminent importance.

And it is not alone the capitalist and banker that purchases and holds stock in corporations. The surplus wealth of the people at large is being invested in corporate stocks and bonds. Consolidations of railroad and manufacturing institutions are taking place on a colossal scale, and each consolidation involves the issue of new securities. A single company, The United States Steel Corporation, has issued bonds and stock aggregating over one and a half billions of dollars. The great railroad systems are annually in-

[1] See §§ 367, 369, *supra*.

creasing their capitalization. Street railways, gas companies, electric-light companies and water-works companies are continually adding to the list of these securities. In the course of time all these securities pass into the hands of investors, *bona fide* holders. It would hardly be an exaggeration to say that the law governing stocks and bonds, in the magnitude of the interests, the number of persons affected, and the variety of legal principles involved, is more important than all other branches of law combined. Even real estate, so far as the cities are concerned, is being absorbed by corporations, which issue stock to represent it. In the great moneyed centres stock constitutes the chief basis of credit, as collateral for loans at banks and trust companies. Hundreds of millions of dollars are loaned with no other security than certificates of stock transferred in blank with no registry whatsoever on the corporate books. Hence it is with reason that the constant tendency of the courts is to protect the *bona fide* purchasers of certificates of stock. It is fitting, in these days of the formative period of the law governing corporations and stock, that the principles governing the transfer of certificates should favor the protection and security of the investing public, and should be against secret liens, attachments, claims, and negligence of both the corporation and third persons. The circuit court of appeals of the United States has well said: "In the great majority of cases when stock is merely pledged for a loan, no record of the transfer is made on the books of the corporation, and in the judgment of laymen the making of such a record seems to be a needless formality. The trend of modern decisions has been to encourage the free circulation of stock certificates in the mode last indicated, on the theory that they are a valuable aid to commercial transactions, and that the public interest is best subserved by removing all restrictions against their circulation, and by placing them as nearly as possible on the plane of commercial paper." [1]

[1] Masury *v.* Arkansas Nat. Bank, 93 Fed. Rep. 603 (1899).

PART III.

MISCELLANEOUS RIGHTS OF STOCKHOLDERS.

CHAPTER XXV.

STOCK-BROKERS AND THEIR CONTRACTS.

§ 445. *Definitions and scope of the subject.*—By far the greater part of purchases and sales of stock is made, both in this country and in England, through organizations especially formed for that purpose and called stock exchanges. A stock exchange is a place of business where those who make up the membership of the exchange buy and sell stocks and bonds. These persons are called stock-brokers. A stock-broker is one who buys and sells stock as the agent of another, the latter being called a customer of the stock-broker.[1] Accordingly, in an ordinary purchase of stock through stock-brokers, there are generally four persons involved—the two

[1] In Sibbald *v.* Bethlehem Iron Co., 83 N. Y. 378 (1881), Finch, J., favors the definition from Pott *v.* Turner, 6 Bing. 702, 706 (1830), where a broker is defined as "one who makes bargains for another and receives a commission for so doing." Story on Agency, § 28 (9th ed.), says: "The true definition of a broker seems to be that he is an agent employed to make bargains and contracts between other persons in matters of trade, commerce, or navigation, for a compensation commonly called brokerage."

brokers and their respective customers. Stock-brokers have a language of their own. They have coined and put into general circulation certain phrases and terms descriptive of their business. These terms have become so closely identified with the subject of stock and transactions in stock that the courts have defined their meaning and explained their application. Definitions of a "bull," "bear," "short" sale, "long" purchase, "put," "call," "straddle," "margin," and "corner," are given in the notes below.[1] A "loan" of stock

[1] A "bull" is a dealer who endeavors to make the price of stocks go higher. A "bear" is a dealer who endeavors to make the price of stocks go lower. A "short" sale is a sale of stocks which the seller does not possess, but which he expects to purchase later on at a lower figure, thus fulfilling his contract and making a profit by the decline. In the meantime the broker generally borrows the stock from other parties to deliver to the vendee, and to be returned to the person loaning the stock at the end of the transaction. The customer deposits with the broker a small amount of money as security, called a "margin," and he is bound to keep the margin good. Hess *v.* Rau, 95 N. Y. 359 (1884); White *v.* Smith, 54 N. Y. 522 (1874); Knowlton *v.* Fitch, 52 N. Y. 288 (1873); Appleman *v.* Fisher, 34 Md. 540 (1871); Sistare *v.* Best, 88 N. Y. 527, 533 (1882). A sale for future delivery, although a "short" sale, is not a gambling contract *per se.* Clews *v.* Jamieson, 182 U. S. 461, 489 (1901). A short sale is not *per se* a wager, nor is it presumed to be. See § 341, *supra*, notes. A short sale was upheld as between a broker and customer in Armstrong *v.* Bickel, 66 Atl. Rep. 326 (Penn. 1907). A stockbroker may recover losses due to short sales which were afterwards covered by order of the customer. Whittmore *v.* Malcomson, 155 Fed. Rep. 503 (1885). A margin "means, in the broker's lexicon, additional collateral security against loss to the broker while . . . carrying stock for his employer." McNeil *v.* Tenth Nat. Bank, 55 Barb. 59 (1869); s. c., 46 N. Y. 325. A "long" purchase of stock is a purchase in the expectation that the stock will rise in value.

Stock options are of three kinds—puts, calls, and straddles. A "put" is a contract whereby a person has the privilege of requiring another person to take from the former certain specified stock at a specified price at any time within a specified period of time, the former not being bound to sell. See Bigelow *v.* Benedict, 70 N. Y. 202 (1877). A "call" is a contract whereby a person has the privilege of requiring another person to sell and deliver to the former certain specified stock at a specified price at any time within a certain specified period, the former not being bound to purchase. A "call" is an agreement to sell. Treat *v.* White, 181 U. S. 264 (1901). A call is legal on its face. Wiggin *v.* Federal Stock, etc. Co., 77 Conn. 507 (1905). A "straddle" or "spread-eagle" is a combination of a put and a call. It gives a person the double privilege of delivering to or demanding from another person certain stock at a certain price within a specified time. Harris *v.* Tumbridge, 83 N. Y. 92 (1880); Story *v.* Salomon, 71 N. Y. 420 (1877). A "straddle" or "spread-eagle" generally runs to bearer and is bought and sold by delivery without endorsement or formal assignment, and hence an action will lie for the conversion thereof. Hence if the holder delivers the instrument to the party who issued it, and requests him to buy at a specified price the stock therein referred to, in order that the

returnable on demand transfers the title in one sense, inasmuch as the borrower may return similar stock of the same amount, in place of returning the identical stock which was loaned to him.[1]

This chapter treats of the rights, duties, and liabilities of stock-brokers.[2] There are various incidental subjects, however, which enter largely into brokers' contracts, such as pledges of stock[3] and gambling sales of stock.[4] These subjects are fully treated elsewhere.

§ 446. *Who may be a broker and customer.*—Any person may be a stock-broker who may make a contract, but it is beyond the power of a national bank to act as a broker.[5] Strict rules prevail as to who may be a customer. An infant is not bound by his contracts with or through a stock-broker, any more than he is bound by his other contracts. Moreover, if the broker carries on stock transactions for an infant he is liable to the latter for all moneys lost thereby.[6] Again, a broker who sells or buys stock in the name

holder may deliver the stock to the party issuing it, and the party issuing it buys the stock at a higher figure, he is guilty of converting the instrument. Vroom *v.* Sage, 100 N. Y. App. Div. 285 (1905), giving the form in full of such an instrument; aff'd, 184 N. Y. 542. A "corner" exists where the "bears" have sold a large quantity of stock "short," and cannot borrow the stock to fill their contracts, but must buy it from those who have cornered the market on that stock. See Cameron *v.* Durkheim, 55 N. Y. 425, 438 (1874). As to the legality of these various transactions, and as to whether they are gambling contracts, see §§ 341–348, *supra*, especially § 344, n. It is not fraud for the owner of the larger part of the capital stock of a corporation to "corner" the market, that is, to enter into contracts with various parties to purchase stock of the corporation, although he knew that such contracts could not be fulfilled by such parties by reason of the fact that he himself held such stock, and it could not be obtained elsewhere. The same rule prevails although such person offered the stock for public subscription and purchased the greater part himself. Salaman *v.* Warner, 64 L. T. Rep. 598 (1891); aff'd, 65 L. T. Rep. 132 (1891).

1 Fosdick *v.* Greene, 27 Ohio St. 484 (1875); Dykers *v.* Allen, 7 Hill, 497 (1844). See also § 469, *infra.* When a man sells stock on the exchange he must deliver it, and if he does not own any he must borrow it of some one who does. When he borrows the stock he advances the market price of it to the lender, who pays interest on this money. The transaction is really a call loan. The lender of the stock can call for his stock at any time, and the borrower can call for his money. A contract to return borrowed money or pay for it is a debt. Dibble *v.* Richardson, 171 N. Y. 131 (1902).

2 See also, on this subject, Lindley on Companies, 6th ed., pp. 688–709.

3 Ch. XXVI, *infra.*

4 See ch. XX, *supra.*

5 First Nat. Bank *v.* Hoch, 89 Pa. St. 324 (1879); Weckler *v.* First Nat. Bank, 42 Md. 581 (1875). But Williamson *v.* Mason, 12 Hun, 97 (1877), holds that a bank has power to take stock from a customer and agree to sell it and credit the customer with the proceeds, and that the bank is liable for the conversion of such stock by its cashier.

6 Ruchizky *v.* De Haven, 97 Pa.

of an infant is himself liable to the other party in case the contract is not completed by reason of such infancy.[1] On the other hand, if the broker's customer hands in the name of a third person, an infant, as the seller or purchaser, such customer is liable to the broker for liabilities thereby incurred by the latter.[2]

§ 447. *Facts making person a broker or customer unintentionally.*—The relationship of broker and customer may be established and exist although one of the parties is personally ignorant of such a relationship.[3] A broker also may be liable as such in transactions where he had no intention of incurring any liability.[4] A broker is nothing more nor less than an agent for a special purpose. The agency may arise by the acts of the parties without any specific agreement.

§ 448. *Broker must obey specific orders of customer.*—A broker is bound to obey and carry out strictly the orders of his customer in the purchase or sale of stock. This rule is rigidly insisted upon by the courts. The orders of the customer may be such as he wishes to give, and when given they must be obeyed, or liability will be incurred by the broker.[5] An order to sell at market means the

St. 202 (1881). The transactions in this case were held to be gambling contracts. Heath *v.* Mahoney, 12 Week. Dig. 404 (1881). The broker himself may be an infant and may repudiate his obligations. See 4 Law Notes, 314.

1 Nickalls *v.* Merry, L. R. 7 H. L. 530 (1875); Heritage *v.* Paine, L. R. 2 Ch. D. 594 (1876). The first case holds him liable although ignorant of the infancy of his customer. See same case, Merry *v.* Nickalls, L. R. 7 Ch. App. 733 (1872). The broker is liable although the name of the infant was passed to him by another broker. Dent *v.* Nickalls, 29 L. T. Rep. 536 (1873); aff'd, 30 L. T. Rep. 644 (1874). It is no defense to the broker that the infant's father was the real customer. Nickalls *v.* Eaton, 23 L. T. Rep. 689 (1871). See also § 250, *supra*, as to the liability to the corporation itself.

2 Peppercorne *v.* Clench, 26 L. T. Rep. 656 (1872).

3 Where the firm does a broker business through its agents, the transactions by the agents on their own private accounts, but ostensibly for the firm, will bind the firm. Wells, etc. Co. *v.* Welter, 15 Nev. 276 (1880). *Cf.* Masterton *v.* Boyce, 6 N. Y. Supp. 65 (1889). A customer's statement that he would like to make a dollar if he could is not sufficient authority for a broker to buy stocks for him. Hopkins *v.* Clark, 7 N. Y. App. Div. 207 (1896); aff'd, 158 N. Y. 299 (1899), holding also that the customer is not liable for an unreasonable use of discretion by the broker.

4 As where he continues to allow his name to remain in the firm name after its dissolution. Hixon *v.* Pixley, 15 Nev. 475 (1880). Also where one of the firm is a trustee and defaults therein, the firm having charge of the trust estate's stocks. De Ribeyre *v.* Barclay, 23 Beav. 107 (1857). As a silent partner he cannot prevent a customer from setting off against a liability a debt personal to the ostensible sole broker. Read *v.* Jaudon, 35 How. Pr. 303 (1868). A stock-broker is bound to obey orders promptly. Galigher *v.* Jones, 129 U. S. 193 (1889).

5 Parsons *v.* Martin, 77 Mass. 111

market at the time of the sale, and not necessarily the market at the time of the order.[1] An order to sell five hundred shares of stock may be executed by selling one hundred shares at a time.[2] When the customer fixes a limit at which the broker may purchase, the latter cannot bind the customer by a purchase at a higher figure.[3] Frequently the customer gives to the broker a "stop order," which is an order to sell or buy, as the case may be, at a certain specified figure, or upon a specified contingency. Under this order the broker must sell or buy when the price or contingency occurs, but not until after it occurs. If the market changes too quickly for him, he must sell or buy at the market price immediately after the fixed price or contingency arises.[4] The customer may leave it in the discretion of the broker as to the best time for buying or selling.[5] When this is done the broker must exercise such discretion in good faith and with reasonably good judgment and care.[6] A stock-broker is not

(1858). See also § 452, *infra*. Thus, where the customer authorizes a sale if the stock goes down to 51, but the broker sells when it goes down to 52, he is liable for an unauthorized sale. Clarke *v.* Meigs, 10 Bosw. 337 (1863). *Cf.* Whelan *v.* Lynch, 60 N. Y. 469 (1875); Jones *v.* Marks, 40 Ill. 313 (1866). But the broker may correct a palpable error in the order given him by his customer. Luffman *v.* Hoy, 13 N. Y. Week. Dig. 324 (1881). Where the customer tells the broker that unless he sells at once he must bear any further loss, the customer is not liable for further losses. Zimmerman *v.* Heil, 86 Hun, 114 (1895); aff'd, 154 N. Y. 703. A broker failing to sell as instructed, is liable only for actual loss. King *v.* Zell, etc., 66 Atl. Rep. 279 (Md. 1907).

1 Fairbairn *v.* Rausch, 104 N. Y. App. Div. 259 (1905).

2 Evans *v.* Wrenn, 93 N. Y. App. Div. 346 (1904); aff'd, 181 N. Y. 566.

3 Whether a limit was fixed is a question for the jury, if the facts are disputed. *Cf.* Smith *v.* Bouvier, 70 Pa. St. 325 (1872). The customer may ratify the unauthorized purchase. Genin *v.* Isaacson, 6 N. Y. Leg. Obs. 213 (1848). If the power to sell depends on the construction of writings, it is a question of law only. Davis *v.* Gwynne, 57 N. Y. 676 (1874); s. c., 4 Daly, 218 (1871). But the written order may be subsequently modified by parol. Burkitt *v.* Taylor, 13 N. Y. Week. Dig. 75 (1881); Clarke *v.* Meigs, 10 Bosw. 337 (1863). Or be waived. Hope *v.* Lawrence, 50 Barb. 258 (1867).

4 Porter *v.* Wormser, 94 N. Y. 431 (1884); Bertram *v.* Godfray, 1 Knapp P. C. 381 (1830). The latter case involved an absolute order to sell should the stock reach a certain price. Where a broker is carrying a "short" sale on a "stop order," and purchases before the price of the "stop order" is reached, and the customer, a week later, then orders the broker to purchase, the purchaser may recover the profit that a purchase at the latter date would have netted. Campbell *v.* Wright, 118 N. Y. 594 (1890). Brokers cannot disregard a "stop order," and act before that price is reached, even though prices are fluctuating rapidly. Campbell *v.* Wright, 118 N. Y. 594 (1890). See also § 459, *infra*.

5 Such discretion, when given, is revoked only by clear notice of revocation. Davis *v.* Gwynne, 4 Daly, 218 (1871).

6 Harris *v.* Tumbridge, 83 N. Y. 92

liable for contracts which he knew nothing about, and which were agreed to in his name by an assistant of one of his employees, especially where the customer knew such to be the fact.[1] Even though the broker buys stock for the customer without an order, yet if the customer ratifies it and pays for the stock he cannot afterwards object to the purchase.[2]

§ 449. *Must act in good faith and in reasonable time.*—The broker must make the purchase or sale in good faith on the best terms possible, and must give the customer the advantage of the transaction as actually made. Any material failure to do this, or to make the sale or purchase as directed, will release the customer from the transaction, although it was reported to him as made in accordance with orders.[3] The broker is allowed a reasonable time within which to make the sale or purchase.[4] Where the principal gives an order

(1880); Hopkins *v.* Clark, 158 N. Y. 299 (1899).

1 Timpson *v.* Allen, 149 N. Y. 513 (1896). A manager of a broker's office may bind him by a contract with a customer whereby a discretionary order is taken. Newman *v.* Lee, 87 N. Y. App. Div. 116 (1903). A broker's bookkeeper who has purchased stock at various times for customers of the firm, and apparently had authority to do so, may bind the firm by another purchase. Merkel *v.* Lazard, 114 N. Y. App. Div. 25 (1906). The customer may be bound by the acts of his clerk. Webb *v.* Challoner, 2 Fost. & F. 120 (1860). As to dealings with a stockbroker's clerk, see Spooner *v.* Browning, [1898] 1 Q. B. 528.

2 Buck *v.* Houghtaling, 110 N. Y. App. Div. 52 (1905).

3 Where the broker buys in his own name at a price less than the price reported to the customer, sells without notice, and subsequently pretends to sell again, the whole transaction is void as to the customer. Levy *v.* Loeb, 85 N. Y. 365 (1881); 89 N. Y. 386. So, likewise, where he purchases an option instead of cash purchase, and reports a higher price than that paid. Voris *v.* McCredy, 16 How. Pr. 87 (1856). So, likewise, where the broker varies the order from a cash purchase to an option, he himself taking the risk of the option. Day *v.* Holmes, 103 Mass. 306 (1869); Pickering *v.* Demerritt, 100 Mass. 416 (1868). A broker who sells bonds, and then reports no sale, but loans money to the customer on the bonds as collateral, may be held liable to account for the sale. Bischoffsheim *v.* Brown, 34 Fed. Rep. 156 (1888). Where an agent or broker is employed to buy stock for a "pool," and agrees to do so for a compensation consisting of a part of the profits, he is liable in damages for fraud if he charges the "pool" more than the stock cost him. Manville *v.* Lawton, 19 N. Y. Supp. 587 (1892). A customer may maintain a suit of equity against his broker to recover back the money paid to the broker to invest where it appears that the broker purchased securities merely by taking stock which another customer of the broker had ordered the broker to sell, there being no actual sale excepting these bookkeeping entries. A stipulation with the broker that any other customer of the broker may be purchaser or seller does not apply to such bookkeeping transactions. Haight *v.* Haight, etc. Co., 112 App. Div. 475 (1906). See also § 452, *infra.*

4 Fletcher *v.* Marshall, 15 M. & W. 755 (1846). *Cf.* Dickenson *v.* Lilwal, 1 Starkie, 128 (1815), which holds that the transaction must be carried

to the broker to sell certain stock which the principal owns, and the broker, by fraudulent representations, dissuades him from selling, the principal may hold the broker liable in damages.[1] An agreement with brokers by which a person is to cause a legislative investigation, and, in case certain stock decline, such person is to share in the profits of short sales, is illegal and not enforceable.[2]

§ 450. *Cannot purchase from or sell to himself.*—A broker cannot, in behalf of his customer, buy from or sell to himself as the other principal. The law will not allow him to act both as agent and as principal at the same time. Such an act is a constructive fraud on account of his fiduciary relation, and will be set aside.[3] Custom or

out on the day of the order. The broker is entitled to his commission although his customer fails before the transaction is made. Inchbald *v.* Western, etc. Co., 34 L. J. (C. P.) 15 (1864). The contract is to be carried out within a reasonable time. A broker's custom is evidence as to what is reasonable time. Stewart *v.* Cauty, 8 M. & W. 160 (1841). A few hours' notice held insufficient. Johnson *v.* Mulvy, 51 N. Y. 634 (1872). "Usually the broker is entitled to a fair and reasonable opportunity to perform his obligation, subject of course to the right of the seller to sell independently. But that having been granted him, the right of the principal to terminate his authority is absolute and unrestricted, except only that he may not do it in bad faith and as a mere device to escape the payment of the broker's commissions." Sibbald *v.* Bethlehem Iron Co., 83 N. Y. 378, 384 (1881). A customer is under no obligation, when he learns that his broker has not sold stock as ordered, to notify the broker that he abandoned any claim to the stock and held the broker responsible for their value. Nor is he obliged to redeem the stock from the sub-broker. Allen *v.* McConihe, 124 N. Y. 342 (1890). In this case the court allowed as damages against a broker who delayed selling when ordered to sell, the difference between the price when the order was given and the price when the sale was actually made. Where for four years both the broker and the customer have apparently abandoned an alleged purchase of stock on a margin, it is a question for the jury whether there was an abandonment or whether the customer continued to be liable. Seligman *v.* Rogers, 113 Mo. 642 (1893). A broker ordered to purchase stock on a margin need not actually purchase at once. It is sufficient if he is ready to fulfill when called upon so to do at the price on the day of the giving of the order. Ingraham *v.* Taylor, 58 Conn. 503 (1889).

1 Fottler *v.* Moseley, 179 Mass. 295 (1901).

2 Veazey *v.* Allen, 173 N. Y. 359 (1903).

3 Mayo *v.* Knowlton, 134 N. Y. 250 (1892); Conkey *v.* Bond, 36 N. Y. 427 (1867); Brookman *v.* Rothschild, 3 Sim. 153 (1829); Marye *v.* Strouse, 5 Fed. Rep. 483 (1880); Robinson *v.* Mollett, L. R. 7 H. L. 802, 818, 826 (1875). Even though the purchase was in good faith and at a lower figure than the market price. Taussig *v.* Hart, 58 N. Y. 425 (1874); Gillett *v.* Peppercorne, 3 Beav. 78 (1840). In Bryan *v.* Baldwin, 52 N. Y. 232 (1873), the court said: "The plaintiff, being pledgee of the stock, and in that character exposing it for sale, could not become the purchaser unless the defendant assented to such purchase. Story on Bailments, § 319; Torrey *v.*

usage cannot legalize such a transaction.[1] The broker may, however, show by parol evidence that he did not deal with himself, though writings indicate otherwise.[2] And there is no rule which prevents the broker from acting as agent both for the selling and the buying customer.[3] Where the broker turns over his own stock to the client's account instead of buying, and sells the client's stocks without orders so to do, and afterwards buys them back, all without his client's knowledge, he cannot recover commissions.[4]

§ 451. *Duties and liabilities of customer towards broker.*—The oral order of a customer to a broker to buy stock may be shown, even though part of it was afterwards reduced to writing.[5] A stockbroker is but the agent of his customer. As such he may bind his customer by acts within the scope of his authority, and compel the customer to respond to his liability. Thus, the broker may proceed to close the transaction, paying out his own money as though it was his own business, and may then compel the customer to repay to

Bank of Orleans, 9 Paige, 649 (1842); Hawley *v.* Cramer, 4 Cow. 717, 736 (1825). This sale to the plaintiff was not void, but voidable at the election of the defendant. Edwards on Bailments, 260, 261. The defendant was at liberty to ratify the sale, and had he done so it would have been valid for all purposes. The ratification would have made it lawful, and relieved it from any imputation of being tortious as to him. . . . But the defendant has not done this, but has elected to treat the purchase by the plaintiff as illegal. This avoids the sale, and, that being avoided by the defendant, the parties are remitted to their rights the same as though no sale had been attempted." It seems that where a broker has an order to sell from one customer and an order to buy from another, he may employ a fellow-broker to purchase on the exchange when the sale is made. Terry *v.* Birmingham, etc. Bank, 99 Ala. 566 (1893). Even though, in closing an account on the death of the customer, the broker sells to a jobber and agrees to repurchase at the same price later on, yet if the price is the fair market price the broker may recover from the customer the loss. Macoun *v.* Erskine, etc. Co., [1901] 2 K. B. 493. But where the broker immediately repurchases and obtains the stock at a less price than the price at which he sold, he must account to his customer for the profit. Erskine, etc. Co. *v.* Sachs, etc., [1901] 2 K. B. 504.

1 Commonwealth *v.* Cooper, 130 Mass. 285 (1881). The custom of brokers to buy in large quantities and sell in small quantities is illegal. Robinson *v.* Mollett, L. R. 7 H. L. 802 (1875).

2 Porter *v.* Wormser, 94 N. Y. 431 (1884).

3 Knowlton *v.* Fitch, 52 N. Y. 288 (1873).

4 Skelton *v.* Wood, 71 L. T. Rep. 616 (1894). Where a broker, instead of selling directly to a purchaser, sells through another person at a less figure in order to cheat his customer, he cannot collect commissions unless the customer knew of the fraud at the time he closed the transaction. Hafner *v.* Herron, 165 Ill. 242 (1896).

5 Picard *v.* Beers, 81 N. E. Rep. 246 (Mass. 1907).

him the money so expended in the customer's behalf.[1] Or, if his customer refuses to carry out the transaction, the broker may settle with the opposite party by paying the loss incurred by buying or selling the stock elsewhere, and may then sue his customer for the differences thus paid.[2] He may also recover his disbursements, commissions, and interest.[3] The customer is liable to the broker for stock purchased, although the stock turns out to be spurious or unauthorized.[4] If the broker seeks to recover the full value of stock which he has purchased for his customer, he must first tender the stock to the customer,[5] or he must sell it after due notice to the customer, and thus accurately ascertain the loss.[6] If he is seeking to recover for differences paid the opposite broker in settlement, *assumpsit* is his remedy.[7] He must clearly prove that the customer

1 Bayley *v.* Wilkins, 7 C. B. 886 (1849); Whitehouse *v.* Moore, 13 Abb. Pr. 142 (1861); Dails *v.* Lloyd, 12 Q. B. 531 (1848). *Cf. Ex parte* Neilson, 3 De G., M. & G. 556 (1853). See also § 461, *infra.*

2 Durant *v.* Burt, 98 Mass. 161 (1867); Bayliffe *v.* Butterworth, 1 Exch. 425 (1847), per Parke, B.; Marten *v.* Gibbon, 33 L. T. Rep. 561 (1875); Biederman *v.* Stone, L. R. 2 C. P. 504 (1867).

3 Where the commissions and interest were paid to other brokers, they may be charged to the customer. Robinson *v.* Norris, 51 How. Pr. 442 (1874); aff'd, 6 Hun, 233. Even though the interest was usurious. Smith *v.* Heath, 4 Daly, 123 (1871). On commissions, see Inchbald *v.* Western, etc. Co., 34 L. J. (C. P.) 15 (1864). Excessive expenses will not be allowed, although customary. Marye *v.* Strouse, 5 Fed. Rep. 483 (1880). The broker is entitled to commissions only when he has rendered some service to the customer. Sibbald *v.* Bethlehem Iron Co., 83 N. Y. 378 (1881); Hoffman *v.* Livingston, 46 N. Y. Super. Ct. 552 (1880). The case of Hatch *v.* Douglas, 48 Conn. 116 (1880), holds that the broker's customary monthly charges and interest thereon are not usurious. The broker may recover from the principal the purchase price of stocks bought by the broker, but not delivered, before the corporation became insolvent. Chapman *v.* Shepherd, L. R. 2 C. P. 228 (1867). Members of a syndicate are jointly liable to a broker employed by them. Sternberger *v.* Bernheimer, 121 N. Y. 194 (1890).

4 See Adamson *v.* Jarvis, 4 Bing. 66 (1827); Peckham *v.* Ketchum, 5 Bosw. 506 (1859). So, also, for spurious stock innocently given to the broker to sell. Westropp *v.* Solomon, 8 C. B. 345 (1849). See also § 452, *infra.*

5 Merwin *v.* Hamilton, 6 Duer, 244 (1856); Bowlby *v.* Bell, 3 C. B. 284 (1846). But after once tendering it he need not continually keep it on hand. Wynkoop *v.* Seal, 64 Pa. St. 361 (1870).

6 Monroe *v.* Peck, 3 Daly, 128 (1869). In Rosenstock *v.* Tormey, 32 Md. 169 (1869), the necessary allegations were held to be a purchase of stock according to an order, at fair market price, which was paid, and the customer notified and payment demanded; willingness to deliver the stock; refusal of customer to pay; notice of sale; a proper sale; and loss.

7 Pollock *v.* Stables, 12 Q. B. 765 (1848). *Contra,* Child *v.* Morley, 8 T. R. 610 (1800).

authorized the order.[1] The broker has a lien on the customer's property in his hands for all debts due to the former.[2]

§ 452. *Duties and liabilities of a broker towards customer.*—The broker also owes certain duties and incurs certain liabilities in his relations with his customer. It is said that he cannot sell on credit, since that is not the usual course of his business.[3] He is liable in damages for failure to buy or sell in accordance with his express orders.[4] Where the customer fails to carry out the transaction, but the broker does carry it out at a profit, the profit belongs to the customer.[5] But the customer is not entitled to stock held for him by the broker until he pays the broker all his reasonable disbursements thereon.[6] But he has no such lien if he knows that the customer is acting as agent for another.[7] The broker may deposit a margin with the opposite broker, according to custom, and not be responsible to his customer if it is lost,[8] although the rule may be otherwise as to a delivery of the stocks themselves.[9] A broker is not bound to call for margins from a lender of stock borrowed to cover a short sale.[10] The broker is required to exercise reasonable diligence and care, and no more.[11] It is a question of doubt whether

1 Ward *v.* Van Duser, 2 Hall (N. Y.), 162 (1829). In White *v.* Baxter, 71 N. Y. 254 (1877), the court held that a customer's contract with his broker to protect the latter against loss by expulsion from the stock exchange for non-compliance with its rules is a valid and enforceable contract.

2 Jones *v.* Peppercorne, Johns. (V.-C.) (1858). Brokers have a general lien upon all securities of their customers which come into their hands in the ordinary course of business and this lien applies to all sums due to them from such customers. *Re* London, etc. Corp., [1902] 2 Ch. 416.

3 2 Kent, Com. 6222 (b), 14th ed.

4 Speyer *v.* Colgate, 4 Hun, 622 (1875); Whelan *v.* Lynch, 60 N. Y. 469 (1875), the case of a wool-broker. See also Jones *v.* Marks, 40 Ill. 313 (1866), and § 448, *supra*. The damages may sound in tort, thus preventing a release in bankruptcy from barring the action. Parker *v.* Crole, 5 Bing. 63 (1828). Under the New York code he may be arrested if he does not use the money for the purpose designated. Dubois *v.* Thompson, 1 Daly, 309 (1863). And in England he is liable criminally. Regina *v.* Cronmire, 54 L. T. Rep. 580 (1886).

5 Fowler *v.* New York Gold Exch. Bank, 67 N. Y. 138 (1876).

6 See McEwen *v.* Woods, 11 Q. B. 13 (1847), where the broker paid calls made on the stock after its sale.

7 Fisher *v.* Brown, 104 Mass. 259 (1870); Pearson *v.* Scott, L. R. 9 Ch. D. 198 (1878).

8 Gheen *v.* Johnson, 90 Pa. St. 38 (1879).

9 Brown *v.* Boorman, 11 Cl. & F. 1 (1844).

10 Morris *v.* Jamieson, 205 Ill. 87 (1903).

11 Phillips *v.* Moir, 69 Ill. 155 (1873); Gheen *v.* Johnson, 90 Pa. St. 38 (1879). As to the construction of a contract wherein the broker invests the customer's money as the broker sees fit, and the broker guarantees the return of the capital and interest and all profits made, see Vermilye's Case, 43 N. J. Eq. 146 (1887). As to the liability of stock-brokers and jobbers

a broker who has received in good faith commissions from a person guilty of embezzlement is liable to pay over to the persons injured by his customer commissions so received.[1] Where a broker has with notice dealt with a trustee who was using trust securities illegally, the broker may be held liable at law for conversion, or in equity to reach the securities and account for the dividends and their value.[2] A broker may, by bill of discovery, be compelled to disclose acts amounting to misconduct.[3] Where the brokers do not make actual purchases and sales as ordered, but carry the same on their books and report fictitious transactions, they are guilty of fraud, and the customer may recover back money paid, even though, if the transactions had been carried out, the customer would have lost his money. The records of the stock-exchange clearing-house may be competent evidence.[4] A customer may maintain a suit of equity against his broker to recover back the money paid to the broker to invest where it appears that the broker purchased securi-

and vendees towards the vendors, see also 1 White & T. Lead. Cas., 6th Eng. ed., pp. 922–929.

1 See Butler *v.* Finck, 21 Hun, 210 (1880). The case of Taft *v.* Chapman, 50 N. Y. 445 (1872), seems to hold that the broker is not liable where he acted without knowledge of his customer's acts. See also s. c., *sub nom.* Brownson *v.* Chapman, 63 N. Y. 625 (1875). See also Porter *v.* Parks, 49 N. Y. 564 (1872); § 350, n., *supra.* The case of Kissam *v.* Anderson, 145 U. S. 435 (1892), reversed the decision below (Anderson *v.* Kissam, 35 Fed. Rep. 699, holding the broker liable) on the ground that it was for the jury to say whether the bank, whose funds were used by the president to pay the broker, had notice of payment by the broker to the president. A broker who takes money as a margin, knowing that the money comes from a trustee and is trust-estate money, is liable to the estate for money lost thereby. Leake *v.* Watson, 58 Conn. 332 (1890). A broker taking, in payment of losses by an individual, checks drawn by him as an officer of a corporation, must refund the money. Huie *v.* Allen, 87 Hun, 516 (1895); aff'd, 156 N. Y. 658.

2 English *v.* McIntyre, 29 N. Y. App. Div. 439 (1898). A stock-broker who sells stock which on its face runs to a person as trustee and who knows it belongs to a trust estate and who pays the proceeds to the trustee individually may be compelled to repay the money to the trust estate if the trustee has embezzled the same, and such liability may be enforced by a suit in equity. Safe, etc. Co. *v.* Cahn, 102 Md. 530 (1906). Even though brokers in sending stock to a customer endorse it in blank and entrust it to a messenger, and the messenger converts it to his use by having other brokers sell it in good faith, yet such latter brokers are liable to the customer for the value of the stock. Hall *v.* Wagner, 111 N. Y. App. Div. 70 (1906).

3 Green *v.* Weaver, 1 Sim. 404 (1827). See Rawlings *v.* Hall, 1 Car. & P. 11 (1823).

4 Prout *v.* Chisolm, 21 N. Y. App. Div. 54 (1897). Where the broker does not buy the stocks, but merely makes entries on his books, the customer may recover back margins and commissions paid. Fuller *v.* Municipal, etc. Co., 117 N. Y. App. Div. 352 (1907).

ties merely by taking stock which another customer of the broker had ordered the broker to sell, there being no actual sale excepting these bookkeeping entries. A stipulation with the broker that any other customer of the broker may be purchaser or seller does not apply to such bookkeeping transactions.[1] A broker is not responsible where he in good faith loans his customer's money, in compliance with his authority, on certificates of stock as collateral, even though they turn out to be forged, provided he was not guilty of negligence. The latter is a question for the jury, and the burden of proof is on the broker. The broker is not bound to present the certificates to the company for verification.[2] Where the broker deposits money in a bank, the bank has a banker's lien on it, although the money really belongs to the broker's client.[3] After a broker has purchased according to order, but his customer dies before the stock is paid for, it is the duty of the broker to sell immediately upon the death of his client, and not to carry the transaction along and afterwards sell.[4] An executor is bound to close at once a speculative account.[5] Even though a broker sells stock held on margin and does not pay over to his customer the balance due, yet he is not indebted in a fiduciary capacity, within the meaning of the bankruptcy act, and hence such a claim is barred by a discharge in bankruptcy.[6]

§ 453. *Brokers' customs and usages.*—It has been a greatly disputed question as to how far and when a custom or usage among stock-brokers or at stock exchanges may enter into and govern stock-brokers' contracts. At an early day the rule was laid down

1 Haight *v.* Haight, etc. Co., 112 App. Div. 475 (1906). A broker cannot legally charge a commission to both buyer and seller. Haight *v.* Haight, etc. Co., 46 N. Y. Misc. Rep. 501 (1905).

2 Isham *v.* Post, 141 N. Y. 100 (1894). See also §§ 296, 369, 451, *supra*, and § 454, *infra*, and Andrews *v.* Clark, 72 Md. 396 (1890). As to a broker's liability on stolen and lost certificates of stock, see § 358, *supra*.

3 Thomson *v.* Clydesdale Bank, [1893] A. C. 282.

4 *Re* Overweg, [1900] 1 Ch. 209. *Cf.* § 459, *infra*. The express power of an agent to sell securities is revoked by the death of the principal, and if he sells thereafter he is liable for damages in conversion. Matter of Mitchell, 36 N. Y. App. Div. 542 (1899); aff'd, 161 N. Y. 654. Where a person sells stock, nothing being paid down, but by the contract on specified dates any decline in the market price of the stock should be paid by the vendee to the vendor and any rise should be paid by the vendor to the vendee, and the vendor dies, his estate is entitled to the full selling price on the next accounting day, and if the vendee does not pay on a demand at that time, and the stock subsequently advances in price, the vendee cannot have specific performance, neither can he recover damages if the contract price exceeded the market value when payment should have been made. *Re* Schwabacher, 98 L. T. Rep. 127 (1907).

5 Matter of Hirsch, 116 N. Y. App. Div. 367 (1906); aff'd, 188 N. Y. 584.

6 Crawford *v.* Burke, 195 U. S. 176 (1904).

by the English courts that he who buys or sells stock through a stock-broker must be considered as dealing with him according to the usages of the market in which he deals, and the customs which prevail in relation to that species of business.[1] A later decision, however, seems to hold that a stock-exchange custom does not bind the customer unless he knew of it and agreed to it.[2] The American rule allows usages of brokers to interpret the language of the contract, and where it is obscure to ascertain its nature and extent, but not to vary its terms, introduce new conditions, or authorize acts contrary to its provisions.[3] The customer may,

1 In Biederman *v.* Stone, L. R. 2 C. P. 504 (1867), the court said: "It has been held in a great number of cases that persons buying or selling stock or shares through members of the stock exchange are bound by the rules which govern the transactions of that body." To the same effect, see Bayliffe *v.* Butterworth, 1 Exch. 425 (1847), per Parke, B.; Mitchell *v.* Newhall, 15 M. & W. 308 (1846); Maxted *v.* Paine, L. R. 6 Exch. 132 (1871); Grissell *v.* Bristowe, L. R. 4 C. P. 36, 47 (1868); Appleman *v.* Fisher, 34 Md. 540 (1871); Coles *v.* Bristowe, L. P., 4 Ch. App. 3 (1868); Stray *v.* Russell, 1 El. & El. 888 (1859); Davis *v.* Haycock, L. R. 4 Exch. 373 (1869); Nickalls *v.* Merry, L. R. 7 H. L. 530 (1875). *Cf.* Pollock *v.* Stables, 12 Q. B. 765 (1848); Taylor *v.* Stray, 2 C. B. (N. S.) 175 (1857); Morrice *v.* Hunter, 14 L. T. Rep. 897 (1866); Kingsbury *v.* Kirwin, 43 N. Y. Super. Ct. 451 (1878); aff'd, 77 N. Y. 612. But the usage must not be illegal. Robinson *v.* Mollett, L. R. 7 H. L. 802, 818, 826 (1875); Hodgkinson *v.* Kelly, L. R. 6 Eq. 496 (1868); Tayler *v.* Great Indian, etc. Ry., 4 De G. & J. 559, 573 (1859). Nor may the custom be established by that one transaction. Westropp *v.* Solomon, 8 C. B. 345 (1849). It must be reasonable. Goldschmidt *v.* Jones, 22 L. T. Rep. 220 (1870). A usage that is contrary to an act of parliament, requiring the broker to notify his customer of the particular numbers of the shares purchased on his account, is void. Perry *v.* Barnett, L. R. 15 Q. B. D. 388 (1885). *Cf.* Seymour *v.* Bridge, L. R. 14 Q. B. D. 460 (1885). Thus, a usage by which the ultimate purchaser's name is handed to the seller for the purpose of having the latter execute a transfer to the former is upheld. Sheppard *v.* Murphy, 16 W. R. 948 (1868); s. c., Ir. Rep. 2 Eq. 544.

2 Blackburn *v.* Mason, 68 L. T. Rep. 510 (1893).

3 "Usage can be admitted to interpret the language of a contract where it is obscure, but not to change its legal character, or derogate from the rights of parties, or authorize acts contrary to its provisions." German Sav. Bank *v.* Renshaw, 78 Md. 475 (1894); Parsons *v.* Martin, 77 Mass. 111 (1858); Hopper *v.* Sage, 112 N. Y. 530 (1889); Lombardo *v.* Case, 30 How. Pr. 117 (1865); 1 Addison, Contracts (8th Eng. ed., 1883), *p. 60; 21 Am. L. Reg. (N. S.) 176, note; Marye *v.* Strouse, 5 Fed. Rep. 483 (1880). *Cf.* Winans *v.* Hassey, 48 Cal. 634 (1874). The case of Baker *v.* Drake, 66 N. Y. 518 (1876), holds that stock-brokers' usage cannot add to or make part of the contract. *Cf.* Horton *v.* Morgan, 19 N. Y. 170 (1859); Peckham *v.* Ketchum, 5 Bosw. 506 (1859); Whitehouse *v.* Moore, 13 Abb. Pr. 142 (1861). If there is doubt as to the existence of the usage the question is for the jury. Dent *v.* Nickalls, 29 L. T. Rep. 536 (1873); aff'd, 30 L. T. Rep. 644 (1874). The usage may be introduced in evidence to show how the business is to be transacted, but

however, by express agreement, waive his common-law rights and allow usage to govern the transaction.[1] A customer directing a purchase of stock in the New York Stock Exchange is bound by the usages and customs of that exchange.[2] An order to a New York stock-broker to sell stock is presumed to authorize a sale in accordance with the usages of the New York Stock Exchange, and hence the broker may borrow stock to complete a sale made by the customer, and may close the transaction and hold the customer

it must not be unreasonable. Rosenstock *v.* Tormey 32 Md. 169 (1869), holding also that the broker's correspondence with his city broker is not competent to prove purchases and sales. Upon the effect of usage in other transactions, see Corn Exchange Bank *v.* Nassau Bank, 91 N. Y. 74 (1883); Richmond *v.* Union Steamboat Co., 87 N. Y. 240 (1881); Walls *v.* Bailey, 49 N. Y. 464 (1872); Vail *v.* Rice, 5 N. Y. 155 (1851); Delafield *v.* Illinois, 26 Wend. 192 (1841); Dawson *v.* Kittle, 4 Hill, 107 (1843); Boardman *v.* Gaillard, 1 Hun, 217 (1874); aff'd, 60 N. Y. 614; Minnesota Cent. Ry. *v.* Morgan, 52 Barb. 217 (1868); Sipperly *v.* Stewart, 50 Barb. 62, 68 (1867); Duguid *v.* Edwards, 50 Barb. 288 (1867); Haskins *v.* Warren, 115 Mass. 514, 536 (1874); Dickinson *v.* Gay, 89 Mass. 29 (1863); Parrott *v.* Thacher, 26 Mass. 426 (1830); Greenleaf *v.* Moody, 95 Mass. 363 (1866); Tilley *v.* Cook County, 103 U. S. 155 (1880); National Bank *v.* Burkhardt, 100 U. S. 686 (1879); Vermilye *v.* Adams Exp. Co., 21 Wall. 138 (1874); Forrestier *v.* Bordman, 1 Story, 43 (1839); s. c., 9 Fed. Cas. 459; Oelricks *v.* Ford, 23 How. 49 (1859); Renner *v.* Bank of Columbia, 9 Wheat. 581 (1824); Cope *v.* Dodd, 13 Pa. St. 33 (1850); Corbett *v.* Underwood, 83 Ill. 324 (1876); Phillips *v.* Moir, 69 Ill. 155 (1873); Bissell *v.* Ryan, 23 Ill. 566 (1860); Williams *v.* Gilman, 3 Me. 276 (1825); Partridge *v.* Forsyth, 29 Ala. 200 (1856); Halwerson *v.* Cole, 1 Spears (S. C.) 321 (1843); Hogg *v.* Snaith, 1 Taunt. 346 (1808); Gibson *v.* Crick, 1 Hurlst. & C. 142 (1862); Fleet *v.* Murton, L. R. 7 Q. B. 126 (1871). Brokers' usages cannot vary fixed principles of law. Hopper *v.* Sage, 112 N. Y. 530 (1889). The custom (in the oil trade) of giving the seller time to investigate and object to a purchaser may be insisted on by the seller. Sumner *v.* Stewart, 69 Pa. St. 321 (1871).

1 In Robinson *v.* Norris, 51 How. Pr. 442 (1874); aff'd, 6 Hun, 233, the court said: "It has been settled by our court of appeals that no custom among brokers can deprive parties of rights which the law gives them, but they have not decided that those rights may not be waived by agreement. I think it perfectly clear that if the broker informs his customer of the terms upon which he will act for him as his broker, and in view of that notice the customer gives an order, he is bound by the terms on which the broker proposed to act for him." See also Baker *v.* Drake, 66 N. Y. 518 (1876). See, in general, Colket *v.* Ellis, 10 Phila. 375 (1875); Sutton *v.* Tatham, 10 Ad. & El. 27 (1839); Bayley *v.* Wilkins, 7 C. B. 886 (1849); Duncan *v.* Hill, L. R. 6 Exch. 255 (1871); Sheppard *v.* Murphy, Ir. Rep. 2 Eq. 544 (1868); s. c., 16 W. R. 948; Bowring *v.* Shepherd, L. R. 6 Q. B. 309 (1871); Evans *v.* Waln, 71 Pa. St. 69 (1872); Sweeting *v.* Pearce, 7 C. B. (N. S.) 449 (1859); Shaw *v.* Spencer, 100 Mass. 382 (1868); Day *v.* Holmes, 103 Mass. 306 (1869). See also § 477, *infra*.

2 Taylor *v.* Bailey, 169 Ill. 181 (1897).

liable for the loss if the customer does not deposit sufficient margin after notice so to do, providing the notice states the amount required.[1] Although a transfer of stock is on a separate piece of paper, and is not acknowledged as required by a rule of the stock exchange, nevertheless the pledgee may be a *bona fide* holder.[2] A witness to a power of attorney authorizing the transfer of registered bonds is liable, if such power of attorney was unauthorized, where such witness was a stock-exchange firm and by custom such a witness is considered a guarantor.[3] Where a broker identifies to a corporation a person as a stockholder, in order that the latter may transfer stock, and such transfer is forged, the broker is liable to the corporation for the cost of the stock which the corporation had to purchase on the market for the benefit of the real owner of the stock.[4]

§ 454. *Privity of contract between broker and opposite parties.*— A broker who buys or sells stock does so subject to certain liabilities towards the parties to whom he sells or from whom he buys. If he does not send in the name of his customer, he is liable on the transaction as though he were the principal himself.[5] He has been held liable for a forgery perpetrated by his customer.[6] Where stock stands in the name of two trustees and one of them signs a

1 Boyle *v.* Henning, 121 Fed. Rep. 376 (1902). Where a customer purchases of a firm of stock-brokers and members of the New York Stock Exchange stocks on margin, the presumption is that the transactions are to be in accordance with the rules and usages of that exchange. Ling *v.* Malcol, 77 Conn. 517 (1905). The customs and rules of the stock exchange are not binding upon a customer of a broker except as the by-laws of a corporation are binding upon a person dealing with a corporation; in other words, the party is bound only when he knew of such customs, rules, or by-laws. Newman *v.* Lee, 87 N. Y. App. Div. 116 (1903).

2 Smith *v.* Savin, 141 N. Y. 315 (1891).

3 Clarkson Home *v.* Missouri, etc. Ry., 182 N. Y. 47 (1905).

4 Bank of England *v.* Cutler, 96 L. T. Rep. 636 (1907); aff'd, 98 L. T. Rep. 336 (1908).

5 Wynne *v.* Price, 3 De G. & Sm. 310 (1849). Where a prospectus, offering for sale trustee's transferable certificates, states that such certificates represent stock deposited with the trustee, the stock being in an English corporation, the trustee is personally liable if it turns out that the English corporation had a prior lien on the stock to the full extent of its value. The trustee was bound to take notice of the lien created by the by-laws of the English corporation. The rule of *caveat emptor* has been relaxed so as to create an implied warranty of title on the part of the seller. Even though the trustee acted as agent, yet the principal not being disclosed the trustee is liable. McClure *v.* Central Trust Co., 165 N. Y. 108 (1900).

6 Royal Exch. Ins. Co. *v.* Moore, 11 W. R. 592 (1863). The broker herein sold in his own name, but the opposite party knew he acted as a broker. See also § 452, *supra*.

transfer and forges the name of the other trustee and sells the stock through a broker, the other trustee whose name was forged may hold the corporation liable for the stock, if it has allowed a transfer, and the corporation may hold the broker liable.[1] Where the treasurer of a charitable corporation forges a resolution of the board of trustees authorizing him to sell bonds registered in the name of the corporation, and he executes fraudulently a power of attorney from the corporation to him as treasurer to make such sale, the corporation which issued the bonds and then allowed a transfer on such forged resolution is liable to the charitable corporation for so doing. The charitable corporation may hold liable a broker who witnessed the power of attorney even in good faith. If the corporation which issued and registered the bonds is held liable it has recourse against the broker by reason of the stock-exchange rules which renders liable a broker who witnesses signatures to transfers of stock or bonds.[2] Where the broker hands in the name of his customer, and that name is accepted, the broker is thereby discharged,[3] unless, of course, the name is unauthorized, or is that of an infant.[4] Upon the disclosure by the broker of his customer's name, the opposite party has the option of holding either the broker or his customer responsible, but cannot hold both.[5] A purchaser of stock through a broker may defend against a suit brought by the broker for the price on the ground that the vendor, a customer of the broker, was guilty of fraud, but such defense is

1 Oliver *v.* Governor, etc. [1901] 1 Ch. 652; aff'd, [1902] 1 Ch. 610; and *sub nom.* Starkey *v.* Governors, etc. of Bk. of England, 88 L. T. Rep. 244. See also § 327, *supra.*

2 Clarkson Home *v.* Missouri, etc. R. R., 182 N. Y. 47 (1905).

3 Maxted *v.* Paine, L. R. 6 Exch. 132 (1871), holding that the broker does not guarantee his customer's responsibility, nor that he is the real purchaser. So also of the stock-jobber. Grissell *v.* Bristowe, L. R. 4 C. P. 36 (1868). *Contra,* Cruse *v.* Paine, L. R. 6 Eq. 641 (1868).

4 See § 446, *supra.* A broker handing in the name of a customer without authority is himself liable. Maxsted *v.* Morris, 21 L. T. Rep. 535 (1869). *Cf.* Shepherd *v.* Gillespie, L. R. 5 Eq. 293 (1867).

5 Watson *v.* Miller, 11 W. N. 18 (1876). Where a broker, who executes an order from another broker for an undisclosed principal, brings suit against the other broker after discovering the principal he cannot sue the principal also for a loss. Barrel *v.* Newby, 127 Fed. Rep. 656 (1904). A custom or usage releasing the broker from this liability is void. Magee *v.* Atkinson, 2 M. & W. 440 (1837). *Cf.* Jones *v.* Littledale, 1 Nev. & P. 677 (1837), the sale being of hemp. Also Thomson *v.* Davenport, 9 B. & C. 78 (1829), holding that the purchaser's option remains open until the *name* of the undisclosed principal is given. It is for the jury to say which one the opposite customer gave credit to, irrespective of a stock-exchange custom. Mortimer *v.* McCallan, 6 M. & W. 58 (1840).

not good so far as the broker advanced money to his customer on such stock.[1] A broker who claims to be acting for an undisclosed principal in contracting for the purchase of bonds, and who stipulates that he shall not be personally liable, cannot enforce such contract, if in fact he was the principal himself.[2] Even though a person accepts the offer of a broker to sell securities, and afterwards buys them direct from the broker's principal, the broker cannot maintain a suit against the vendee.[3] Where the broker buying stock does not have it transferred on the books and does not divulge the name of his principal, and the vendor is obliged to pay a statutory liability on the stock, the broker is personally liable to him.[4] But a broker buying for a customer is not liable to corporate creditors on the statutory liability, even though he did not give up the name of the customer, the broker's name not having appeared on the corporate books.[5] Even though stock, the subscription price of which has not been paid, is transferred after winding up has been commenced, to an infant with the consent of the liquidators, yet stock-brokers who brought about the transaction are not liable on the stock.[6] A stock-broker is liable to the owner for the value of mining shares received for sale from one who had stolen them, although he acted in good faith, without notice, and paid the proceeds to the thief, relying on his representations of ownership.[7] Where a person secretly speculates in stock in the name of another person, the latter having accounts with brokers, in some of which accounts the former is not interested, the former cannot maintain a bill for accounting against the brokers.[8]

§ 455. *Privity of contract between the opposite customers.*—When the broker of one customer has agreed with the broker of another customer on the terms of a purchase and sale of stock, there immediately arises a privity of contract between the two customers. A customer may be sued by a dealer from whom his broker has purchased specific stock, and the dealer may sell the stock after no-

1 Leo *v.* McCormack, 186 N. Y. 330 (1906).

2 Paine *v.* Loeb, 96 Fed. Rep. 164 (1899).

3 Mason *v.* Chicago, B. etc. Ry., 156 Fed. Rep. 959 (1907).

4 Boultbee *v.* Gzowski, 29 Canada S. C. Rep. 54 (1898).

5 Joecken *v.* Cuyahoga, etc. Co., Ohio Circuits (1903), p. 605.

6 *Re* National Bank, etc., Ltd., 96 L. T. Rep. 493 (1907).

7 Swim *v.* Wilson, 90 Cal. 126 (1891). Even though brokers in sending stock to a customer endorse it in blank and entrust it to a messenger, and the messenger converts it to his use by having other brokers sell it in good faith, yet such latter brokers are liable to the customer for the value of the stock. Hall *v.* Wagner, 111 N. Y. App. Div. 70 (1906).

8 MacKay *v.* Hudson, 118 Fed. Rep. 919 (1902).

tice, and recover the loss.[1] The purchasing customer is liable to the selling customer for all calls and liabilities arising on the stock after the broker's contract is made, if the selling customer is obliged to pay such liabilities by reason of his being the registered stockholder.[2] So also the purchasing customer may hold the selling customer responsible for the carrying out of the contract.[3] It has been held that the remedy may be an action at law[4] or in equity.[5] Even though brokers on the stock exchange are acting for undisclosed principals, yet one of the principals can sue the other principal for breach of the contract.[6] The right of set-off for other debts applies as between the two customers,[7] but not for debts due from one of the brokers to the opposite customer.[8]

§ 456. *Intervening sub-brokers and sub-customers.*—A broker may employ a sub-broker unless his instructions are to the contrary, and

1 Anderson *v.* Beard, [1900] 2 Q. B. 260. A broker's client is not liable to a stock-jobber of whom the broker has purchased stock, a portion of such stock to go to the broker's client. No usage of the stock exchange can create such liability. Beckhuson *v.* Hamblet, [1900] 2 Q. B. 18; aff'd, [1901] 2 K. B. 73. Where a client buys stock on the stock exchange through his broker, and the broker fails before the delivery of the stock, the jobber selling the stock may hold the client liable for any loss due to the client refusing to accept the stock. Levitt *v.* Hamblet, [1901] 2 K. B. 53; compare Beckhuson *v.* Hamblet, [1901] 2 K. B. 73, aff'g [1900] 2 Q. B. 18.

2 Hawkins *v.* Maltby, L. R. 4 Ch. App. 200 (1869), aff'g s. c., L. R. 6 Eq. 505; Evans *v.* Wood, L. R. 5 Eq. 9 (1867); Hodgkinson *v.* Kelly, L. R. 6 Eq. 496 (1868); Remfrey *v.* Butler, 1 E., B. & E. 887 (1858); Allan *v.* Graves, L. R. 5 Q. B. 478 (1870). A stock-exchange custom making the broker a principal does not prevent the customer suing as principal. Langton *v.* Waite, L. R. 6 Eq. 165 (1868). The refusal of the directors to register the sale does not enable the purchasing customer to recover back the purchase price. Stray *v.* Russell, 1 El. & El. 888 (1859). The purchaser may be compelled, by a bill in equity, to register the transfer made through brokers. Paine *v.* Hutchinson, L. R. 3 Eq. 257 (1866); aff'd, L. R. 3 Ch. App. 388. Where a broker by instructions from his customer arranges with another party to carry the customer's stocks and also other stocks of the same kind carried by the broker, and the broker fails and the customer refuses to protect his own stock, the party carrying the same may hold him liable for the loss on his part. Scott, etc. *v.* Godfrey, [1901] 2 K. B. 726.

3 Even though the selling customer did not authorize the use of his name, but knew of it and did not object. Shepherd *v.* Gillespie, L. R. 5 Eq. 293 (1867).

4 Street *v.* Morgan, L. R. 4 Exch. 384 (1869), cited in Davis *v.* Haycock, L. R. 4 Exch. 373 (1869).

5 Sheppard *v.* Murphy, 16 W. R. 948 (1868); s. c., Ir. Rep. 2 Eq. 544.

6 Clews *v.* Jamieson, 182 U. S. 461 (1901).

7 Carr *v.* Hinchliff, 4 B. & C. 547 (1825).

8 Fish *v.* Kempton, 7 C. B. 687 (1849). See also Sweeting *v.* Pearce, 7 C. B. (N. S.) 449 (1859). Unless, possibly, where the customer sup-

may allow the sub-broker to retain the stock if the main broker has deposited sufficient money with the sub-broker to protect it and can take up the stock at any time he wishes, but the main broker is liable to his customer if he does not produce the stock on demand and payment therefor.[1] Where a customer's broker employs another broker to transact the business, the customer cannot compel the second broker to complete the contract as he might compel the first broker.[2] The second broker cannot claim a lien on the stock for debts due him from the first broker.[3] The broker cannot offset against the customer of the sub-broker a debt due the broker from the sub-broker. Not even a custom of the stock exchange to that effect binds the customer unless he agreed to it.[4] If the first broker merely introduces the parties he cannot charge a commission therefor, although custom allows it.[5] The real customer may hold an intermediate customer liable. A sub-broker or correspondent broker is not obliged to ascertain the relations and agreements between the chief broker and the customer. Where brokers send the stock of their clients endorsed in blank to corresponding brokers in exchange for stock given up by the latter, the latter, having acted in good faith and without notice, are protected.[6] A stock-broker receiving an order from other stock-brokers to buy stock and put it in the name of a certain person and draw on them for the price, with the certificate attached, is entitled to payment on delivery of the certificate, even though the stock-brokers who gave the order had collected from their customer and embezzled the funds.[7] The sub-broker may hold all stocks as security for all accounts between himself and the chief broker, there being no notice given of the customer's rights. If there is any surplus after the sub-broker's debt is paid, a customer who placed his own stock in the chief broker's hands to sell is preferred to another customer who had purchased on a margin and left the stock as security.[8] A broker is liable to his customer for the misconduct of his sub-

posed the opposite broker was the principal. See Kelley *v.* Munson, 7 Mass. 319 (1811), and § 456, *infra.*

1 Hoogewerff *v.* Flack, 101 Md. 371 (1905).

2 Booth *v.* Fielding, 1 W. N. 245 (1866).

3 Fisher *v.* Brown, 104 Mass. 259 (1870). See also § 455, *supra.*

4 Blackburn *v.* Mason, 68 L. T. Rep. 510 (1893). He may hold an intermediate customer or agent liable for set-off due from the latter to the broker. Jaycox *v.* Cameron, 49 N. Y. 645 (1872).

5 Gibson *v.* Crick, 1 Hurl. & C. 142 (1862).

6 Elliott *v.* Miller & Co., 158 Fed. Rep. 868 (1908).

7 Burnham *v.* Eyre, 123 N. Y. App. Div. 777 (1908).

8 Willard *v.* White, 56 Hun, 581 (1890). See also §§ 460, 473, *infra.* A sub-broker who knows that the stock deposited as collateral with the chief broker belongs to the customer

broker in selling the stock to himself.[1] Where the customer orders his broker to buy stock, and the broker does buy it through a sub-broker, and the broker then notifies the customer that the stock has been bought, the broker's title to the stock thereby passes to the customer, subject to any amount due from the customer to the broker and to any lien of the sub-broker. The subsequent insolvency of the broker does not prevent a customer notifying the sub-broker not to sell out the stock without notifying him, the customer; and the customer may insist that the sub-broker resort to other stocks belonging to the broker and remaining in the sub-broker's hands to pay the broker's debts to the sub-broker before resorting to the above stock.[2] If brokers in New York take orders through a local broker in another place, they are liable for false and fictitious orders given to them by him in the name of a customer.[3] A broker cannot recover from his principal for losses due to purchases and sales where the broker charged not only his own commission, but the commission of a sub-broker, thus compelling the customer to pay two commissions without knowledge thereof.[4]

§ 457. *Purchases or sales on margins—Broker as a pledgee—Distribution of assets on failure of broker.*—By far the larger part of a stock-broker's business consists of purchases and sales of stock on what is called a "margin."[5] The customer deposits with the broker, as security, a sum of money equal to but a small part of the value of the stock involved. This sum of money is the "margin." If the customer's order is to purchase, then the broker keeps both the margin and the purchased stock as security against loss in the final closing of the transaction. If the customer's order is to sell, then the broker sells; but, having no stock to deliver, he borrows the same from other parties and delivers it to the purchaser, the broker still keeping the margin as security. Frequently no stock passes, nor is intended to pass, but merely the ultimate profit or loss, called "differences," is paid; the losing customer loses the whole or part of his margin, the winning customer get-

is liable in damages for conversion where he receives such stock on further orders, and it transpires that such use of the stock was unauthorized. Ryman *v.* Gerlach, 153 Pa. St. 197 (1893). Dealings in stock between a broker and a correspondent broker are dealings between principals, the customers not being named or known, and hence subject to the United States government tax on sales of stock. Municipal, etc. Co. *v.* Ward, 133 Fed. Rep. 70 (1904); aff'd, 138 Fed. Rep. 1006.

1 Evans *v.* Wrenn, 93 N. Y. App. Div. 346 (1904); aff'd, 181 N. Y. 586.

2 Le Marchant *v.* Moore, 150 N. Y. 209 (1896).

3 Caswell *v.* Putnam, 120 N. Y. 153 (1890).

4 Johnson *v.* Kearley, 98 L. T. Rep. 418 (1908).

5 A margin "means, in the broker's lexicon, additional collateral se-

ting back his margin and also the profits, less commissions. This in some of the states is held to be a gambling contract, and, like all gambling contracts, not enforceable.[1] But a purchase or sale of stock on margins, where there is no proof of an intent not to actually deliver the stock, is legal.[2] The relation between a customer and his broker, in cases where the broker buys for his customer and retains the stock as security, is in most jurisdictions held to be that of a pledgor towards a pledgee, the customer being the pledgor, the broker being the pledgee, and the stock being the article pledged.[3] In New York the rule is clearly adhered to that the relation between a stock-broker and his customer is that of pledgor

curity against loss to the broker while . . . carrying stock for his employer." McNeil *v.* Tenth Nat. Bank, 55 Barb. 59 (1869); s. c., 46 N. Y. 325.

1 McBurney *v.* Martin, 6 Rob. (N. Y.) 502 (1866). A broker cannot recover commissions or disbursements from his customer where the transactions were gambling and intended so to be by both. Harvey *v.* Merrill, 150 Mass. 1 (1889).

2 See ch. XX, *supra*, where the character, effect and non-enforceability of a broker's gambling contracts are fully treated. A "margin" transaction is not necessarily gambling and invalid. See § 344, *supra*. The important case of Hatch *v.* Douglas, 48 Conn. 116 (1880), clearly sets out the legality of such contracts. The court said: "It is pretty evident that the parties did not contemplate that the stock should be actually transferred to the defendant. . . . The defendant [customer], through his agents, the plaintiffs, actually purchased the stock, and there was an actual delivery—not to the principal, but to the agents for the principal." The brokers "knew that the defendant was speculating, and that they advanced him money for that purpose. But that was neither illegal nor immoral. . . . No case has been cited which declares such a contract illegal. If we should so hold, it would be difficult, if not impossible, to draw the line between legal and illegal transactions." The California constitution renders void a transaction wherein a broker buys stock for the customer with the broker's money and holds the stock as security and charges the customer interest and commissions. Cashman *v.* Root, 89 Cal. 373 (1891).

3 Approved in Skiff *v.* Stoddard, 63 Conn. 198 (1893); Markham *v.* Jaudon, 41 N. Y. 235 (1869); Baker *v.* Drake, 66 N. Y. 518 (1876). The broker is bound to keep constantly on hand the amount of stock so held on margin, *i. e.*, pledged. Taussig *v.* Hart, 58 N. Y. 425 (1874); Rogers *v.* Gould, 6 Hun, 229 (1875). See also § 469, *infra*. In fact, the broker is obliged to conform to the rules governing pledges of stock—a subject treated in ch. XXVI, *infra*. The broker is a pledgee, and without express contract has a lien on the stock for the balance due under a purchase, but not for any general balance due. Leahy *v.* Lobdell, etc. Co., 80 Fed. Rep. 665 (1897). The customer as pledgor may claim his stock from the broker's assignee for the benefit of creditors if the customer can identify it. Chamberlain *v.* Greenleaf, 4 Abb. N. Cas. 178 (1878). See Boylan *v.* Huguet, 8 Nev. 345 (1873). A broker holding as pledgee stock purchased for a customer on margin need not keep that identical stock on hand, and it is sufficient if he keeps an equal quantity on hand over and above stock of the same kind held by him for other customers. Caswell *v.* Putnam, 120 N. Y. 153 (1890).

and pledgee, even though the stock-broker advances the whole purchase price without requiring any margin, and hence a sale by the broker on a notice of intent to sell without specifying the time and place is a conversion, there being no waiver by the customer.[1] In Massachusetts, however, and it seems also in California, a different rule prevails, and the rule is clearly laid down that a broker is not a pledgee of stocks which he buys for his customer on a margin, but that, on the contrary, the broker is the owner of the stock, and that he is not bound to keep the stock of one customer distinct from that of another, but may take a single certificate in his own name for several customers and may pledge the stock for advances made to himself, and that he is the person to be taxed on such stock.[2] The supreme court of the United States finally passed upon this subject in 1908, and held that a broker is an agent, and not the owner of stocks, purchased by him on a margin, and that while he might not be strictly a pledgee, as understood at common law, he was essentially a pledgee, and

1 Content *v.* Banner, 184 N. Y. 121 (1906). Stock purchased by a broker on margin belongs to the customer and the broker holds it as security for the balance due. Tompkins *v.* Morton T. Co., 91 N. Y. App. Div. 274 (1904); aff'd, 181 N. Y. 578. In New York a broker must have either in possession or control an amount of stock equal to that which he is carrying for a purchaser on a margin. If he repledges it without authority and it then passes into the hands of one who takes it with notice of the customer's claim, the customer may reclaim the stock. Strickland *v.* Magoun, 119 N. Y. App. Div. 113 (1907).

2 The court realized, however, that its decision was not in accord with the current of authority, and said: "The English doctrine seems to be the same as that of this commonwealth, so that we are not left quite alone in a desert of logic." Chase *v.* City of Boston, 180 Mass. 458 (1902). In Massachusetts it is held that a broker carrying stocks on a margin is not a pledgee. Covell *v.* Loud, 135 Mass. 41 (1883). A broker who purchases stock for a customer on a margin is not a pledgee, but is merely under contract to deliver the stock on payment of the balance, and hence he may pledge the stock or sell it, and is not in default until the customer has tendered the balance and demanded the stock. If the broker is adjudicated a bankrupt the customer may treat this as a breach of contract and prove his claim. *In re* Swift, 105 Fed. Rep. 493 (1900). In a bankruptcy court sitting in Massachusetts the relation between a broker and a customer was defined to be that of debtor and creditor. *In re* Topliff, 114 Fed. Rep. 323 (1902). The relation between a broker and his customer in a purchase of stock on margin is not that of a pledgee and pledgor, but of parties to an executory contract for the sale and purchase of stock, whenever demand and payment is made by the purchaser, or after the broker has tendered the stock and made demand for payment after reasonable notice. The bankruptcy of the broker is a breach of the contract by him. *In re* Todd, 112 Fed. Rep. 315 (1901). By written agreement even in Massachusetts the title may remain in the purchaser, the broker being merely a pledgee, and the statute

hence might turn over similar stock to his customer and receive payment therefor, and that such an act would not be a preference within the meaning of the bankrupt law. The court approved the New York rule and declined to follow the Massachusetts rule on this subject.[1]

In England a customer, by employing a broker to do business on the stock exchange, is presumed to have authorized him to do business on the terms of such exchange. Hence the broker may have the right to sell his customer's stock upon the customer's failure to pay therefor, without observing the rules applicable to pledgees of stock.[2] In England, also, where certificates of stock have not the quasi-negotiability that they have in America, a mortgage of stock is common and is enforced as a mortgage, and the mortgagee after a reasonable time may sell without notice to the mortgagor, the law being laid down as follows: "Express powers were not formerly necessary on mortgages of stock, or in the instruments of defeasance executed by the transferee; nor need a mortgagee of stock now rely on his statutory power in order to realize his security by sale. If stock is itself made the security for money, and the day appointed for payment is passed, the mortgagee may at once proceed to sell the stock, and repay himself, principal and interest, without any authority from the mortgagor, and without commencing an action of foreclosure."[3] In America

of Massachusetts passing title by a transfer and delivery of the certificate has no application. Chase *v.* City of Boston, 193 Mass. 522 (1907). In California the relation of a broker and customer is that of vendor and vendee, and hence a completed delivery of stock is not in violation of the constitutional provision against sales of stock on margin. Conradt *v.* Lepper, 13 Wyo. 473 (1905).

1 Richardson *v.* Shaw, 209 U. S. 365 (1908).

2 Forget *v.* Baxter, [1900] A. G. 467. In England the carrying of stock by a broker on a margin is called "contango," and the broker is held to be the owner of the stock. In the case of Bentinck *v.* London, etc. Bank, [1893] 2 Ch. 120, the court said: "In all these transactions, therefore, when money is borrowed from a stock-broker in this way on 'contango' or continuation, whether the money is obtained from the dealer or from other stock-brokers, or from bankers, the result is the same; the arrangement is one by which the broker becomes, as between himself and his client, the owner of the shares in question, although he is under a contract to provide an equal amount of similar shares at a future date." The rule in the stock exchange as between members, that in case of a default the official assignee shall fix the price, does not apply to the relation between a broker and a customer. The customer is not bound by such price. The customer is a mortgagor to the broker as mortgagee. Ponsolle *v.* Webber, 98 L. T. Rep. 375 (1907).

3 Deverges *v.* Sandeman, etc. Co., [1901] 1 Ch. 70; aff'd, [1902] 1 Ch. 579.

some of the most important questions connected with brokers' contracts arise out of the pledgee relationship. This subject, however, is fully treated in the following chapter. Like an ordinary pledgee of stock, the broker may have the stock transferred into his own name;[1] and he can put his customer in default only by tendering the stock and demanding payment for their whole value less the margin.[2] A receipt given by a broker to a customer reciting first that certain stocks had been deposited as security, and, second, that certain stocks purchased on a margin might be hypothecated, will be strictly construed, and the first mentioned stocks cannot legally be rehypothecated under such receipt, hence the title does not pass except to a *bona fide* pledgee or purchaser, and if they have passed, any surplus in such stocks will be applied to the first mentioned stock.[3] There is a difference of opinion as to whether the broker may repledge stock held by him on a margin. This subject is considered elsewhere.[4] A customer cannot claim stock which he left with his broker as security and which the broker has repledged without authority unless he pays the amount which he owes.[5] A broker or pledgee need not sell the stock held as collateral before bringing an action against the pledgor for the amount due, and brokers' custom cannot compel it.[6] Where the owner of stock which is endorsed in blank leaves it with his broker for safe keeping and the broker fraudulently pledges it, the pledgee, being *bona fide*, is protected.[7] Such stock, however, may be redeemed from the assignee of the broker, provided the stock can be identified.[8] Where a broker has purchased bonds for various customers, their title is superior to that of an assignee for the benefit of creditors.[9] Where a broker

1 Horton *v.* Morgan, 19 N. Y. 170 (1859).

2 Read *v.* Lambert, 10 Abb. Pr. (N. S.) 428 (1871).

3 Thomas *v.* Taggart, 209 U. S. 385 (1908).

4 See § 467, *infra*.

5 Tompkins *v.* Morton T. Co., 91 N. Y. App. Div. 274 (1904); aff'd, 181 N. Y. 578.

6 De Cordova *v.* Barnum, 130 N. Y. 615 (1892).

7 Shattuck *v.* American Cement Co., 205 Pa. St. 197 (1903).

8 Skiff *v.* Stoddard, 63 Conn. 198 (1893). Even though a broker repledges the stocks of various customers without authority from them, the pledgee is protected if he had no knowledge of the fact that the broker did not own the stocks, and if the pledgee, after selling out the stocks on notice, has a balance remaining both of money and stocks, the customers *prorate* as to such balance, even though the stocks of some of them were not sold by the pledgee. This rule is based on the principle that if they all had united in redeeming from the pledgee they would have borne the loss *pro rata*. Whitlock *v.* Seaboard Nat. Bank, 29 N. Y. Misc. Rep. 84 (1899).

9 Hunt *v.* Marquand, 109 N. Y. App. Div. 729 (1905).

executes through sub-brokers an order to purchase stock and collects the price thereof from the customer and then fails, and there is a balance due from the sub-broker to the broker, the customer is entitled to the full value of the stock so purchased, the stock itself having been sold by the sub-brokers on account of the broker. On the other hand, a sale of such stock by the sub-broker does not entitle a customer to a preference over other customers of the broker.[1] Where a broker pledges stock which has been left with him by a customer for safe keeping and pledges also on the same loan certain stock which he holds for customers, and on which he has a lien for advances, and the pledgee sells out the stocks and realizes enough to pay the debt without resorting to the first mentioned stock, the owner of the latter is entitled to it without contributing towards the amount of such loan.[2] A customer who owns particular certificates of stock and pledges them with his broker may reclaim such certificates from the broker's assets upon the insolvency of the latter, but he cannot claim any particular stocks which the broker has *purchased* for him, even though he is able to identify them as being the ones which were purchased for him, inasmuch as his equities are no better than the equities of other customers.[3] Where a broker wrongfully pledges stock deposited

1 Denison *v.* Emery, 153 Fed. Rep. 427 (1907).

2 Tompkins *v.* Morton T. Co., 91 N. Y. App. Div., 274 (1904); aff'd, 181 N. Y. 578.

3 Sillcocks *v.* Gallaudet, 66 Hun, 522 (1892). Where the bank in which stock-brokers deposit their funds is a *bona fide* holder of cash so deposited and also of securities deposited by the brokers as security, and the brokers fail, and the bank applies the cash to the brokers' debts and then sells the securities to pay the balance, leaving a surplus, a customer of the brokers whose cash was deposited by the brokers in the bank may reclaim the same, even as against the owners of the securities. Mutton *v.* Peat, [1900] 2 Ch. 79. The rule that a customer who pays money to a broker to buy stocks or gives him securities to sell is a special creditor does not apply where the customer bought and sold stocks through the broker and kept merely a general account. King *v.* Hutton, [1900] 2 Q. B. 504. The right of a stock exchange, in accordance with its rules, to apply the assets on the exchange of an insolvent member to his obligations on the exchange is not affected by the bankruptcy act in England. *Re* Woodd, 82 L. T. Rep. 504 (1900). Where a broker purchases stock for a customer through another broker and then fails, and the sub-broker sells out all his securities to pay a debt and has a surplus, the customer may reach such surplus in preference to other creditors of his broker. *In re* Graff, 117 Fed. Rep. 343 (1902). Where a broker at the time of his failure has on hand a larger amount of a certain stock than he holds for a customer, the customer may claim that part of such stock is his own. *In re* Graff, 117 Fed. Rep. 343 (1902). A creditor of a defaulter on the stock exchange who has taken the benefit of the private distribution of stock-exchange assets, made by the official assignee of the stock exchange

with him for safe keeping together with stock held by him on a margin, the owner of the former stock is entitled to priority as to the equity of such wrongful pledge by the broker.[1] If a broker, by custom and authority impliedly given, repledges stock carried by him on a margin, the customer cannot, upon the failure of the broker, have all the broker's stock of that class first applied in discharge of his claim.[2] Where a customer delivers stock to a broker, and the broker without his consent transfers it into his own name, the customer may claim the new certificate upon satisfactorily identifying the stock.[3] These questions, however, relative to marshaling the assets and controversies between various customers claiming the same securities are considered elsewhere.[4] A broker who wrongfully pledges his customer's stock is guilty of conversion and may be arrested therefor.[5] The margin held by a broker is not a trust fund and hence the broker is not guilty of conversion, even though he fails and is unable to repay it.[6] Even though a broker sells stocks held on margin and does not pay over to his customer the balance due, yet he is not indebted in a fiduciary capacity, within the meaning of the bankruptcy act, and hence such a claim is barred by a discharge in bankruptcy.[7]

§ 458. *Broker's rights and duties on failure of margin.*—When the "margin" which the customer deposits with his broker happens to become exhausted by the fluctuations of the market adversely to the customer, difficult questions arise as to the several rights and duties of the broker and of the customer. If the broker is under orders to close the transaction when the margin becomes

under its rules, is not precluded from afterwards taking ordinary legal proceedings for the recovery of his debt, though he must give credit for what he has received from the official assignee. Ratcliff *v.* Mendelssohn, [1902] 2 K. B. 653. As to sub-brokers or correspondent brokers, see § 456, *supra.* See also § 473, *infra.*

1 Matter of Mills, 125 N. Y. App. Div. 730 (1908).

2 Skiff *v.* Stoddard, 63 Conn. 198 (1893).

3 Mould *v.* Importers', etc. Bank, 72 N. Y. App. Div. 30 (1902).

4 See § 473, *infra.*

5 Oregon, etc. Co. *v.* Hilmers, 20 Fed. Rep. 717 (1884); Barry *v.* Calder, 48 Hun, 449 (1888); aff'd, 111 N. Y. 684. See also § 576, *infra.* Brokers holding a certificate of stock as security for the balance of the purchase price due from the customer are pledgees, and if the broker, in violation of the express contract, repledges or sells such stock without authority from the customer, he is guilty of a conversion for which trover will lie. Chew *v.* Louchheim, 80 Fed. Rep. 500; 125 N. Y. A. D. 605.

6 Kinsey *v.* Meaney, 98 N. Y. App. Div. 420 (1904). A broker holding stock as collateral security on a margin does not hold the stock in a fiduciary capacity. McBurney *v.* Martin, 6 Rob. (N. Y.) 502 (1866); Lambertson *v.* Van Boskerk, 49 How. Pr. 266, 4 Hun, 628 (1875).

7 Crawford *v.* Burke, 195 U. S. 176 (1904).

exhausted, he of course is obliged to do so.[1] But, otherwise, the rule is that the broker cannot summarily close the transaction, even though he has fear of greater loss, involving a loss by himself. He is obliged to demand further margin from his customer, at the same time notifying him that the previous margin is exhausted; also that, in case the margin is not made good, he will close the transaction, holding the customer liable for the loss; also stating the time and place of such threatened sale.[2] The notice must be

1 See § 448, *supra*. Where the customer and the broker agree that the former shall not be liable for anything beyond his margin, this is binding on the broker. Zell *v.* Corkran, 5 Penn. (Del.) 312 (1905).

2 In New York the rule is clearly adhered to that the relation between a stock-broker and his customer is that of pledgor and pledgee, even though the stock-broker advances the whole purchase price without requiring any margin, and hence a sale by the broker on a notice of intent to sell without specifying the time and place is a conversion, there being no waiver by the customer. Content *v.* Banner, 184 N. Y. 121 (1906). In the usual short sale of stock through a broker on a margin, the brokers "were bound to carry the stock until plaintiff directed them to close the transaction, so long as he complied with the terms of the contract on his part, and to give the plaintiff reasonable notice of the want of sufficient margin, and of their intention to buy in the stock and cover his short account if the margin was not made good, in accordance with the terms of the notice." Rogers *v.* Wiley, 131 N. Y. 527 (1892), holding also that where a customer who is selling on a margin desires to close the transaction, but his broker dissuades him by promising to carry the stock, the broker cannot close the transaction without notice. There is no duress in brokers threatening to sell stock unless they are given additional security, inasmuch as the law allows them to sell, proper notice being given. Buck *v.* Houghtaling, 110 N. Y. App. Div. 52 (1905). A broker has no legal right to sell out the stock without notice, even though there is a decline in the market. Wiggin *v.* Federal Stock, etc. Co., 77 Conn. 507 (1905). An order to a New York stock-broker to sell stock is presumed to authorize a sale in accordance with the usages of the New York Stock Exchange, and hence the broker may borrow stock to complete a sale made by the customer, and may close the transaction and hold the customer liable for the loss if the customer does not deposit sufficient margin after notice so to do, provided the notice states the amount required. Boyle *v.* Henning, 121 Fed. Rep. 376 (1902). Brokers, before selling a customer's stock which they hold as pledgees, the stock having been purchased on a margin, are bound to demand further margin and give notice of intent and time and place of sale. If they fail to do so, but sell and then sue the customer for the loss, they cannot recover anything. They cannot claim that their loss has been greater than defendant's loss due to their conversion. Gillett *v.* Whiting, 120 N. Y. 402 (1890); Markham *v.* Jaudon, 41 N. Y. 235 (1869), overruling Hanks *v.* Drake, 49 Barb. 186 (1867), and Sterling *v.* Jaudon, 48 Barb. 459 (1867). See also Kenfield *v.* Latham, 2 Cal. Leg. Rec. 235 (1879), and § 461, *infra*. *Cf.* Worthington *v.* Tormey, 34 Md. 182 (1870); and see ch. XXVI, *infra*. A formal demand for further margin is insufficient where, subsequently to that demand, the

given a reasonable time before such closing of the transaction, and notice sent by mail is sufficient if actually received.[1] If the broker fails to comply with these rules, and sells, he is guilty of conversion of the stock.[2] Where the broker is merely authorized to sell he is not bound to sell.[3] In Massachusetts all these rules are different because there the broker is held to be the owner of the stock.[4]

§ 459. *What will excuse notice and demand for more margin.*—All these rights of the customer to notice of failure of margin, demand of more margin, notice of intent to sell, and of time and place of sale, may be waived; and brokers generally require their customers to sign written contracts to that effect.[5] But a mere

broker negotiates with the customer and tells him that he will consider what to do. McGinnis *v.* Smythe, 1 Silvern. 23 (1886). The broker's telegrams and conversations with his customers may amount to a waiver of his right to demand further margin. Rogers *v.* Wiley, 14 N. Y. Supp. 622 (1891); aff'd, 131 N. Y. 527 (1892). When called upon for further margin, a customer may make a "stop-order," the price fixed in such order being within the margin already furnished. Campbell *v.* Wright, 118 N. Y. 594 (1890). The giving of a note to a broker pledgee does not extend the time within which the pledgor was to deposit further margin. Gould *v.* Trask, 10 N. Y. Supp. 619 (1890).

1 Worthington *v.* Tormey, 34 Md. 182 (1870). Leaving a notice at the office was held insufficient where it did not reach the customer. Bryan *v.* Baldwin, 52 N. Y. 232 (1873). Two days' notice held sufficient. Stewart *v.* Drake, 46 N. Y. 449 (1871). See also, in general, § 477, *infra*. A notice after the sale is insufficient, and the question of whether a notice was given is for the jury if it is denied. Gillett *v.* Whiting, 120 N. Y. 402 (1890). The broker is bound to give the customer reasonable notice to furnish more margin. Lazare *v.* Allen, 20 N. Y. App. Div. 616 (1897). The amount of notice to be given by a broker to a customer to put up more margin must be reasonable in the absence of proof of usage to the contrary. Ling *v.* Malcom, 77 Conn. 517 (1905).

2 Baker *v.* Drake, 66 N. Y. 518 (1876). *Cf.* Gregory *v.* Wendell, 40 Mich. 432 (1879), involving a purchase of corn. It is only in stock transactions that the relation of pledgor and pledgee arises. Where the broker closes the transaction without notice, and later the customer gives an order which, if the transaction had not been closed, would have yielded a profit, the customer may recover damages to the amount of that profit. Rogers *v.* Wiley, 131 N. Y. 527 (1892).

3 Robinson *v.* Norris, 51 How. Pr. 442 (1874); aff'd, 6 Hun, 233; Esser *v.* Linderman, 71 Pa. St. 76 (1872). *Cf.* Harris *v.* Tumbridge, 83 N. Y. 92 (1880). On a short sale of grain the broker is not bound to sell as soon as the principal refuses to advance more margin. Perin *v.* Parker, 126 Ill. 201 (1888).

4 See § 457, *supra*. Where a person in Michigan buys stock in Boston through Boston brokers, the Massachusetts rule as to the right of brokers to sell without notice on failure of margin applies, even though the purchase was through a Michigan agent of the Boston brokers. Douglass *v.* Paine, 141 Mich. 485 (1905).

5 Thus, a written authority to the brokers "to sell in their discretion, at public or private sale, . . . without any notice whatever, the stocks, bonds, or gold which they might be

memoranda on accounts stated from a broker to a customer that the broker reserves the right to close out transactions when margins are running out, without further notice, is not a waiver by the customer of his right to notice and demand for margin.[1] Where the customer, upon being presented with his account, does not object, but promises to pay the amount, he thereby waives his right to object to a sale as being without notice.[2] Where the customer is called upon for more margin and replies "I will have to let my stocks go," this is sufficient authority to sell.[3] It is doubtful whether the death of the customer will authorize the broker to close the transaction without notice.[4] After a broker has purchased according to order, but his customer dies before the stock is paid for, it is the duty of the broker to sell immediately upon the death of his client, and not to carry the transaction along and afterwards sell.[5] A custom of brokers to dispense with these notices is void, and not binding on the customer.[6] The fact that a panic occurs, or ususual fluctu-

carrying [for the plaintiff] whenever my margin shall fall below" a certain figure, waives all the customer's rights herein. Wicks *v.* Hatch, 62 N. Y. 535 (1875). See also Cameron *v.* Durkheim, 55 N. Y. 425 (1874). See also § 477, *infra.* The customer may waive his rights after the broker has made the unauthorized sale. Stewart *v.* Drake, 46 N. Y. 449 (1871); Milliken *v.* Dehon, 27 N. Y. 364 (1863). But authority "to close the account without notice, by purchase or sale, at public or private sale" does not waive right to notice of failure of margin and demand for more. Stenton *v.* Jerome, 54 N. Y. 480 (1873); Kenfield *v.* Latham, 2 Cal. Leg. Rec. 235 (1879). The demand for further margin may be waived, and waiver may be inferred from the negotiations and proposition. Harris *v.* Pryor, 18 N. Y. Supp. 128 (1892). A common form of the contract which the broker requires the customer to sign is the following:

"—— hereby agrees to maintain with you at all times a margin of —— per centum of the par value of all stocks and bonds against which you have made or may hereafter make advances to ——, and a like margin on stocks or bonds which —— have borrowed or may hereafter borrow through you to make deliveries on sales made for —— account or otherwise.

"In case —— margin should become impaired and the same is not promptly made good in response to personal notice or notice sent by wire or letter and directed to —— usual address, you are authorized in your discretion to buy or sell at the New York Stock Exchange or at public or private sale, without further notice, such securities as may be necessary to place the account in condition satisfactory to you, or to close the same entirely, as you may prefer.

"In case of my decease you are hereby authorized to close my account by purchase or sale of securities, as the same may require. ——."

1 Bosoian *v.* Hubbard, 121 N. Y. App. Div. 510 (1907).

2 Gillett *v.* Whiting, 141 N. Y. 71 (1894).

3 Evans *v.* Wrenn, 93 N. Y. App. Div. 346 (1904); aff'd, 181 N. Y. 566.

4 The broker will be protected in continuing the transaction until personal representatives are appointed. Hess *v.* Rau, 95 N. Y. 359 (1884). The broker may immediately sell the stock. Lacey *v.* Hill, L. R. 8 Ch. App. 921 (1873). See § 322, *supra.*

5 *Re* Overweg, [1900] 1 Ch. 209.

6 Markham *v.* Jaudon, 41 N. Y. 235 (1869); Taylor *v.* Ketchum, 35 How. Pr. 289 (1867); s. c., 5 Rob. (N. Y.) 507. *Contra,* Appleman *v.* Fisher, 34

ations of the market happen, does not excuse a broker from giving such notice.[1]

§ 460. *Customer's remedies and damages herein.*—For an unauthorized sale by a broker of stock held upon a margin, the customer has ample remedies. He may claim the benefit of the sale, or may claim the value of the stock.[2] Or the customer may require the broker to replace the stock, and, upon his failure so to do, the customer may replace it himself and charge the broker with the loss.[3] Or the customer may recover the advance in the market price from the time of the sale up to a reasonable time to replace the stock after notice of the sale.[4] The unauthorized sale by the

Md. 540 (1871), a case of a gold-broker; also Colket *v.* Ellis, 10 Phila. 375 (1875), where both parties were brokers and knew the custom. If the customs are expressly made part of the contract, insolvency of the customer authorizes sale without notice, such being the custom. Lacey *v.* Hill, L. R. 18 Eq. 182 (1874).

1 Markham *v.* Jaudon, 41 N. Y. 235 (1869); Brass *v.* Worth, 40 Barb. 648 (1863); Ritter *v.* Cushman, 7 Rob. (N. Y.) 294 (1867). See also § 448, *supra.*

2 Taussig *v.* Hart, 58 N. Y. 425 (1874); Strong *v.* National, etc. Assoc., 45 N. Y. 718 (1871).

3 Baker *v.* Drake, 53 N. Y. 211, 217 (1873); Colt *v.* Owens, 90 N. Y. 368 (1882).

4 Colt *v.* Owens, 90 N. Y. 368 (1882), holding that prices within thirty days after the sale is a reasonable rule. See also Gruman *v.* Smith, 81 N. Y. 25 (1880); Capron *v.* Thompson, 86 N. Y. 418 (1881). *Cf.* Andrews *v.* Clerke, 3 Bosw. 585 (1858). The measure of damages in a suit by a customer against a broker for an unauthorized sale of stock is the difference between the price at which it was sold and the highest price within a reasonable time thereafter, which, in this case, the court fixed at thirty days. Burhorn *v.* Lockwood, 71 N. Y. App. Div. 301 (1902). Where a broker sells his client's stock illegally, the measure of damages in a suit by the client is the difference between the price at which the stock was sold and the highest market price within a reasonable time thereafter. Wolff *v.* Lockwood, 70 N. Y. App. Div. 569 (1902). A customer's measure of damages for an illegal sale by a broker is the highest price within a reasonable time after the customer learned of the sale in which time he could have repurchased the stock. Burnham *v.* Lawson, 118 N. Y. App. Div. 389 (1907). The measure of damages in a suit by a customer against a broker for illegally selling collateral, is the difference between the price realized by the broker and the highest market price attained within a reasonable time thereafter during which the customer might have replaced the securities. Ling *v.* Malcom, 77 Conn. 517 (1905). The measure of damages to a customer by reason of a broker illegally selling his stock, the broker having become bankrupt, is the value of the stock on the day of filing the petition in bankruptcy, the exact time of the sale not being ascertainable. *In re* Graff, 117 Fed. Rep. 343 (1902). In some jurisdictions the measure of damages is different. See ch. XXXV, *infra.* Thus where a broker illegally sells out his customer's stocks which he is carrying as pledgee, he is liable for the highest price of the stock in the market up to the date of the trial in a suit for conversion, the court saying that this was by reason "of the

broker herein is not necessarily a fraudulent sale.[1] The customer cannot enjoin the broker unless the latter is insolvent.[2] The suit should be at law,[3] and demand and tender need not be alleged.[4] A customer who has notified his broker that a sale was unauthorized does not waive the objection by retaining the account of the sale subsequently sent to him by the broker.[5] A delay by the customer of twelve days in objecting to an irregular sale by the broker is not ratification thereof where the customer was not fully informed of the facts.[6] Two weeks' delay by the customer in ascertaining his loss after conversion by the broker is an unreasonable time.[7] The ratification by the customer of an illegal sale by the broker does not bind the customer if the broker sends a subsequent statement changing the

shifting character of the prices of stock in our stock exchanges." Learock *v.* Paxson, 208 Pa. St. 602 (1904). The court said: "The foundation of this rule rests upon the changing character of the value of such property as evidenced by the varying quotations in the different stock markets, and sometimes the advances in valuation are made with astonishing rapidity. Political action or material or financial combinations often are the occasion of such exceptional advances. The very nature of such property, with its constantly changing valuations, indicates the necessity of a measure of damages shifting in character, and hence it has been made to differ from that in the case of ordinary chattels, where it is based upon their valuation at the time of the conversion, because such value is not so changeable."

1 Stratford *v.* Jones, 97 N. Y. 586 (1885).

2 Park *v.* Musgrave, 2 Thomp. & C. 571 (1874).

3 Delevan *v.* Simonson, 35 N. Y. Super. Ct. 243 (1873). In Butts *v.* Burnett, 6 Abb. Pr. (N. S.) 302 (1869), involving the arrest of a broker who had sold the pledge before the note was due, the court said: "It is very questionable, I think, whether a demand after default in payment of the debt for which property is pledged as security will render a refusal to deliver the pledged property a tortious conversion of it. No doubt the pledgor can redeem upon a tender of the debt, or he may recover the difference between the value of the pledge and the debt. But to lay the foundation for an action for conversion, I am of opinion that an offer and demand must be made on the day, and is not sufficient if made after the day on which the debt has become payable."

4 Clarke *v.* Meigs, 22 How. Pr. 340, 13 Abb. Pr. 467 (1861); s. c., 10 Bosw. 337. No tender need be made by the customer where the broker has sold his stock illegally. Learock *v.* Paxson, 208 Pa. St. 602 (1904). Under the California code, the pledgor, in order to redeem, must tender the amount due even though the pledgee has converted the stock. Bell *v.* Bank of California, 94 Pac. Rep. 889 (Cal. 1908).

5 Burhorn *v.* Lockwood, 71 N. Y. App. Div. 301 (1902). A customer after learning of an illegal sale cannot object if for six months he does not tender the amount due the broker and demand the stock. Swann *v.* Baxter, 36 N. Y. Misc. Rep. 233 (1901).

6 Burnham *v.* Lawson, 118 N. Y. App. Div. 389 (1907).

7 Hurt *v.* Miller, 120 N. Y. App. Div. 833 (1907).

sale.[1] An illegal sale of the pledge by the pledgee is a conversion, and a complaint for such conversion will not be construed as a complaint for breach of contract.[2] The margin held by a broker, however, is not a trust fund and hence the broker is not guilty of conversion, even though he fails and is unable to repay it.[3] Even though a broker sells stocks held on margin and does not pay over to his customer the balance due, yet he is not indebted in a fiduciary capacity, within the meaning of the bankruptcy act, and hence such a claim is barred by a discharge in bankruptcy.[4]

Where a broker buys or sells stock on his customer's account in violation of the terms of his contract, and thereby makes a profit, the customer has his option either to repudiate the transaction altogether and sue for damages, or he may adopt it and claim for himself the benefit made by his agent.[5] It has been held that, where the broker fails to buy according to the instructions of his customer, and the customer suffers a loss by reason of the failure, the object of the purchase being to cover a short sale, the measure of damages is the difference between the price at which the stock was sold short and the market price upon the day when the order was given to the broker to buy in. In other words, the plaintiff may in such a case recover the profits which he would have made had his order been properly executed.[6] And the rule is the same when the loss to the customer results from the failure of the broker

1 Stewart *v.* Harris, 101 N. Y. App. Div. 181 (1905).

2 Smith *v.* Hall, 67 N. Y. 48 (1876), distinguishing Austin *v.* Rawdon, 44 N. Y. 63 (1870).

3 Kinsey *v.* Meaney, 98 N. Y. App. Div. 420 (1904).

4 Crawford *v.* Burke, 195 U. S. 176 (1904).

5 Kimber *v.* Barber, L. R. 8 Ch. App. 56 (1872); Marsh *v.* Keating, 1 Bing. N. C. 198 (1834); Taussig *v.* Hart, 49 N. Y. 301 (1872); s. c., 58 N. Y. 425 (1874); Pickering *v.* Demerritt, 100 Mass. 416 (1868); Day *v.* Holmes, 103 Mass. 306 (1869). In the case of Clews *v.* Jamieson, 89 Fed. Rep. 63 (1898), where the broker was authorized to sell at 229 and actually did sell at 221, the court held that the principal could not adopt and enforce the contract, inasmuch as the broker was not authorized to sell at that price, and the contract not binding the principal when made did not bind the other parties. For the measure of damages where a broker converts his customer's securities, and then is unable by reason of his insolvency to replace them, see Chamberlain *v.* Greenleaf, 4 Abb. N. Cas. 178 (1878). Sometimes an advance in the price of the stock, within a reasonable time after notice of the conversion is received, is allowed. Gruman *v.* Smith, 81 N. Y. 25 (1880). See § 475. And what is a reasonable time in such a case is a question for the jury. Baker *v.* Drake, 66 N. Y. 518 (1876); Stevens *v.* Hurlbut Bank, 31 Conn. 146 (1862); Stewart *v.* Cauty, 8 M. & W. 160 (1841); Field *v.* Lelean, 6 H. & N. 617 (1861). *Cf.* Allen *v.* Dykers, 3 Hill, 593 (1842). As to the measure of damages in an action against a broker for fraud, inducing the plaintiff to invest in "Grant and Ward" securities, see James *v.* Work, 70 Hun, 296 (1893).

6 In an action to recover damages,

to sell as instructed, or where the broker sells at an improper or manifestly unfavorable time.[1] Where a broker agrees to carry stocks to a certain time, but he sells them before that time, the

where a firm of stockbrokers sold for a customer, upon his order and for his account, three hundred shares of stock, short, at 186, and subsequently, without the customer's order or knowledge, bought in stock to cover the sale, and then a few days later, the stock having declined several points, the customer ordered them to cover their sale, to which order no attention was paid, it was held that the proper measure of damages was the difference between the price at which the stock was sold short and the market price upon the day when the order was received to purchase, with interest, deducting commissions, etc. White *v.* Smith, 54 N. Y. 522 (1874). See Magee *v.* Atkinson, 2 M. & W. 440 (1837). In Allen *v.* McConihe, 124 N. Y. 342 (1891), the court allowed as damages against a broker who delayed selling when ordered to sell, the difference between the price when the order was given and the price when the sale was actually made.

1 In Harris *v.* Tumbridge, 83 N. Y. 92 (1880), it appears that the plaintiff purchased through the agency of the defendant a stock option, a privilege known as a "straddle," upon which the defendant guaranteed that the fluctuations in the stock during the pendency of the contract should amount to eight per cent. On the next day after the purchase defendant sold the stock short, which resulted in a loss to the plaintiff, who had at the time of the purchase authorized defendant, as her agent, to exercise the option. As to the measure of damages the court said: "An objection is taken to the rule of damages. It is insisted that, as plaintiff never gave any directions to 'put' or 'call' the stock, she should not have recovered as if she had. But in the absence of such directions it was defendant's duty, under the circumstances of this case, as we have already said, to have closed the 'straddle' contract by exercising the option at the most favorable time, and to have acted for her in that respect with reasonable care and skill. As he did not do so, she is entitled to recover what she has lost by his neglect; and the price of the stock from day to day during the running of the option having been shown, it was for the jury to determine that amount." *Cf.* Speyer *v.* Colgate, 4 Hun, 622 (1875). Where a broker sold stock for his customer without authority and in violation of an agreement not to sell, and it appeared that for thirty days after notice was given to the customer of the sale the stock could have been purchased in the market for the price at which it was sold or even for less, it was held, in an action to recover damages, that the customer, having had a reasonable time after he was notified of the sale of his stock to replace it at the same or a lower price, was entitled only to nominal damages. Colt *v.* Owens, 90 N. Y. 368 (1882). *Cf.* Randall *v.* Albany City Nat. Bank, 1 N. Y. St. Rep. 592 (1886). See also McArthur *v.* Seaforth, 2 Taunt. 257 (1810). But when the action of the broker is fraudulent the customer may, upon obtaining knowledge of the facts, repudiate the whole transaction and recover back the money paid. Levy *v.* Loeb, 89 N. Y. 386 (1882), reversing s. c., 47 N. Y. Super. Ct. 61. *Cf.* Stewart *v.* Drake, 46 N. Y. 449 (1871). In Baker *v.* Drake, 66 N. Y. 518 (1876), where a broker, unauthorized to do so, sold stock which he was carrying for his customer, it was held, in an action for damages, that the measure of damages was the advance in the market price from the time of the sale up to a reasonable time to replace it after notice of sale.

damage is based upon the prices at the time to which he agreed to carry the stocks.[1]

Where a party telegraphs to sell a certain stock, the sale to be "short" and speculative, the damages for failure of the telegraph company to deliver the message are too remote and speculative, even though the stock goes down on the market.[2] The question of the customer's rights, where the broker has repledged the stock and then failed, is considered elsewhere.[3]

§§ 461, 462. *Broker's remedies and damages herein.*—If a broker sells out his customer's stock without notice, he may recover any loss from the customer, where the broker's loss is greater than the customer's damages for the conversion.[4] But where the broker's act is strictly according to law, he is of course entitled to recover from his customer any loss that has been sustained in excess of the margin.[5] And where a broker purchases stock on an order and demands payment of the price, the broker may sell the stock for non-payment, after waiting a reasonable time, such being the custom of the market.[6] Where the customer fails to deliver to the broker stock which the former has ordered the latter to sell, the broker may purchase in the open market in order to fulfill the con-

1 Michael *v.* Hart & Co., [1902] 1 K. B. 482.

2 Cahn *v.* Western U. Tel. Co., 48 Fed. Rep. 810 (1891), 46 Fed. Rep. 40. The measure of damages for error in the delivery of telegraph messages to buy stock "is the difference between the market value of the shares at the time when the dispatch should have been delivered and the sum paid for them in the market on the receipt of the message." Pearsall *v.* Western U. Tel. Co., 124 N. Y. 256 (1891).

3 See §§ 471–473, *infra.*

4 Minor *v.* Beveridge, 141 N. Y. 399 (1894), practically overruling Gillett *v.* Whiting, 120 N. Y. 402, and holding that the broker *may* sue the customer for losses, even though he sold without notice, and that the customer is entitled to a counter-claim only. To same effect, see Gruman *v.* Smith, 81 N. Y. 25 (1880). See also Capron *v.* Thompson, 86 N. Y. 418 (1881); § 458, *supra;* and § 475, *infra.* Where the customer sues the broker for selling the stock illegally the broker may set up the amount due from the customer, not by way of recoupment, but by way of a lien on the stock. Farrar *v.* Paine, 173 Mass. 58 (1899). In Ellis *v.* Pond, [1898] 1 Q. B. 426, the court held that even though a broker sold his principal's stock, which the broker held as pledgee, prior to the time to which the broker had agreed to carry the stock, yet that the broker might recover from his principal any loss in such sale as compared with the price at which the broker originally bought the stock, but that the client could counter-claim for the damage due to the sale being made prior to the agreed time. The court held, however, that where by the contract the broker was to accept delivery of certain stock at a certain time for his principal, but before that time the broker sold such stock, contrary to his agreement with his principal, the broker could not recover any damages for the loss.

5 Schepeler *v.* Eisner, 3 Daly, 11 (1869).

6 Taylor *v.* Bailey, 169 Ill. 181 (1897).

tract, and may hold the customer liable for the loss.[1] It is a well-settled rule that if a broker, acting in good faith and without default, incurs personal loss or damage in the course of transacting the business of his agency, or in following the instructions of his principal, he may recover from the principal full compensation therefor.[2] Accordingly, where a broker buys stock upon his customer's order and pays for it, and upon a decline in value the customer refuses to accept it, the broker may recover the price paid by him, and not merely the difference between that price and the market value on the day of his demand.[3] The guaranty by a third party of the customer's account may be enforced.[4] A broker cannot interplead between his customer and an indorser of the customer's note, in regard to stocks deposited with the broker by the customer, even though the administrator of the indorser claims that he has an interest in such stock.[5] A broker carrying a joint account of two persons cannot be compelled to accept the separate liability of each for one-half.[6] A broker cannot recover from his customer the commissions on stock transactions unless there is proof that the stock was actually purchased or sold.[7] In a suit by stock-brokers against a customer entries in their books are not admissible, such books not being the same as shop books of sale and delivery of merchandise on credit, but if proof is given that the entries were correct, this is sufficient.[8] A stock-broker in suing for the balance of account may in testifying use memoranda showing the sales and his clerk may testify as to telephoning the same to the office, and the clerk in the office may testify as to entries in the books in accordance therewith.[9]

1 Baily *v.* Cardnuff, 14 Colo. App. 169 (1899).

2 Sedgwick on Damages (7th ed.), 86; Lindley on Companies (5th ed.), pp. 512–516; Sutton *v.* Tatham, 10 Ad. & E. 27 (1839); Bayliffe *v.* Butterworth, 1 Exch. 425 (1847); Bowlby *v.* Bell, 3 C. B. 284 (1846); Bayley *v.* Wilkins, 7 C. B. 886 (1849); McEwen *v.* Woods, 2 Car. & K. 330 (1846); Taylor *v.* Stray, 2 C. B. (N. S.) 175 (1857); Stray *v.* Russell, 1 El. & El. 888 (1859); Chapman *v.* Shepherd, L. R. 2 C. P. 228 (1867); Biederman *v.* Stone, L. R. 2 C. P. 504 (1867); Robinson *v.* Mollett, L. R. 7 H. L. 802 (1875); s. c., L. R. 7 C. P. 84; L. R. 5 C. P. 646; Pollock V. Stables, 12 Q. B. 765 (1848); Lacey *v.* Hill, L. R. 8 Ch. App. 921 (1873). See also Dos Passos on Stock-brokers, pp. 123, 802.

3 Giddings *v.* Sears, 103 Mass. 311 (1869). *Cf.* Field *v.* Kinnear, 4 Kan. 476 (1868). Where there is a rescission of a contract for the sale of stock, the measure of the damages is the value of the stock at the time and place of the proposed delivery. White *v.* Salisbury, 33 Mo. 150 (1862); Vance *v.* Tourne, 13 La. 225 (1839).

4 Oppenheim *v.* Waterbury, 86 Hun, 122 (1895); aff'd, 155 N. Y. 684.

5 Post *v.* Emmett, 40 N. Y. App. Div. 477 (1899).

6 Levy *v.* Popper, 104 N. Y. App. Div. 457 (1905).

7 Hurd *v.* Taylor, 181 N. Y. 231 (1905).

8 Rathborne *v.* Hatch, 80 N. Y. App. Div. 115 (1903).

9 Rathborne *v.* Hatch, 90 N. Y. App. Div. 151 (1904); aff'd, 181 N. Y. 520.

CHAPTER XXVI.

PLEDGES AND MORTGAGES OF STOCK.

§ 463. *Definition of pledge, mortgage, and lien.*—A pledge may be defined to be a delivery of personal property as a security for some debt or engagement. A mortgage of personalty, on the other hand, is a sale with the condition attached that if the mortgagor performs some act, the sale shall be void. In a pledge the title remains in the pledgor, and the pledgee has a special property in the thing pledged.[1] In a mortgage the title passes to the mortgagee, subject to being revested in the mortgagor upon payment of the debt. In pledges the thing pledged must be delivered to the pledgee. In mortgages, generally, the possession of the thing mortgaged remains with the mortgagor. A mortgage of stock is the same as a pledge of stock in that the mortgagee may sell the stock upon default and after proper notice.[2] In England a deposit

1 See Pars. Cont., I, p. 569; II, p. 113; III, p. 272. Where an employee is by contract entitled to a certain salary so long as he should own certain stock, he does not break the contract by pledging his stock. McMullan *v.* Dickinson Co., 63 Minn. 405 (1896).

2 Deverges *v.* Sandeman, etc. Co., [1902] 1 Ch. 579; aff'g [1901] 1 Ch. 70.

of certificates of stock is an equitable mortgage and not a pledge, and hence while foreclosure would not lie as regards a pledge, it does lie as regards such an equitable mortgage.[1]

A pledge differs also from a lien. A pledge, by implication, gives the pledgee a power to sell on due notice, in case the debt is not paid at maturity, while a lien gives merely the power of detention until the debt is paid.[2]

Where a corporation is in financial difficulties and its mortgage is due, and the stockholders make an agreement with the mortgagee whereby they turn over to him a majority of the stock to become his absolute property if the debts of the corporation are not then paid, in consideration of which he agrees to advance further additional moneys, such a contract is a conditional sale of the stock and is not a pledge.[3] A contract to return borrowed stock or pay for it is a debt.[4]

§ 464. *Mortgages and pledges of stock—Trust mortgages covering stocks.*—Shares of stock may be the subject of a mortgage or pledge.[5] A collateral trust indenture is often made to cover stock as security for a debt, but such an instrument would hardly be called a mortgage. In fact a mortgage of stock is not often made, and, unless there is a clear intent to the contrary, the courts will treat the transaction as a pledge rather than a mortgage.[6] In fact it is

1 Harold *v.* Plenty, [1901] 2 Ch. 314.

2 Donald *v.* Suckling, L. R. 1 Q. B. 585, 604 (1866). "A simple lien—that is to say, a right to detain chattel property until a given debt be paid, but without any right to sell and apply the proceeds in payment—is one thing; a pledge, since it implies the right in the depositary to sell the deposit and apply the proceeds to the debt it was given to secure, is another. Shares of stock put up as collateral security constitute a pledge." First Nat. Bank *v.* Illinois T. & S. Bank, 84 Fed. Rep. 34 (1897).

3 Ware *v.* Hooper, 98 Fed. Rep. 160 (1899).

4 Dibble *v.* Richardson, 171 N. Y. 131 (1902). A contract whereby a person receives stock and agrees to return it within a specified time or else pay a specified sum is not a bailment, and hence if the stock is not returned at the specified time the specified price may be recovered, even though the party at a later time desires to return the stock. Haskins *v.* Dern, 19 Utah, 89 (1899). See also § 445, *supra*, and § 469, *infra*.

5 "Nothing is better settled than that shares in the capital stock of a corporation are the subject of pledge." Dayton Nat. Bank *v.* Merchants' Nat. Bank, 37 Ohio St. 208 (1881). "It was formerly doubted whether it [stock] could be the subject of a pledge, but it is now held that it can be." Newton *v.* Fay, 92 Mass. 505 (1865). As to pledges to secure parties who advance money to the company, see ch. XX and § 76, *supra*.

6 Newton *v.* Fay, 92 Mass. 505 (1865); Nabring *v.* Bank of Mobile, 58 Ala. 204 (1877); Merchants' Bank *v.* Cook, 21 Mass. 405 (1826); Mechanics', etc. Assoc. *v.* Conover, 14 N. J. Eq. 219 (1862); Doak *v.* Bank of the State, 6 Ired. L. (N. C.) 309 (1846). In England security is given by a process called a sale with a con-

difficult to ascertain from the cases how shares of stock may be mortgaged; and transactions which, in a few early decisions, were held to be mortgages, would to-day be held to be pledges.[1] There are but few clear cases of a mortgage of stock to be found. It

tract of repurchase. The court holds that this is not a pledge. "An essential term of a pledge is that on fulfillment by the pledgor of the conditions of the bargain, commonly called redemption, the pledgee is bound to hand back to the pledgor the very thing deposited with him," whereas in a sale and contract of repurchase, the identical property in numbers, etc., need not be returned. Simmons *v.* London J. S. Bank, [1891] 1 Ch. 270.

1 Quoted and approved in Irving, etc. Assoc. *v.* Watson, 41 Or. 95 (1902). Thus, in Huntington *v.* Mather, 2 Barb. 538 (1848), the court said: "There are two leading considerations to be regarded in determining whether the transaction is a pledge or a mortgage: namely, the title and the possession. If it is a mortgage, the legal title passes to and is vested in the creditor. With a pledge it is different; the legal title, until a sale on default of payment or redemption, continuing in the pledgor. . . . The essential difference as to matter of right is that in one the title passes and in the other it does not. But the difference in substance and fact is that, in the case of a pawn or pledge, the possession must pass out of the pawner, but in the case of a mortgage it need not." The court, however, influenced probably by the equities of the case, held the transaction to be a mortgage, and that the right of the debtor to redeem was barred by the ten-year statute of limitations. In the case of Smith *v.* Forty-nine and Fifty-six Quartz Min. Co., 14 Cal. 242 (1859), the court held the transaction to be a mortgage rather than a conditional sale of the stock. The question of pledge was not considered. Manns *v.* Brookville Nat. Bank, 73 Ind. 243 (1881), speaks of the transaction as a mortgage; and Williamson *v.* New Jersey, etc. R. R., 26 N. J. Eq. 398 (1875), says that such a mortgage need not be recorded in the municipal clerk's office, as required by the chattel-mortgage act. In both cases the transaction might better have been treated as a pledge. In Adderly *v.* Storm, 6 Hill (N. Y.), 624 (1844), the court said: "I have already said that this was not a pawn or pledge of the stock; neither was it strictly a mortgage." At the present day it would be held to be a pledge. Wilson *v.* Little, 2 N. Y. 443 (1849); Hasbrouck *v.* Vandervoort, 4 Sandf. 74 (1850). In Brewster *v.* Hartley, 37 Cal. 15 (1869), the court said: "The transfer in writing of shares of stock not only does not prove that the transaction is not a pledge, but the stock, unless it is expressly made assignable by the delivery of the certificates, cannot be pledged in any other manner." In Thompson *v.* Holladay, 15 Oreg. 34 (1887), a chattel mortgage on shares of stock was involved. It was declared void because it was given to a receiver who previously held the stock as receiver. Sometimes a chattel mortgage of stock arises where a railroad mortgage covers not only real estate, but also all personal property, bonds, and stock which are or shall be owned by the mortgagor corporation. A deposit of bonds as security for the payment for rolling stock, but to be used only to pay any deficiency after the rolling stock had been sold and the proceeds credited, is a pledge and not a mortgage, and hence if the pledgee takes back the rolling stock without selling it the pledge ceases. Herrmann *v.* Central, etc. Co., 101 Fed. Rep. 41 (1900).

seems that a formal instrument of chattel mortgage of stock, duly executed and registered at the municipal clerk's office, as required by law in case of chattel mortgages, would not constitute an effectual mortgage of stock, and the mortgagee would not be protected where he does not receive the certificate of stock from the mortgagor, or does not obtain a registry of transfer on the corporate books.[1] Where a railroad company owns shares of stock in an

[1] The clearest and most satisfactory case is Spalding *v.* Paine, 81 Ky. 416 (1883), where a chattel mortgage of a share of stock was duly recorded in the proper county, the mortgagor retaining the certificate of stock. The mortgagor subsequently sold and transferred the certificate of stock to a *bona fide* purchaser. The court held that the recording of the mortgage was of no avail; that there could be no mortgage of choses in action, and that the *bona fide* transferee took the stock. Pryor, J., well said: "Much of the business of the country is conducted on the faith of the pledge of such stock as collaterals; and to adjudge that the holder of the stock by transfer on the books of the corporation, or by indorsement and delivery by the owner, is subordinate in his claim to the mortgagee, upon the doctrine of constructive notice, would paralyze trade and open a wide field for the fraudulent disposition of such valuable interests at the expense of honest and confiding purchasers." Inasmuch as a mortgage on shares of stock is not a recordable instrument, the record thereof does not operate as constructive notice. Shuster *v.* Jones, 58 S. W. Rep. 595 (Ky. 1900). Stocks are not goods and chattels within the meaning of the act concerning chattel mortgages. State *v.* King County Super. Ct. 13 Wash. 607 (1896). The right of a subscriber to demand a certificate of stock may be attached before such certificate is issued and delivered, and such attachment has precedence over a mortgage even though the mortgage is recorded with the register of deeds, no notice, however, of such mortgage being given to the corporation itself. Cates *v.* Baxter, 97 Tenn. 443 (1896). *Cf.* Manns *v.* Brookville Nat. Bank, 73 Ind. 243 (1881); Foster *v.* Potter, 37 Mo. 525 (1866); Vowell *v.* Thompson, 3 Cranch, 428 (1829); s. c., 28 Fed. Cas. 1308. See also Holyoke *v.* McMurtry, 33 Neb. 548 (1891). A mortgage of stock is valid as between mortgagor and mortgagee without a transfer of certificates. The mortgagee after foreclosure may compel the corporation to transfer without making the transferee a party. Tregear *v.* Etiwanda Water Co., 76 Cal. 537 (1888). Stock may be mortgaged and no delivery of the certificates need be made. Though a foreclosure is made irregularly the mortgagor may ratify it, or may be barred by the six-year statute of limitations. Campbell *v.* Woodstock Iron Co., 83 Ala. 351 (1887). The pledgor may, by an instrument in writing, assign his equity of redemption to one of his creditors. Such assignment need not be recorded as a chattel mortgage and is not fraudulent, even though it be kept secret from the other creditors of the pledgor. National H. R. Bank *v.* Chaskin, 28 N. Y. App. Div. 311 (1898). Where an unincorporated partnership issues so-called certificates of stock representing a specified interest in such partnership, and one of the partners assigns his certificates as collateral security, and afterwards sells them, the purchaser is entitled to his share of the partnership property and to demand an accounting, even though the certificates provided that they were not transferable. The transfer of

elevator company, such stock is not subject to the general mortgage executed by the railroad company.[1] A pledge of stock without a delivery is not strictly and legally a pledge.[2] It "may have amounted to a mortgage, but it could amount to nothing more; and if a mortgage, it did not place the mortgagee in possession, but gave him merely a naked right to have the property appropriated and applied to the payment of his debt." [3]

Where, on the other hand, the certificate of stock is delivered to the creditor as security, it is evident that possession of the property is given to the creditor, but that the debtor still considers the stock to be his. Such a transaction is a pledge and not a mortgage; and consequently, since the giving of stock certificates as security is almost invariably effected by a delivery of the certificates, a mortgage of stock may be said to be possible, but is not technically a correct use of the word. The delivery of a certificate of stock with a blank power of attorney, as collateral security, constitutes a pledge and not a mortgage;[4] and the same rule prevails even though an absolute transfer or registry is made on the corporate books.[5] A mortgage on shares of stock is sometimes made by transferring the stock to the trustee of the mortgage.[6] The rights and duties of the

such certificates as security need not be recorded as a chattel mortgage. Rommerdahl *v.* Jackson, 102 Wis. 444 (1899).

1 Humphreys *v.* McKissock, 140 U. S. 304 (1891). A chattel mortgage does not include shares of stock, although broad enough in its terms to do so, where both parties testify that it was not the intent to include the stock, and the mortgagee allowed the mortgagor's assignee to take away the stock. Younkin *v.* Collier, 47 Fed. Rep. 571 (1891). See also § 317, *supra.* A mortgage on the real estate of a land company may also cover shares of stock in a water company, the latter being a water right appurtenant to the land, and hence passing with it. San Gabriel, etc. *v.* Lake View Town Co., 89 Pac. Rep. 360 (Cal. 1906).

2 See § 465, *infra.*

3 Christian *v.* Atlantic, etc. R. R., 133 U. S. 233, 242 (1890).

4 Mechanics', etc. Assoc. *v.* Conover, 14 N. J. Eq. 219 (1862); Lewis *v.* Graham, 4 Abb. Pr. 106 (1857); Irving, etc. Assoc. *v.* Watson, 41 Or. 95 (1902). But see Greene *v.* Dispeau, 14 R. I. 575 (1884). A delivery of the certificates as security is a pledge and not a mortgage. George, etc. Co. *v.* Range, etc. Co., 16 Utah, 59 (1897).

5 Nabring *v.* Bank of Mobile, 58 Ala. 204 (1877); Wilson *v.* Little, 2 N. Y. 443 (1849). The question of whether a sale or pledge was involved in the relations between a contractor and the party who financed the matter for him was discussed in Griggs *v.* Day, 58 N. Y. Super. Ct. 385 (1890), finally decided in 158 N. Y. 1 (1899).

6 See § 317, *supra,* and §§ 777, 852, *infra.* Where stock is mortgaged and delivered to the trustee of the mortgage, this is a mortgage and not a pledge. Toler *v.* East Tennessee, etc. Ry., 67 Fed. Rep. 168, 178 (1894). Where the pledgee takes out a new certificate of stock it is a pledge and not a chattel mortgage, even though the instrument creating the pledge was a mortgage on real estate and the

trustee in such cases are considered elsewhere.[1] Where stock in several corporations is put in trust by a deed acknowledged, delivered and accepted by the trustees in New York, where the grantor resided, the trust deed is governed by the law of New York, without reference to the residence of the trustees or the subsequent residence of the grantor.[2] A mortgage on shares of stock does not prevent the corporation controlled by such stock from issuing a mortgage on its property; and it is no breach of trust for the trustee of the first mortgage to be the trustee of the second mortgage, where the first mortgage does not prohibit such second mortgage, the stock, by the terms of the mortgage, remaining in the name of the mortgagor.[3] A contract whereby a stockholder delivers certain stock for money to be paid to the corporation, the money to be repaid out of dividends and in other ways and the stock then to be returned, is a conditional sale, and not a loan to the corporation.[4] It seems that a stockholder may lease his stock. He may for a certain sum assign to another all dividends during the specified time, and give to the lessee the right to vote the stock during that time.[5]

In England, where certificates of stock have not the quasi-negotiability that they have in America, a mortgage of stock is common and is enforced as a mortgage, and the mortgagee after a reasonable time may sell without notice to the mortgagor.[6]

stock. Richardson *v.* Longmont, etc. Co., 19 Colo. App. 483 (1904).

1 See § 317, *supra*. Where stock is deposited with one trust company as additional security for a mortgage given to another trust company, and upon default the former company refuses to deliver the stock, and the latter trust company then commences a suit in equity to compel the former trust company to deliver the stock, and during that suit the stock declines in value, a bondholder secured by such mortgage cannot hold liable the trust company holding the stock, on account of the decline in value, inasmuch as the suit in equity determined all questions, including the amount of damage. Bracken *v.* Atlantic T. Co., 167 N. Y. 510 (1901). A pledge of securities to a trustee to secure the payment of bonds may be forclosed by the trustee by a suit in equity. The trustee is not bound to sell at public auction without such suit. Land Title, etc. Co. *v.* Asphalt Co., 127 Fed. Rep. 1 (1903).

2 Mercer *v.* Buchanan, 132 Fed. Rep. 501 (1904).

3 Gasquet *v.* Fidelity, etc. Co., 75 Fed. Rep. 343 (1896).

4 Crimp *v.* McCormick Const. Co., 71 Fed. Rep. 356 (1896).

5 Zachry *v.* Nolan, 66 Fed. Rep. 467 (1895).

6 "Express powers were not formerly necessary on mortgages of stock, or in the instruments of defeasance executed by the transferee; nor need a mortgagee of stock now rely on his statutory power in order to realize his security by sale. If stock is itself made the security for money, and the day appointed for payment is passed, the mortgagee may at once proceed to sell the stock, and repay himself principal and interest, without any authority from the mortgagor, and

§ 465. *How a pledge of stock arises or is made — Pledge, by the corporation itself, of its own stock.*—A pledge of stock is generally made by a delivery of the certificates of stock indorsed in blank to the pledgee, and a memorandum in writing to the effect that the stock is held in pledge is generally signed and given by the pledgor to the pledgee. The pledge may be to a third person for the benefit of the creditor.[1] A mere direction to the corporation cannot constitute a pledge.[2] But where no certificate has been issued to the stockholder he may pledge the stock by an instrument in writing.[3] And the pledgee may foreclose by a suit in equity.[4] A verbal statement by the owner of stock to a person loaning him money that the stock is security for the loan, there being no delivery of the certificates, is not a valid pledge as against a subsequent *bona fide* pledgee of the certificates.[5] Actual delivery is necessary to constitute a pledge.[6] It does not exist although the president of a railroad

without commencing an action for foreclosure." Deverges *v.* Sanderman, etc. Co., [1901] 1 Ch. 70; aff'd, [1902] 1 Ch. 579.

1 See § 317, *supra*, also § 476, *infra*, as to stock placed under a mortgage deed of trust. A party receiving money paid on subscriptions for stock does not, merely because he places in a tin box in a safe-deposit company a declaration that certain securities owned by him are held as collateral security therefor, create a pledge for the benefit of the corporation to secure the paying over of such subscriptions to the corporation. Girard Trust Co. *v.* Mellor, 156 Pa. St. 579 (1893).

2 Cumming *v.* Prescott, 2 Y. & C. Exch. 488 (1837); Lallande *v.* Ingram, 19 La. Ann. 364 (1867), the court saying: "In all cases of pledges the pledgee must be put in possession of the thing pledged; and, if it be a claim, the evidence of the obligation must be transferred and delivered. Shares in stock cannot be pledged unless they be evidenced by certificates, which must be transferred and delivered to the pledgee." If the certificates of stock are not delivered to the pledgee nor to any one for him there is no pledge. Succession of Lanaux, 46 La. Ann. 1036 (1894). The pledgee who does not receive the certificate of stock, but takes a seperate written assignment thereof and files that with the company and obtains from the company a certificate that the shares have been transferred on the books, may hold the company liable if subsequently the company on presentation of the original certificate of stock duly endorsed transfers the same to a purchaser thereof. Equitable, etc. Co. *v.* Johnson, 36 Col. 377 (1906).

3 First Nat. Bank *v.* Gifford, 47 Iowa 575 (1877), where such a pledgee was protected against a third person who had advanced the money to the pledgor to purchase the stock. See also Brigham *v.* Mead, 92 Mass. 245 (1865); Thorp *v.* Woodhull, 1 Sandf. Ch. 411 (1844), and § 360, *supra*. Unissued stock may be pledged by the person entitled to it. When issued, it at once becomes a pledge. Harris's Appeal, 12 Atl. Rep. 743 (Pa. 1888).

4 South Dakota *v.* North Carolina, 192 U. S. 286 (1904).

5 Third Nat. Bank *v.* Buffalo, etc. Co., 193 U. S. 581 (1904).

6 Christian *v.* Atlantic, etc. R. R., 133 U. S. 233 (1890), the court saying: "A pledge, in the legal sense, requires to be delivered to the pledgee.

company has its bonds in his possession and states that he holds them in pledge for a syndicate of which he is a member. An equitable pledge may be enforced by the court, but only where there is a contract by the pledgor corporation applying to specific property.[1] A pledgee does not waive his pledge although he returns the stock to the pledgor to be sold.[2] A mere delivery of the certificate without a written transfer is sufficient to constitute a pledge, but such a pledge is imperfect, and to enforce it a suit in equity is

He must have the possession of it. He may then, in default of payment of the debt for which the thing is pledged, sell it for the purpose of raising the amount, by merely giving proper notice to the pledgor. In the case of stocks and other choses in action, the pledgee must have possession of the certificate or other documentary title, with a transfer executed to himself, or in blank (unless payable to bearer), so as to give him the control and power of disposal of it. Such things are then called pledges, but more generally collaterals, and they may be used in the same manner as pledges properly so called. If there is no transfer attached to or accompanying the document, it is imperfect as a pledge, and requires a resort to a court of equity to give it effect." The certificate of stock must be actually delivered in order to constitute a pledge. Robertson *v.* Robertson, 186 Mass. 308 (1904). An agreement that certain bonds in the possession of a third party shall be held in pledge is not a good pledge. Actual delivery is necessary to constitute a pledge. Seymour *v.* Hendee, 54 Fed. Rep. 563 (Vt. 1893). Where stock is placed in a trustee's hands, and a trustee's certificate is taken therefor, a pledge of the trustee's certificate is not a pledge of the stock sufficient to cut off subsequent attachments of the stock. Bidstrup *v.* Thompson, 45 Fed. Rep. 452 (1891). Where one party loans money to another party to buy stock in a certain company, such stock to be delivered to the former party in pledge, and the latter party uses the stock for another purpose, the loan of the money is not a mere loan, but the money is impressed with a trust, and this trust follows the stock except as against *bona fide* holders. Barnard *v.* Hawks, 111 N. C. 333 (1892). A pledge made by a separate written assignment of the stock, the certificates remaining in the pledgor's possession and continuing to stand in his name on the corporate books, is not good as against the pledgor's receiver who takes possession of the certificates. Atkinson *v.* Foster, 134 Ill. 472 (1890).

1 Hook *v.* Ayers, 80 Fed. Rep. 978 (1897). On the question of the necessity of a delivery in order to constitute a pledge, see also Fidelity, etc. T. Co. *v.* Roanoke, etc. Co., 81 Fed. Rep. 439 (1896).

2 Winslow *v.* Harriman Iron Co., 42 S. W. Rep. 698 (Tenn. 1897). Even though a pledgee who holds the certificates indorsed in blank sends them to the pledgor to be executed for new certificates in a consolidated company, and even though the pledgor takes out such new certificates in his own name, yet this is not a waiver of the pledge entitling attaching creditors of the pledgor to precedence over the pledgee. McClung *v.* Colwell, 107 Tenn. 592 (1901). A transaction whereby a debtor delivers certificates of stock to its creditor in pledge, and the creditor immediately returns them to the debtor, is not a valid pledge, even though the debtor told the corporate officers of the pledge, but said he did not want the transaction to ap-

necessary.[1] A delivery of the certificate of stock indorsed in blank is sufficient to constitute a pledge, without any memorandum in writing to that effect and without a registry of the same being made on the corporate books.[2] Not even a provision of the charter or a by-law of the corporation to the effect that transfers are not valid until registered on the corporate books can prevent a pledge of stock

pear on the books, and even though the secretary makes a note of the fact on the stubs of the certificate of stock book. An execution subsequently levied upon the stock as the property of the debtor takes precedence over the alleged pledge. McFall *v.* Buckeye, etc. Assoc., 122 Cal. 468 (1898). A pledge to secure the debt of another is not waived by temporarily allowing that other to have the pledge for a short time. Wing *v.* Holland T. Co., 5 N. Y. Supp. 384 (1889).

1 See Brewster *v.* Hartley, 37 Cal. 15 (1869); Robinson *v.* Hurley, 11 Iowa, 410 (1860); Christian *v.* Atlantic, etc. R. R. 133 U. S. 233, 242 (1898). See also § 476, *infra;* but see Lallande *v.* Ingram, 19 La. Ann. 364 (1867). *Contra,* Nisbit *v.* Macon, etc. Co., 12 Fed. Rep. 686 (1882). See also § 375, *supra.* A pledge of the certificates of stock is effective without notice to the corporation. Crescent City, etc. Co. *v.* Deblieux, 40 La. Ann. 155 (1888). A pledge without a transfer confers no legal title. Wagner *v.* Marple, 10 Tex. Civ. App. 505 (1895). A decision of a state court that a *donatio causa mortis* of bank stock was effective, although the donor merely delivered the certificates of stock without transferring the same on the back thereof, does not raise a federal question, even though the stock was national-bank stock. Leyson *v.* Davis, 170 U. S. 36 (1898). In a suit by the pledgee to have a judicial sale of the stock, an assignee of the pledgor's interest is a necessary party, where the pledgee knows of such assignment, and the pledge was made merely by delivery of the certificate without any transfer on the back thereof. Brown *v.* Hotel Assoc., 63 Neb. 181 (1901). A pledge of policies of fire insurance may be made by delivery. *In re* Little River, etc. Co., 92 Fed. Rep. 585 (1899). Where a pledge of the certificate is made without a transfer and the pledgee forges the transfer, a bank taking the stock in re-pledge is not a *bona fide* owner. Unity, etc. Co. *v.* Boyden, 159 Fed. Rep. 916 (1908).

2 Spreckels *v.* Nevada Bank, 113 Cal. 272 (1896); Masury *v.* Arkansas National Bank, 93 Fed. Rep. 603 (1899); Mount Holly, etc. Co. *v.* Ferree, 17 N. J. Eq. 117 (1864); Finney's Appeal, 59 Pa. St. 398 (1868); Jarvis *v.* Rogers, 13 Mass. 105 (1816); s. c., 15 Mass. 389; Blouin *v.* Hart, 30 La. Ann. 714 (1878); Merchants' Nat. Bank *v.* Richards, 6 Mo. App. 454 (1879); aff'd, 74 Mo. 77; Broadway Bank *v.* McElrath, 13 N. J. Eq. 24 (1860); Cornick *v.* Richards, 3 Lea (Tenn.), 1 (1879); Baldwin *v.* Canfield, 26 Minn. 43 (1879); Pitot *v.* Johnson, 33 La. Ann. 1286 (1881); New Orleans, etc. Assoc. *v.* Wiltz, 10 Fed. Rep. 330 (1881); Continental Nat. Bank *v.* Eliot Nat. Bank, 7 Fed. Rep. 369 (1881); U. S. *v.* Cutts, 1 Sumner, 133 (1832); s. c., 25 Fed. Cas. 745. *Cf.* State *v.* Jeffersonville Nat. Bank, 89 Ind. 302 (1883). A pledge may be made by signing in blank on the back of the certificate and pinning the certificate to the note. McClintock *v.* Central Bank, 120 Mo. 127 (1894). As to how a pledge may be made, see also Winslow *v.* Harriman Iron Co., 42 S. W. Rep. 698 (Tenn. 1897). The pledgor may by word of mouth, extend stock already pledged to further advancements by the pledgee. Van Blarcom *v.* Broadway Bank, 9 Bosw. 532 (1862).

being made by a mere delivery of the certificates indorsed in blank, or indorsed to the pledgee, without such registry.[1] The provision requiring such registry would seem not to concern the pledgee in any way, except that without the registry he could not claim the dividends from the corporation;[2] and in a few states, where an attachment of the stock for the pledgor's debts would cut off a previous unregistered vendee's or pledgee's rights, he by not registering encounters that risk.[3] Although a transfer is on a separate piece of paper, and is

1 McNeil *v.* Tenth Nat. Bank, 46 N. Y. 325 (1871); Dickinson *v.* Central Nat. Bank, 129 Mass. 279 (1880); Fraser *v.* Charleston, 11 S. C. 486 (1878); Factors', etc. Ins. Co. *v.* Marine, etc. Co., 31 La. Ann. 149 (1879); Pitot *v.* Johnson, 33 La. Ann. 1286 (1881); Continental Nat. Bank *v.* Eliot Nat. Bank, 12 Rep. 35 (1881); s. c., 7 Fed. Rep. 369; Lowry *v.* Commercial, etc. Bank, Taney, 310 (1848); s. c., 15 Fed. Cas. 1040; Blouin *v.* Hart, 30 La. Ann. 714 (1878); Lightner's Appeal, 82 Pa. St. 301 (1876); U. S. *v.* Cutts, 1 Sumner, 133 (1832); s. c., 25 Fed. Cas. 745; Leitch *v.* Wells, 48 N. Y. 585 (1872); Commercial Bank *v.* Kortright, 22 Wend. 348 (1839), aff'g 20 Wend. 91; Otis *v.* Gardner, 105 Ill. 436 (1883). As regards such provisions requiring registry, a pledge of stock stands on the same footing as a sale of stock. See also §§ 379, 432, *supra.* Where a person, as preliminary to making a loan with stock as collateral, indorses his stock over to the lender and leaves it with the corporate secretary, and then the loan is abandoned, the secretary is bound to deliver back the stock. Galvin *v.* Mac Mining, etc. Co., 14 Mont. 508 (1894). The unregistered pledge is protected against the pledgor's assignee in bankruptcy. *Re* Shelley, 34 L. J. (Bankr.) 6 (1864). Under the New Hampshire statute a pledge of stock to secure a previously existing debt is void if made within three months of insolvency. Hackett *v.* Leominster, etc. Bank, 68 N. H. 274 (1895). In Vermont where a pledge of stock may be made only by transfer on the books or notice to the corporation, a pledge without such transfer or notification or any assignment in writing is not good as against a trustee in bankruptcy. French *v.* White, 78 Vt. 89 (1905). In England certificates of stock have little of the quasi-negotiability which they have in America. See § 412, *supra.* In England, even if the secretary by mistake delivers the old certificates back to the transferrer and he pledges them, the pledgee is not protected, the basis of this decision being that the proximate cause of the loss was the transferrer and not the secretary, but in England the transfers are made by instruments separate from the certificates. Longman *v.* Bath, etc. Ltd., [1905] 1 Ch. 646. In England shares of the capital stock cannot be transferred without the production of the certificate, where the certificate recites on its face that no transfer can be registered without its production, and hence the company is liable to a pledgee of the certificate, even though he does not apply for a transfer until after the owner has transferred the shares to a third person, without producing the original certificate. Rainford *v.* Keith, etc. Co., Ltd., [1905] 2 Ch. 147, rev'g [1905] 1 Ch. 296.

2 See § 468, *infra.*

3 Thus, in states where an attachment has precedence over not only transfers without registry made after the attachment is levied, but over unregistered transfers made before the levy of attachment, a pledge, like a sale of stock, is protected against attachment on

not acknowledged as required by a rule of the stock exchange, nevertheless the pledgee may be a *bona fide* holder.[1] A transfer need not be on the back of the certificate. A statement in a collateral note that the stock has been deposited as security, and that on default the pledgee might sell the same at public auction, is sufficient to give the purchaser at such sale sufficient title to entitle him to a transfer on the corporate books.[2] An apparently absolute transfer of stock, whether registered on the corporate books or not, may be shown to be a pledge, and parol evidence is admissible to prove that fact.[3] A transfer of stock under a contract reciting that it was a

the pledgor's debts only by registry. Weston *v.* Bear River, etc. Co. 5 Cal. 186 (1855); Williams *v.* Mechanics' Bank, 5 Blatchf. 59 (1862); s. c., 29 Fed. Cas. 1376; State Ins. Co. *v.* Sax, 2 Tenn. Ch. 507 (1875); State *v.* First Nat. Bank, 89 Ind. 302 (1883); Shipman *v.* Ætna Ins. Co., 29 Conn. 245 (1860); Pinkerton *v.* Manchester, etc. R. R., 42 N. H. 424 (1861); Oxford Turnp. Co. *v.* Bunnell, 6 Conn. 552 (1827). *Cf.* Strout *v.* Natoma W. & M. Co., 9 Cal. 78 (1858). But the purchaser at the execution sale is not protected against the pledge, if he purchased with notice. Weston *v.* Bear River etc. Co., 6 Cal. 425 (1856). And if notice of the pledge is given to the corporation, the pledgee is protected against the attachments, although no registry is had. States Ins. Co. *v.* Gennett, 2 Tenn. Ch. 100 (1874). See also § 486 *et seq.*, *infra*. As to the dividends, the pledgee is entitled to them as against the pledgor, but of course can obtain them from the corporation only by obtaining registry.

1 Smith *v.* Savin, 141 N. Y. 315 (1894).

2 Bank of Culloden *v.* Bank of Forsyth, 120 Ga. 575 (1904).

3 Brick *v.* Brick, 98 U. S. 514 (1878); Wilson *v.* Little, 2 N. Y. 443 (1849); Ginz *v.* Stumph, 73 Ind. 209 (1880); Newton *v.* Fay, 92 Mass. 505 (1865); McMahon *v.* Macy, 51 N. Y. 155 (1872); Becher *v.* Wells, etc. Co., 1 Fed. Rep. 276 (1880); Burgess *v.* Seligman, 107 U. S. 20 (1882); Pinkerton *v.* Manchester, etc. R. R., 42 N. H. 424 (1861); Butman *v.* Howell, 144 Mass. 66 (1887); Ayer *v.* Seymour, 5 N. Y. Supp. 650 (1889). An absolute transfer of stock may be shown to have been in trust only, the stock to be returned upon the termination of a lease. Town of Mt. Morris *v.* Thomas, 158 N. Y. 450 (1899). A depositor in a bank who has been induced to take from the bank its stock as security may show by parol evidence that he took such stock as collateral security, and not in liquidation of his deposit. Williams *v.* American Nat. Bank, 85 Fed. Rep. 376 (1898); aff'd, 101 Fed. Rep. 943 (1900). A certificate of stock indorsed in blank may be shown to have been delivered in pledge. Riley *v.* Hampshire County Nat. Bank, 164 Mass. 482 (1895). It may be a question of fact whether the delivery of certificates of stock is made as a sale or as collateral security. The presumption is that it is collateral security where the facts show a prior debt, and there is no proof as to the purpose of the transfer. Borland *v.* Nevada Bank, 99 Cal. 89 (1893). This subject is somewhat similar to the claim of a person that another person purchasing stock did so as agent for the former. "Loose, vague, and indefinite expressions are insufficient to create such a trust. The intention must be evinced with clearness and certainty." Levi *v.* Evans, 57 Fed. Rep. 677 (1893). See § 321, *supra*. An apparent sale of

sale, but giving the transferrer the right to purchase it within one year, may be construed as a pledge where no consideration passed and no obligation of the transferrer was canceled.[1]

A corporation may pledge its unissued stock,[2] and the pledgee

stock is not proven to be a pledge on the evidence of plaintiff, contradicted by defendant, when the full value of the stock was paid and a receipt therefor given by the plaintiff. Travers *v.* Leopold, 124 Ill. 431 (1888). A pledgor may bring a suit for an accounting and to establish the fact that the transfer of stock was a pledge, and he may restrain a suit by the pledgee against the corporation for the stock. McDowell's Appeal, 123 Pa. St. 381 (1889). What appears to be an absolute sale may be shown to be a pledge, but the proof must be clear and conclusive. McLeod *v.* Weldon, 1 New Brunswick Eq. Rep. 181 (1895). The relation of pledgor and pledgee may be proved by oral testimony of the pledgee that he bought the stock in the name of the pledgor, and became surety on money borrowed for that purpose, and that the stock was deposited in a certain way as security. Schwind *v.* Boyce, 94 Md. 510 (1902). Where a written contract constitutes a sale of stock it cannot be shown to be a pledge unless a mutual mistake or fraud or other inequitable conduct is shown. Miller *v.* Carpenter, 68 N. Y. App. Div. 346 (1902). In a suit by a person to redeem stock which has been transferred absolutely, but which he claims was a pledge, the proof being oral, he must allege that the absolute assignment was made by mutual mistake or that there was fraud. Miller *v.* Carpenter, 79 N. Y. App. Div. 130 (1903). An absolute written contract of sale may be shown by parol to be in pledge merely or a conditional sale. Farmer *v.* Farmer etc. Co., 83 N. Y. App. Div. 218 (1903). An apparently absolute sale of stock cannot be shown to be merely a pledge, unless the proof is clear, plain and convincing. Wilson *v.* Cunningham, 24 Utah 167 (1901). Where the owner of stock has pledged all of it to different parties, and arranges with one of them to take up all the stock and the latter does so, and for several years treats it as his own, and the lower court finds that the agreement was that the pledgee should own it, the upper court will not disturb the decision, especially where the pledgor claims that he transferred the stock to avoid paying other creditors. Hukill *v.* Yoder, 189 Pa. St. 233 (1899).

1 Keifer *v.* Myers, 91 Pac. Rep. 163 (Cal. 1907).

2 Burgess *v.* Seligman, 107 U. S. 20 (1882); Combination Trust Co. *v.* Weed, 2 Fed. Rep. 24 (1880); Melvin *v.* Lamar Ins. Co., 80 Ill. 446 (1875); Protection Life Ins. Co. *v.* Osgood, 93 Ill. 69 (1879); *Re* City Terminus Hotel Co., 14 Eq. 10 (1872); Union Sav. Assoc. *v.* Seligman, 92 Mo. 635 (1884), overruling Griswold *v.* Seligman, 72 Mo. 116. *Contra*, Brewster *v.* Hartley, 37 Cal. 15 (1869). See § 247, *supra*, p. 675, note 6. Where a corporation pledges its own stock, the pledgee may sell that stock for nonpayment of the debt at less than par. This rule prevails even though the charter provides that the stock shall not be sold below par. Peterborough R. R. *v.* Nashua, etc. R. R., 59 N. H. 385 (1879). Unissued stock may be issued by the corporation as a pledge to secure a loan, and the corporation cannot set up that it was issued at less than par in violation of the constitution. The issue is good in the hands of the pledgee to the extent of the loan. Gasquet *v.* Crescent City B. Co., 49 Fed. Rep. 496 (1892); aff'd, 148 U. S. 31. Where the company issues its stock as collateral security to notes

is not liable as an absolute stockholder on such stock.[1] An issue of stock to a creditor to be redeemed within eighteen months is a pledge

given to it by its subscribers in payment for such stock, and then sells the notes, the stock follows the notes and may be subjected to the payment of judgments on the notes. If the corporation has issued the stock to others it must pay the judgments. Houston, etc. Ry. *v.* Bremond, 66 Tex. 159 (1886). A mortgage is valid as against the corporation giving it, although the officers give to the mortgagee their individual notes as additional security and cause the corporation to issue stock to themselves without payment, which they deposit also as collateral with the mortgagee. The giving of the mortgage is not an increase of indebtedness such as is prohibited by the Pennsylvania constitution. Powell *v.* Blair, 133 Pa. St. 550 (1890). The unissued stock of the corporation may be issued to one of its creditors as collateral security. Parberry *v.* Woodson Sheep Co., 18 Mont. 317 (1896). The appointment of a receiver does not affect the rights of a pledgee from the corporation prior to such appointment. The pledgee may sell. National, etc. Bank *v.* Benbrook, etc. Co., 27 S. W. Rep. 297 (Tex. 1894). A corporation may pledge treasury stock to a director. Where treasury stock, instead of being given to the corporation, is placed in the hands of trustees under a trust agreement, such agreement may be modified by a new agreement, and the stock turned over to the corporation. Kinsman *v.* Fisk, 83 Hun, 494 (1895). Questions relative to the pledge by a company of its own bonds are considered elsewhere. See § 763, *infra.* A corporation may pledge its bonds at less than par. Duncomb *v.* N. Y. etc. R. R., 84 N. Y. 190 (1881). In this case $34,000 of bonds were pledged to secure an overdue note for $5,000 and interest. The court said (p. 202) that the pledgee "had unquestionably the right to take as large a 'margin' for his loan as the borrower was willing to grant. Nor can we discern any valid reason why a railroad corporation may not dispose of its bonds by way of pledge as well as of sale; and in the absence of proof that the proceeds of the loan were, with the knowldege of both parties, to be applied to some purpose not authorized by the statute permitting their issue, we can see no reason, as has already been said, why they might not be used as a pledge to secure an indebtedness already existing." Where underwriters have agreed to purchase the bonds of the corporation at a certain price with a bonus of seventy-five per cent. in stock, the corporation may pledge the bonds and assign the underwriting agreement to the pledgee, and the pledgee in order to enforce the underwriting agreement may compel the corporation to furnish the seventy-five per cent. in stock for that purpose. Kirkpatrick *v.* Eastern, etc. Co., 135 Fed. Rep. 146 (1904); aff'd, 137 Fed. Rep. 387. Even though a stockholder pledges his stock to secure a debt of the corporation, and such stock is sold out, yet he is not entitled to an equal amount of stock from the corporation, but is merely a creditor of it. Dempster *v.* Rosehill, etc. Co., 206 Ill. 261 (1903). A corporation having charter power to purchase the stock of other corporations may give its certificates of indebtedness in payment therefor, and may also issue with such certificates its preferred stock, the dividends to be used to pay the principal and interest of such certificates, the preferred stock then to belong to the vendors. Ingraham *v.* National Salt Co., 130 Fed. Rep. 676 (1904), overruling 122 Fed. Rep. 40.

[1] See §§ 247, 309–313, *supra.*

and not a sale.[1] The question of usury in the note secured by a pledge of stock may affect the pledge itself.[2] In England by statute money loaners will be compelled by the courts to return harsh and unconscionable interest or bonuses and this applies to a person who loans money to a promoter and takes excessive bonuses of stock in payment.[3] A pledge is not illegal though it secures a greater amount than the pledgee bank is entitled to loan to one person.[4] A *bona fide* pledgee of stock is protected against claims of former owners of that stock to the same extent that an absolute purchaser of the stock would be protected, with the single exception that the power of a trustee or agent to sell stock does not give him power to pledge it.[5] The quasi-negotiability of certificates of stock protects a pledgee and a vendee alike.[6] The negotiability of a note is not destroyed by a provision that certain bonds are given as collateral security for its payment.[7] Where a trust company has orally agreed to hold certain bonds for delivery in accordance with certificates issued by another company, and subsequently the trust company loans money to such other company and takes such bonds as security, the holders of the certificates may hold the trust company liable for not protecting the certificates.[8] Where a pledgee brings suit to obtain possession of the pledge, which had been wrongfully diverted, and during the suit the pledge becomes worthless, a supplemental com-

1 *In re* United, etc. Co., 153 Fed. Rep. 169 (1907). *Cf.* § 167, *supra.*

2 See Little *v.* Barker, 1 Hoffm. Ch. 487 (1840); and see Frost *v.* Stokes, 55 N. Y. Super. Ct. 76 (1887), holding that the New York statute of 1882 allows any interest if the debt is on demand and is over $5,000, and stock is pledged. The New York statute of 1882, as to bankers loaning on collateral, was applied in Thomas *v.* Coffin, 62 Fed. Rep. 665 (1894), a case in which the taking of commissions was also involved. If stock is pledged to secure an usurious note, the pledgor may, under the New York statute, sue to recover back the stock without paying the debt. Dickson *v.* Valentine, 6 N. Y. Supp. 540 (1889); Cousland *v.* Davis, 4 Bosw. 619 (1859). See also Birdseye's Statutes, 2d ed., p. 1696. Even though the charter requires corporate notes to be signed by the president and secretary, yet a note signed by the secretary alone is sufficient if that has been the custom of the company. Moreover, a pledge of property to secure the note may be good, even though the note is void. Blanc *v.* Germania Nat. Bank, 114 La. 739 (1905).

3 Bonnard *v.* Dott, 92 L. T. Rep. 822 (1905); s. c., [1906] 1 Ch. 740.

4 McClintock *v.* Central Bank, etc., 120 Mo. 127 (1894).

5 See §§ 326, 351, *supra.*

6 See § 432, *supra.*

7 Valley Nat. Bank *v.* Crowell, 148 Pa. St. 284 (1892). The fact that a promissory note negotiable in form recites that it is secured by collateral and that the latter may be sold does not destroy the negotiability of the note. 1 Daniel Neg. Inst., 4th ed., §§ 1774–1784.

8 Hubbard *v.* Manhattan Trust Co., 87 Fed. Rep. 51 (1898).

plaint may be served alleging that fact and demanding the value of the pledge at the time demand was made therefor.[1]

Where a pledge is made by depositing stock in the hands of a third party, or where stock is delivered to a trustee of a mortgage deed of trust, various questions arise, which are considered elsewhere.[2]

§ 466. *Pledgee may have the stock registered in his own name or the name of another.*—Where certificates of stock indorsed in blank are delivered to a person in pledge as collateral security for a debt or for any other purpose, the pledgee has a right to fill in the blanks and have the stock registered in his own name on the corporate books;[3] or the pledgee may have the stock registered in the name

1 Central T. Co. *v.* West India, etc. Co., 109 N. Y. App. Div. 517 (1905).

2 See § 317, *supra.*

3 Skiff *v.* Stoddard, 63 Conn. 198 (1893); Hubbell *v.* Drexel, 11 Fed. Rep. 115 (1882); *Re* Angelo, 5 De G. & S. 278 (1852); Horton *v.* Morgan, 19 N. Y. 170 (1859); Union, etc. Bank *v.* Farrington, 13 Lea (Tenn.), 333 (1884); Heath *v.* Griswold, 5 Fed. Rep. 573 (1881), holding also that a surety is not thereby discharged; Smith *v.* Traders' Nat. Bank, 82 Tex. 368 (1891); Day *v.* Holmes, 103 Mass. 306 (1869); Fitchburg Sav. Bank *v.* Torrey, 134 Mass. 239 (1883), also holding that a release of the stock by the pledgee releases a surety; Fay *v.* Gray, 124 Mass. 500 (1878). *Cf.* State *v.* Smith, 15 Oreg. 98, 114 (but see p. 132) (1887). The pledgee may sue to have the pledge transferred to himself and determine the rights of other claimants. Newcombe *v.* Lottimer, 12 N. Y. Supp. 381 (1890). The corporation must allow the registry. Cornick *v.* Richards, 3 Lea (Tenn.), 1 (1879). Where a contract does not merely pledge stock, but gives the creditor the legal title and unlimited power of disposition, the creditor may, by suit in equity, compel the company to allow a transfer, and the transferrer need not be made a party to the suit. Skinner *v.* Fort Wayne, etc R. R., 58 Fed. Rep. 55 (1893). In California a pledgor may enjoin a pledgee from transferring stock into his name for the purpose of controlling an election, which otherwise the pledgor would control, where the statutes of the state provide for recording such a pledge without a transfer of the stock itself. Spreckels *v.* Nevada Bank, 113 Cal. 272 (1896); Tom, etc. Co. *v.* Green, 11 Colo. App. 447 (1898). A pledgee has power to have the stock transferred on the corporate books, and if it has agreed to hold certain stock as security for a third person's note and fails to obtain a proper transfer, it is liable. First Nat. Bank *v.* Park, 117 Iowa, 552 (1902). A pledgee is entitled to have stock transferred into his own name. Davis *v.* Hardwick, 94 S. W. Rep. 359 (Tex. 1906). Even though the pledgee eight years after the pledge was made obtained judgment for the amount due, yet if for twenty-two years he takes no further action, he cannot compel the corporation to transfer the stock to him unless the pledgor is made a party, the stock not having been transferred in the meantime. Wadlinger *v.* First Nat. Bank, 209 Pa. St. 197 (1904). A pledgee cannot insist on a transfer of the stock to himself on the corporate books where the corporation has a lien on the stock, even though such lien is subject to the pledge. White River, etc. Bank *v.* Capital, etc. Co., 77 Vt. 123 (1904). A pledgee cannot maintain a bill to com-

of another person, in order that he may protect his special property in the stock and at the same time not be liable thereon.[1] Where the pledgee presents the stock to the corporation for transfer, but the pledgor forbids the transfer, and thereafter the stock goes down, the pledgee may hold the pledgor liable for loss caused by interfering with the transfer.[2] It is proper and legal for a corporation to add to the name appearing on the stock certificate the words "as pledgee," or "as collateral security," or similar words.[3] In some states there are statutes as well as decisions to the effect that notice to the corporation that a person holds as pledgee certain certificates of stock, which stand on the books of the company in the pledgor's name, prevents an attachment against the pledgor from reaching more than the equity of redemption in such stock.[4]

§ 467. *Stock-broker purchasing stock for a customer on a margin is a pledgee of the stock.*—It has been well established that, where a stock-broker purchases stock on an order from his customer, and the customer does not pay for the stock, but deposits with the broker a sum of money called a "margin," to protect the broker against loss, the broker is bound to have on hand the stock so purchased during the entire time of the contract, and has the rights, duties, and liabilities of a pledgee, with the customer as a pledgor.[5] The broker

pel a transfer of the stock to the pledgee on the books, and to restrain the corporation from paying dividends to the pledgor. American, etc. Co. *v.* Pacific, etc. Co., 34 Wash. 10 (1904). A pledgee cannot maintain a bill in equity against the corporation to compel a transfer of the stock to him where in his pleading he claims to be owner of the stock, and upon the trial states that he holds the stock in pledge, but fails to prove any debt for which he holds the stock in pledge, it appearing that the stock had been held by him for a continuing credit. State *v.* North, etc. Co., 112 La. 441 (1904).

1 Day *v.* Holmes, 103 Mass. 306 (1869); Heath *v.* Griswold, 5 Fed. Rep. 573 (1881); Anderson *v.* Philadelphia Warehouse Co., 111 U. S. 479 (1884). See also § 470, *infra.*

2 Hooper *v.* Herts, [1906] 1 Ch. 549.

3 See § 247, *supra*, and ch. XXVII, *infra.* A court will not at the instance of a pledgee order a transfer to be recorded on the books to the pledgee as pledgee, and giving the pledgor the right to vote the stock, inasmuch as this would complicate the title as between the corporation and its stockholders and interfere with the business of the corporation. American, etc. Co. *v.* Pacific, etc. Co., 34 Wash. 10 (1904).

4 See ch. XXVII, *infra.*

5 Baker *v.* Drake, 66 N. Y. 518 (1876); Markham *v.* Jaudon, 41 N. Y. 235 (1869); and see § 457, ch. XXV, *supra.* A broker holding stock as collateral security on a margin does not hold the stock in a fiduciary capacity. McBurney *v.* Martin, 6 Rob. (N. Y.) 502 (1866); Lambertson *v* Van Boskerk, 49 How. 266, 4 Hun, 628 (1875). Securities deposited by the customer with the broker as collateral create the relation of pledgor and pledgee and not the relation of debtor and creditor. *In re* Jacob Berry & Co., 149 Fed. Rep. 176 (1906). A broker carrying stock on margin is a pledgee, and

under such circumstances must conform to all the rules governing a pledgee's attitude towards a pledgor. He cannot repledge, nor can he sell without due notice, unless such rights are given by the customer, the pledgor. A broker has no right to repledge his customer's stocks or bonds, carried by the broker as collateral or on a margin, unless the debt is transferred at the same time, or unless an express contract authorizes such repledge.[1]

hence a transfer of the stock by him to his customer within four months of his bankruptcy is not a preference, the court pointing out that practically all the states, excepting Massachusetts, hold that the broker is not an owner of stock carried by him on a margin. Richardson *v.* Shaw, 147 Fed. Rep. 659 (1906); aff'd, 209 U. S. 365. If a broker, who is carrying stock on margin, becomes bankrupt, his customer may redeem it. *In re* Bolling, 147 Fed. Rep. 786 (1906).

1 Dykers *v.* Allen, 7 Hill, 497 (1844). A broker has no right to repledge stock held by him for a customer to secure margins, and, even if the customer authorizes him to repledge, this authority sustains a repledge only to the extent of the amount due from the customer, and the broker must be ready at all times to return the stock to the customer upon the latter paying the debt. The repledgee, under the usual transfer in blank on the back of the certificate, is not a *bona fide* pledgee. German Sav. Bank *v.* Renshaw, 78 Md. 475 (1894). Where it was understood between a firm of brokers and its customers, for whom and on whose order it bought stocks on the security of a margin, that the firm might, according to the usual course of business, pledge or hypothecate as security for loans to the firm the stocks thus bought, it was held that a mere pledge of such stocks would not be of itself a conversion. Chamberlain *v.* Greenleaf, 4 Abb. N. Cas. 178 (1878). See also Lawrence *v.* Maxwell, 58 Barb. 511 (1871); 6 Lans. 469; 53 N. Y. 19. The decided weight of authority holds that, unless the power is expressly given to the broker to repledge the stock, he cannot legally repledge it. A broker has no right to repledge the stocks held by him as collateral to advances to a customer, especially so after the customer has repaid the advances. Van Voorhis *v.* Rea, 153 Pa. St. 19 (1893). Where the pledgee converts the pledge by selling it, and then assigns for the benefit of creditors, the pledgor comes in as any other creditor, and not as a preferred creditor. *Re* Jamison's Estate, 163 Pa. St. 143 (1894), holding also that the debt due from the pledgor to the pledgee may be set off. Where a broker, a gratuitous bailee of corporate stock, delivers the same to the company without authority, and the stock is converted to the use of the company, the bailee is liable for its value, irrespective of what his intentions were in the premises. In such case the bailor may recover the value of the stock at the time of conversion, with all dividends paid from the time of delivery, together with interest on the value of the stock from date of conversion, and on the dividends from date of respective payments. Hubbell *v.* Blandy, 87 Mich. 209 (1891). A broker has no implied power to repledge. Skiff *v.* Stoddard, 63 Conn. 198 (1893). Where a broker repledges stock carried by him on a margin, the customer cannot, upon the failure of the broker, have all the broker's stock of that class first applied in discharge of the claim. Skiff *v.* Stoddard, 63 Conn. 198 (1893); Jamison's Assigned Estate, 3 Pa. Dist. 217 (1894). On this subject, see also § 471, *infra*, and § 457, *supra*.

In New York it is still held that the broker is but a pledgee, but a broker is entitled to pledge his customer's stock to raise money to pay for the stock, it having been purchased for the customer on margin and the broker being ready at all times to produce that amount of the stock.[1] In Massachusetts still different rules prevail. In that state the rule is clearly laid down that a broker is not a pledgee of stocks which he buys for his customer on a margin, but that, on the contrary, the broker is the owner of the stock and that he is not bound to keep the stock of one customer distinct from that of another, but may take a single certificate in his own name for several customers, and may pledge the stock for advances made to himself, and that he is the person to be taxed on such stock.[2] The supreme court of the United States

[1] Tompkins *v.* Morton T. Co., 91 N. Y. App. Div. 274 (1904); aff'd, 181 N. Y. 578. Stock purchased by a broker on margin is held by the broker as pledgee. The broker has a right to repledge the stock, provided he is in a position at all times to deliver the stock to his customer on payment of the balance due, and it is sufficient that the broker is able to take up the repledge at any time. If he does not do so, however, and the stock is sold by the repledgee, the broker is guilty of conversion upon payment being tendered for the stock and it not being delivered to the customer, and a sale by the repledgee without notice renders the broker guilty of conversion. Rothschild *v.* Allen, 90 N. Y. App. Div. 233 (1904); aff'd, 180 N. Y. 561. A broker carrying stock on a margin is not bound to retain the identical stock, but may deliver other stock purchased subsequently at a lower price. Helm *v.* Ennis, 109 N. Y. App. Div. 42 (1905). A broker may pledge his customer's securities for an amount not exceeding the amount due from the customer, but the broker must not put the securities beyond the reach of the customer, nor mingle such securities with others and hypothecate all of them for a large amount; the reason of this decision being that, so long as the customer could go to the pledgee and redeem the securities without loss, he, the customer, was not injured. Douglas *v.* Carpenter, 17 N. Y. App. Div. 329 (1897). Where the pledgee, without the knowledge of the pledgor, sells one of the notes, and gives with it a part of the collateral as security, the pledgor may pay that note and take all the security so given to the repledgee. The first pledgee cannot claim any lien on the part so repledged. McDonald *v.* Grant, N. Y. L. J., July 16, 1895, Supr. Ct. Sp. T. A broker may employ a sub-broker unless his instructions are to the contrary, and may allow the sub-broker to retain the stock if the main broker has deposited sufficient money with the sub-broker to protect it and can take up the stock at any time he wishes, but the main broker is liable to his customer if he does not produce the stock on demand and payment therefor. Hoogewerff *v.* Flack, 101 Md. 371 (1905).

[2] The court realized, however, that its decision was not in accord with the current of authority and said: "The English doctrine seems to be the same as that of this commonwealth, so that we are not left quite alone in a desert of logic." Chase *v.* City of Boston, 180 Mass. 458 (1902). In Massachusetts a broker who purchases stock for a customer on a margin is not a pledgee, but is merely under contract to deliver the stock on payment of the balance, and hence he may pledge the stock or sell it, and is not in default

finally passed upon this subject in 1908, and held that a broker is an agent, and not the owner of stocks, purchased by him on a margin, and that while he might not be strictly a pledgee, as understood at common law, he was essentially a pledgee, and hence might turn over similar stock to his customer and receive payment therefor, and that such an act would not be a preference within the meaning of the bankrupt law. The court approved the New York rule and declined to follow the Massachusetts rule on this subject.[1] Where a broker sells his client's stock illegally, the measure of damages in a suit by the client is the difference between the price at which the stock was sold and the highest market price within a reasonable time thereafter.[2] Even though a broker sells stock held on margin and does not pay over to his customer the balance due, yet he is not indebted in a fiduciary capacity, within the meaning of the bankruptcy act, and hence such a claim is barred by a discharge in bankruptcy.[3] An executor is bound to close at once a speculative account.[4]

§ 468. *Miscellaneous rights of pledgee and pledgor — Dividends — Reorganizations — The equity of redemption.* — Dividends declared during the continuance of the pledge belong to the pledgee,[5] and

until the customer has tendered the balance and demanded the stock. If the broker is adjudicated a bankrupt the customer may treat this as a breach of contract and prove his claim. *In re* Swift, 105 Fed. Rep. 493 (1900). In Wood *v.* Hayes, 81 Mass. 375 (1860), it was held that "a broker who advanced money to buy stock for another, and held it in his own name, might, so long as he had not been paid or tendered the amount of his advances, pledge it as security for his own debt to a third person, without making himself liable to an action by his employer; and this upon the ground that the contract was conditional to deliver the shares upon the payment of the money." Approved in Covell *v.* Loud, 135 Mass. 41 (1883), where it was held that, where the customer is unable to advance further margin, and tells the broker to do the best he can, he may sell without notice. See also § 457, *supra.*

1 Richardson *v.* Shaw, 209 U. S. 365 (1908).

2 Wolff *v.* Lockwood, 70 N. Y. App. Div. 569 (1902). The measure of damages in a suit by a customer against a broker for an unauthorized sale of stock is the difference between the price at which it was sold and the highest price within a reasonable time thereafter, which, in this case, the court fixed at thirty days. Burhorn *v.* Lockwood, 71 N. Y. App. Div. 301 (1902).

3 Crawford *v.* Burke, 195 U. S. 176 (1904).

4 Matter of Hirsch, 116 N. Y. App. Div. 367 (1906); aff'd, 188 N. Y. 584. See also § 452, *supra.*

5 Herrman *v.* Maxwell, 47 N. Y. Super. Ct. 347 (1881). And the pledgor who collects them holds them in trust for the pledgee. Hill *v.* Newichawanick Co., 8 Hun, 459; affirmed, 71 N. Y. 593 (1877). Where a pledge of stock is renewed and a new note given, dividends accruing before the renewal go to the pledgor. Fairbank *v.* Merchants' Nat. Bank, 132 Ill. 120 (1889). A pledgee is entitled

even though the latter is not registered as owner on the corporate books, yet, if the corporation has notice of the pledge, it must pay the dividends to the pledgee.[1] Where a certificate of stock has

to the dividends on the stock. Reid *v.* Caldwell, 120 Ga. 718 (1904). A pledgee may collect the dividends and must account therefor to the pledgor on final settlement, but the assignee of the pledgee is not responsible for dividends so collected by the pledgee. Maxwell *v.* National Bank, etc., 70 S. C. 532 (1905). Dividends and interest on stocks and bonds pledged by a testator do not constitute income for annuities. Skinner *v.* Taft, 140 Mich. 282 (1905).

1 In Central, etc. Bank *v.* Wilder, 32 Neb. 454 (1891), it was held that not only was the pledgee entitled to the dividends, but was entitled to them although the stock stood on the corporate books in the name of the pledgor, where the officers knew all about the pledge. A pledgee is entitled to collect the dividends, and in some instances may do so even though the stock is not transferred to him on the books, it being shown that the officers knew of the pledge. Guarantee Co. *v.* East Rome Town Co., 96 Ga. 511 (1895). A pledgee of stock, even though not recorded as a stockholder, is entitled to dividends declared after the pledge was made, as against a claim of the corporation against the pledgor as an offset. Gemmell *v.* Davis, 75 Md. 546 (1892). Where a stockholder of record pledges his certificates of stock, and no transfer is made on the books, and subsequently a dividend is declared, and after such dividend is payable, but before it is actually paid, the pledgee presents to the company the stock for transfer, with a written request of the pledgor to the same effect, together with an assignment by the pledgor to the pledgee of the dividend, it is no defense to the company that it has a claim against the pledgor for a personal debt, or for a debt of a firm in which he is interested. American, etc. Bank *v.* Nashville, etc. Co., 36 S. W. Rep. 960 (Tenn. 1896). The corporation is liable to a pledgee, to whom the stock has been transferred on the books, for dividends paid to the pledgor. The acceptance of part payment, etc., by the pledgee from the pledgor does not waive his cause of action against the company. Boyd *v.* Conshohocken Worsted Mills, 149 Pa. St. 363 (1892). In Maine it has been held that while a corporation may pay an ordinary dividend to a stockholder of record, yet that a dividend paid in the liquidation and winding up of the corporation must be paid to the holder of the certificate, even though such holder be a transferee who has not been recorded as such on the books of the company, and that the company is liable to him for dividends in liquidation, even though it has paid them to the registered stockholder, and that this rule applies to a pledgee of a certificate of stock as well as a purchaser of a certificate of stock. Bath Sav. Inst. *v.* Sagadahoc Nat. Bank, 89 Me. 500 (1897). Where a certificate is issued by the corporation to the pledgee as pledgee, on the face of the certificate, the dividends must be paid to him, and if the corporation pays the dividends to the pledgor it is liable therefor to the pledgee. Hunt *v.* Laconia, etc. Ry., 68 N. H. 561 (1896). The pledgee may claim the dividends from the corporation, even though the stock has not been transferred into his name. Page, etc. Co. *v.* F. H. Prince & Co., 67 Atl. Rep. 401 (N. H. 1907). In insolvency proceedings a pledgee is entitled to dividends without giving up his security, and the federal court will not follow the state decisions on this point in receivership cases. London, etc. Bank *v.* Willamette, etc. Co., 80 Fed. Rep. 226

been pledged, but no transfer has been made on the corporate books, and a dividend is paid to the pledgor, the pledgee may bring suit against the pledgor for such dividend.[1] The pledgee, however, must account for dividends when the pledge is redeemed.[2] A provision in the contract that the vendor of stock shall have all the dividends, may be shown to mean that he was to apply the dividends on the purchase price.[3] A dividend which is received by the pledgee stops the running of the statute of limitations on the note.[4] Where a stockholder who has pledged his stock is refused permission to examine the books and no dividends have been declared, although large profits have been made, and the majority stockholders are planning to deprive him of his stock, he may file a bill to compel the declaration of a dividend.[5] The executor of an estate owning stock in a corporation may enjoin the corporation from paying a back salary to its president, who is a co-executor of the estate, even though the stock of the estate was pledged by the decedent and was transferred into the name of the pledgee.[6] A pledgee has a legal right to surrender the certificate to the corporation and take a new certificate therefor, running either to himself or to any other person whom he may designate.[7]

A pledgee of stock may bring suit to set aside a fraudulent sale of all the corporate assets which will result in destroying the value

(1897). See § 763, *infra*, on this point. The pledgee is entitled to the dividends, even though the stock stands in the name of the pledgor on the books of the company. George, etc. Co. *v.* Range, etc. Co., 16 Utah, 59 (1897). Where stock still stands in the name of the pledgor and an attachment is levied upon it, dividends that accrue thereafter belong to the pledgee, both as against the pledgor and his creditors. Farmers,' etc. Bank *v.* Mosher, 63 Neb. 130 (1901). Where the stock still stands in the name of the pledgor there is no duty imposed on the pledgee to collect the dividends declared thereon. McAulay *v.* Moody, 128 Cal. 202 (1900). A pledgee is not entitled to past-due coupons which were detached from the bonds before they were pledged, even though such coupons are entitled to payment in priority to the bonds themselves. Rhawn *v.* Edge Hill, etc. Co., 201 Pa. St. 637 (1902).

1 Meredith, etc. Bank *v.* Marshall, 68 N. H. 417 (1896).

2 Hasbrouck *v.* Vandervoort, 4 Sandf. 74 (1850); Edw. Bailm., § 300.

3 Commercial etc. Co. *v.* Pott, 89 Pac. Rep. 431 (Cal. 1907).

4 Bosler *v.* McShane, 110 N. W. Rep. 726 (Neb. 1907); s. c., 113 N. W. Rep. 998. Dividends received by the pledgee on stock held as collateral are sufficient to prevent the running of the statute of limitations on the debt. Fletcher *v.* Brainerd, 75 Vt. 300 (1903).

5 Anderson *v.* W. J. Dyer & Bro., 94 Minn. 30 (1904). *Cf.* § 735, *infra*.

6 Monmouth Inv. Co. *v.* Means, 151 Fed. Rep. 159 (1906).

7 See § 247, *supra;* Donnell *v.* Wyckoff, 49 N. J. L. 48 (1887). A pledge of bonds has a right to have them registered in his own name. Ritchie *v.* Burke, 109 Fed. Rep. 16 (1901).

of his stock.[1] Where the pledgor has pledged stock to secure the debts of another at a bank, and renewals thereof, the pledge continues though the pledgor dies.[2] But a pledge of stock to secure another person's debt is released by an extension of that debt.[3] If a note is secured by collateral, an accommodation indorser is not liable if the collateral is released from its deposit as security for the note.[4] An indorser, however, is not released by a change in the security, except to the extent that the security is decreased.[5] If a note secured by collateral has been paid by a surety, and the surety claims the collateral, and the collateral is also claimed by another person, the pledgee may interplead.[6] Where the pledgor delivers to the pledgee a certificate of stock in order that a part thereof may be transferred to the pledgee, and the latter endeavors to keep all of the stock and sues the corporation for not transferring the same to him, the corporation may bring the pledgor into the suit and have all rights adjudicated.[7] Where a pledge is deposited in third parties' hands for the benefit of both parties, the creditor is not bound to see to the return of the pledge.[8] A pledge to secure indebtedness of specified parties is not security for their individual debts.[9] A pledge to secure the note of another person, past due, is not binding where there is no extension of the time of payment.[10] If a person agrees to deposit stock to secure the debt of another, and fails to do so, he is liable, not for the debt, but for the value of the stock.[11] The pledge may be for a running liability, and is not released by an extension of any particular debt.[12] Stock may be given by the

1 Andrews Co. *v.* National Bank, etc., 58 S. E. Rep. 633 (Ga. 1907).

2 Cotton *v.* Atlas Nat. Bank, 145 Mass. 43 (1887).

3 Price *v.* Dime Sav. Bank, 124 Ill. 317 (1888).

4 Smith *v.* Traders' Nat. Bank, 82 Tex. 368 (1891).

5 Nelson *v.* First Nat. Bank, 69 Fed. Rep. 798 (1895). A pledgee may enforce his claim against the principal debtor, although the stock, which had been pledged by a third person to the pledgee to secure the debt, has been exchanged for stock in a reorganized company with the consent of the owner of the stock, but without the consent of the debtor or its receiver. McKusick *v.* O'Gorman, 69 N. W. Rep. 317 (Minn. 1896).

6 Sioux Falls, etc. Bank *v.* Lien, 14 So. Dak. 410 (1901).

7 Tom Boy, etc. Co. *v.* Green, 11 Colo. App. 447 (1898).

8 Robertson *v.* Sully, 2 N. Y. App. Div. 152 (1896), reversed on another point in 157 N. Y. 624.

9 Haldeman *v.* German, etc. Bank, 44 S. W. Rep. 383 (Ky. 1898). Where one of the makers of a joint note gives collateral as security for that note, such collateral cannot be applied to another individual note given by him. First Nat. Bank *v.* Finck, 100 Wis. 446 (1898).

10 Haldeman *v.* German, etc. Bank, 44 S. W. Rep. 383 (Ky. 1898).

11 Hite Nat. Gas Co.'s Appeal, 118 Pa. St. 436 (1888).

12 Merchants' Nat. Bank *v.* Hall, 83 N. Y. 338 (1881).

debtor to his creditor to sell for the benefit of the creditor, and the surplus to be returned to the debtor.[1] A deposit of bonds as security for the payment for rolling stock, but to be used only to pay any deficiency after the rolling stock has been sold and the proceeds credited, is a pledge and not a mortgage, and hence if the pledgee takes back the rolling stock without selling it the pledge ceases.[2] The pledge may be to secure the carrying out of a contract.[3] The agreement of the pledgor that the pledgee, a broker, should always thereafter have the brokerage business of the company, is enforceable, even after the pledge ceases, and for breach the pledgee may recover damages.[4] The pledge of stock may provide that, for part payments of the debt, the pledgor may withdraw part of the stock pledged.[5] A pledge, to secure a certain note and all other present or future demands of any kind, due or not due, is good as a pledge for the note specified, but does not apply as a pledge to another note due five years later, the payment of which is secured by real estate. Upon payment of the first note the pledgor may file a bill in equity to obtain the stock.[6] A person taking stock or bonds in pledge, with knowledge of the fact that the pledgor is under contract to deliver them to another person, may not be protected.[7] By a custom of banks in a particular local-

1 Beckwith *v.* Burrough, 13 R. I. 294 (1881). Such action would probably make the creditor the agent of the debtor.

2 Herrmann *v.* Central, etc. Co., 101 Fed. Rep. 41 (1900).

3 Vaupell *v.* Woodward, 2 Sandf. Ch. 143 (1844). The owner of stock may pledge it to secure his agreement that he will form a corporation to take over certain property, and he may agree that the stock shall be forfeited to the pledgee if the agreement is not carried out. Electric etc. Co. *v.* Smith, 113 N. Y. App. Div. 615 (1906). *Cf.* § 479 *infra.*

4 Carritt *v.* Bradley and another, [1901] 2 K. B. 550.

5 First Nat. Bank *v.* Root, 107 Ind. 224 (1886).

6 First Nat. Bank *v.* Illinois T. & S. Bank, 84 Fed. Rep. 34 (1897).

7 See §§ 317, 766*c*, 852. Even though a party agrees to make future advances of money and is to receive bonds as security therefor, yet if, prior to such advances being made and the bonds received, the pledgor has contracted with another party to deliver to the latter said bonds, the latter is entitled to the bonds as against the first-named party who makes such advances subsequently and received the bonds with notice of such intervening contract. Columbia, etc. Co. *v.* Mercer, 57 S. W. Rep. 787 (Ky. 1900). Where a mortgage covers bonds to be thereafter delivered, and instead of such delivery the mortgagor deposits the bonds as security with the United States government, and then makes another mortgage covering such bonds, the first mortgagee is entitled to the bonds upon their being released by the United States government, even though such bonds are delivered under the second mortgage, unless the bonds or the notes secured by them under the second mortgage have passed into *bona fide* hands. Central T. Co. *v.* West India, etc. Co., 169 N. Y. 314 (1901).

ity, stock held by the bank against the pledgor as collateral for one loan may be held as collateral for all loans.[1] The statute of limitations may be a bar to the debt and yet not to the pledge.[2]

A pledgee has a right to vote on the pledged stock where he is registered as a stockholder,[3] but the pledgor may compel him, by legal proceedings, to give a proxy for voting purposes where there are equitable reasons for so doing.[4] The pledgee is not liable to the pledgor for depreciation in the value of the stock, there being no agreement that the pledgee was to sell it.[5] A pledgee is not bound to protect the stock from forfeiture for non-payment of calls.[6] A pledgee may, however, pay assessments levied upon the stock, such assessments being a lien prior to his lien, and may charge such payments as expenses in preserving and protecting the title and making the security available on maturity.[7] But where stock is worth but five dollars a share the pledgee is not justified in paying an assessment of thirty dollars a share on the theory of being repaid expenses in maintaining and keeping available the pledge.[8] A pledgee of certificates of stock is protected against further sales or pledges of the same stock by the pledgor, such other sales or pledges being

1 Bacon's Adm'r *v.* Bacon's Trustees, 94 Va. 686 (1897).

2 See § 476, *infra.*

3 See § 612, *infra.*

4 See § 612, *infra.*

5 Lake *v.* Little Rock, etc. Co., 77 Ark. 53 (1905). See also § 476, *infra.*

6 Southwestern R. R. Bank *v.* Douglas, 2 Spears (S. C.), 329 (1844). It has been held that where stock is only partly paid, and the corporation issues a certificate reciting on its face how much is still due, and the holder pledges it, and no transfer to the pledgee is made on the corporate books, the corporation can have a sale of the stock for non-payment of the balance remaining due, but such proportion of the proceeds will be paid to the pledgee as the amount already paid on the stock bears to the par value of the stock. Ingles, etc. Co. *v.* Knoxville, etc. Co., 53 S. W. Rep. 1111 (Tenn. 1899).

7 Wells, etc. Co. *v.* Walker, 9 New Mex. 456 (1898). Where the pledgee of irrigation stock pays an assessment in order to save the pledge, he may recover the amount from the pledgor. Mabb *v.* Stewart, 147 Cal. 413 (1905). A surety on a note is not liable for assessments on stock pledged to secure such note, even though such assessments are paid by the pledgee. Iowa Nat. Bank *v.* Cooper, 101 N. W. Rep. 459 (Iowa 1904). Where a third party holds the pledged stock and agrees with the pledgee that if the pledgee does not pay any assessments the third party may pay them and obtain repayment out of the dividends, holding the stock as security, and the third party pays the assessments without the pledgee being notified of such assessments, and the third party causes the identity of the stock to be lost the pledgee can reclaim the stock without paying the assessment to such third party. Moore *v.* Bank of British Columbia, 125 Fed. Rep. 849 (1903).

8 Iowa Nat. Bank *v.* Cooper, 101 N. W. Rep. 459 (Iowa 1904). The payment of an assessment by the pledgee cannot be questioned by pledgors who took part in the making of the assessment. Iowa Nat. Bank *v.* Cooper, 131 Iowa 556 (1906).

without the delivery of any certificate, the same as the vendee of a certificate of stock is protected against another sale of the stock to a purchaser who takes without any certificate.[1] The possession of the certificate protects the pledgee herein. The pledgee is not liable for a loss of the pledge by theft, there being no negligence on his part.[2] But where the pledgee is a corporation, and the president, who has entire charge of its affairs, steals the securities, the corporation is liable to the pledgor for the value thereof, on the principle that a bailee for hire is liable for negligence in regard to the pledge.[3]

A pledgee of a certificate of stock is not bound by an agreement of all the stockholders to surrender to the corporation a part of their stock, which part is to be then considered preferred stock and is to be sold by the corporation for the purpose of paying corporate debts.[4] The stockholders of a corporation may, together with the directors, cause the corporate property to be sold to a new corporation in exchange for the stock of the latter. A pledgee of stock in the former corporation cannot after the sale undo it, nor hold the latter corporation liable. His remedy is against the pledgor and the first corporation.[5] An unrecorded pledgee of stock is not

1 Maybin *v.* Kirby, 4 Rich. Eq. (S. C.) 105 (1851). See §§ 321, 360, *supra*. The cases therein cited are partly cases of pledge and partly of sale of certificates of stock. The rule applies equally to both. A person to whom a pledgor fraudulently transfers his equity, and who redeems the stock and then sells it, is liable only for its actual value less the amount paid to so redeem. Hamilton Nat. Bank *v.* Halsted, 134 N. Y. 520 (1892). The pledgee who does not receive the certificate of stock, but takes a separate written assignment thereof and files that with the company and obtains from the company a certificate that the shares have been transferred on the books, may hold the company liable if subsequently the company on presentation of the original certificate of stock duly endorsed transfers the same to a purchaser thereof. Equitable, etc. Co. *v.* Johnson, 36 Col. 377 (1906).

2 Fleming *v.* Northampton Nat. Bank, 9 Fed. Cas. 264 (1881).

3 Cutting *v.* Marlor, 78 N. Y. 454 (1879). See also Ouderkirk *v.* Central National Bank, 119 N. Y. 263 (1890).

4 Although all the other stock has had this agreement stamped on the certificates, yet the corporation cannot insist that the purchaser of the stock so pledged shall allow the same agreement to be stamped on the new certificates issued to such purchaser. The court will order a transfer free from the agreement. Campbell *v.* American Zylonite Co., 122 N. Y. 455 (1890). "A stockholder of a corporation is so far a privy to a judgment against the corporation that he cannot attack the judgment in any collateral proceeding." National Foundry, etc. Works *v.* Oconto Water Co., 68 Fed. Rep. 1006 (1895), applying the rule to pledgees also. See also § 209, *supra*.

5 Quoted and approved in Elyea *v.* Lehigh, etc. Co., 45 N. Y. App. Div. 231 (1899), holding that an unregistered pledgee of stock in a New Jersey corporation cannot prevent the stockholders, by unanimous consent, selling the entire assets of the company

entitled to be notified of proceedings for a consolidation with another company. A corporation is not liable to an unrecorded pledgee of its stock, even though a consolidation is brought about and the new stock issued to the pledgor, thereby depriving the pledgee of the value of the stock held in pledge, the corporation having acted in good faith.[1] Although the pledgor of stock votes the stock in favor of a lease of the corporate property on such terms that no dividends on the stock are possible, yet, in the absence of fraud, the pledgee is bound.[2] A pledgor of bonds may take part in the purchase at the reorganization without any obligations towards the pledgee as to such purchase.[3] After default by the pledgor the pledgee may put the bonds which he holds as collateral under a reorganization plan, and may agree that part of the expense of foreclosure shall be a lien on the bonds, but he cannot do so where he is to receive new securities instead of cash on the reorganization.[4] The pledgee of securities, who turns them in to a reorganization and takes new securities without the consent of the pledgor, is liable to the pledgor, but the pledgor can recover only the actual value of the securities so turned in. The pledgee is not bound to aid the pledgor in using the pledge in a

to a competing company in good faith, the business being unprofitable.

Where by the written consent of all the stockholders of a New Jersey corporation, and the action of its board of directors, a corporation sells all its property for stock and bonds of a new company to be distributed among the old stockholders, a pledgee of one of the old stockholders cannot object, especially where the statute authorizes the pledgor of stock to represent the stock and no notice had been given of the pledge. Elyea *v.* Lehigh, etc. Co., 169 N. Y. 29 (1901); Leathers *v.* Janney, 41 La. Ann. 1120 (1889). A pledgee of common stock cannot object to the merging of preferred stock into mortgage bonds. Havemeyer *v.* Bordeaux Co., 8 Nat. Corp. Rep. 127 (Ill. C. C., 1894). In Allis *v.* Jones, 45 Fed. Rep. 148 (1891), it is intimated that a pledgee has not the same right to attack an *ultra vires* corporate debt that the pledgor has, especially where the stock is worthless. *Cf.* § 735, *infra*. In McCaleb *v.* Goodwin, 114 Ala. 615 (1897), one street railway purchased all the stock of another street railway and paid the stockholders therefor by issuing the mortgage bonds of the latter street railway company. The former then placed the stock under its own mortgage, and, this mortgage having been foreclosed, the purchaser attacked the validity of the first-mentioned mortgage. The court sustained the mortgage, however, on the ground that all the stock had voted therefor. Where the pledgor of stock votes at a corporate meeting in favor of selling the property the pledgee is bound, the corporation having had no notice of the pledge. City of Spokane *v.* Amsterdamsch, etc., 22 Wash. 172 (1900).

1 Cleveland City Ry. *v.* First Nat. Bank, 68 Ohio St. 582 (1903).

2 Gibson *v.* Richmond, etc. R. R., 37 Fed. Rep. 743 (1889).

3 Brown *v.* Anderson, 104 Ga. 30 (1898).

4 Field *v.* Sibley, 74 N. Y. App. Div. 81 (1902); aff'd, 174 N. Y. 514.

reorganization, nor is the pledgee bound to delay the reorganization on account of any demand of the pledgor.[1] Where a pledgee's debt has really been paid and yet he retains the stock, and by reason thereof the pledgor is unable to enter a reorganization, the pledgor can recover for the actual damages sustained, but such value must be shown by him; otherwise it will be inferred that it had little or no value.[2] Even though a pledgee of bonds accepts common stock in a reorganized company in place of the bonds, yet, if both the bonds and the common stock are worthless, the pledgor is not released from his debt, and even if the common stock had value it would be merely a substituted collateral.[3] Where the maker of a note secured by bonds as collateral causes the pledgee to exchange the bonds for bonds in a reorganized company, it is for the jury to say whether that amounts to an acknowledgment of the debt postponing the statute of limitations.[4] A pledgor of stock may enforce a claim against the corporation, even though thereby the corporation will become insolvent and the stock be rendered worthless. Although the pledgor has made an assignment for the benefit of creditors, yet his assignee cannot be enjoined by the pledgee from enforcing the claim against the corporation.[5]

The fact that the pledgee, a corporation, gave through its president incorrect information to the pledgor, whereby the pledgor did not sell the stock in pledge and liquidate the debt, is no defense to an action on the debt.[6] A person loaning money to an individual and taking bank stock as collateral security cannot hold the bank liable, in an action for damages for deceit, on the ground that its published statements were false and fraudulent and that he relied on these statements.[7] Where stock has been pledged, and

1 Griggs *v.* Day, 136 N. Y. 152, 162 (1892).

2 Griggs *v.* Day, 158 N. Y. 1 (1899). This case arose out of a controversy between a contractor in the construction of a railroad and the chief stockholder and promoter, who advanced money on the security of stock and corporate notes.

3 *In re* Lorillard, 107 Fed. Rep. 677 (1901).

4 Becker *v.* Oliver, 111 Fed. Rep. 672 (1901).

5 Janney *v.* Merchants', etc. Bank, 98 Ala. 515 (1893).

6 Investment Co. *v.* Eldridge, 175 Pa. St. 287 (1896); aff'g, 2 Pa. Wis. 394.

7 Merchants' Nat. Bank *v.* Armstrong, 65 Fed. Rep. 932 (1895). But see §§ 352–355, *supra*. A bank which as pledgee causes by its statements a party to purchase the stock held in pledge may be held liable in damages if such statements were false. Hindman *v.* First Nat. Bank, etc., 98 Fed. Rep. 562 (1899). Where a purchaser of goods misrepresents the value of stock which is to be given as a pledge for the purchase price and refers the vendor to a bank, which bank repeats the misrepresentations, the pledgee may sue the bank for damages, and may show that the bank at that time held stock in pledge and that the goods so purchased were substituted

the pledgor makes a contract with a third person, by which the latter agrees to pay the debt and take the stock, the pledgor may enforce this contract without tendering the stock.[1] Where a bank states to a pledgee that it holds certain negotiable bonds in pledge to secure the debt, and the bonds are produced, shown, and handed back to the bank, the latter cannot afterwards claim that it held these bonds subject to a prior pledge by the same pledgor to another person.[2] Pledgees of a majority of the corporate stock, who by voting their stock cause men of their choice to be elected directors, are not liable for the misconduct of such directors.[3] Nevertheless "the bailee owes a direct duty to the pledgor to be reasonably careful that no harm come through his custody to the subject-matter of the pledge." [4]

for the stock of the bank upon the transaction being closed. Am. Nat. Bank, etc. *v.* Hammond, 25 Colo. 367 (1898).

1 Gilbert *v.* Adams, 99 Iowa, 519 (1896).

2 Gibson *v.* Lenhart, 111 Pa. St. 624 (1886). Where a corporation guarantees certain bonds, and a person holding stock of the company indorses on the guaranty that he holds stock to secure the performance of the guaranty, he cannot afterwards claim that he has a prior lien as pledgee of the stock. Mercantile Trust Co. *v.* Atlantic Trust Co., 86 Hun, 213 (1895). For subsequent phases of this litigation, see Bracken *v.* Atlantic Trust Co., 167 N. Y. 510 (1901).

3 Higgins *v.* Lansingh, 154 Ill. 301 (1895). Where stock is pledged and the pledgee is in control of the company, and instead of declaring dividends he honestly and intelligently applies the profits to improvements, the pledgor cannot hold him liable for not declaring dividends, and for not thus decreasing the debt for which the stock was given in pledge. Zellerbach *v.* Allenberg, 99 Cal. 57 (1893). A pledgor of stock cannot, in a suit brought by his creditor to reach the equity in a pledge, raise an issue as to the mismanagement of the corporation. McMullen *v.* Ritchie, 57 Fed. Rep. 104 (1893). It is no defense to a note secured by stock that the pledgee, by means of the stock, controlled the company and managed it so badly that the stock became worthless. Dunham *v.* Boyd, 64 Conn. 397 (1894). In the case Dudley *v.* Armenia Ins. Co., 115 N. Y. App. Div. 380 (1906), it was held that a stockholder, who with other stockholders pledged his stock to secure a debt from the corporation, and whose stock was sold out for the non-payment of the debt, cannot hold the pledgee liable in damages, even though he charges that the latter wrecked the corporation and thereby rendered the stock valueless, the decision being based on the theory that the depreciation in the value of the stock was due to a wrong perpetrated upon the corporation, for which the remedy in the first instance was with the corporation.

4 Ritchie *v.* McMullen, 79 Fed. Rep. 522, 533 (1897). In this case the court held that if a pledgee, being in control of the corporation, refuses to develop the property and to accept subsidies which are offered, and to accept profits under a contract which are possible, and to sell the property at a large price, all for the purpose of depreciating the pledged stock and thus obtain the stock himself, the pledgor may call the pledgee to account for the loss suffered from this

The pledgor may by an instrument in writing assign his equity of redemption to one of his creditors. Such assignment need not be recorded as a chattel mortgage, and is not fraudulent even though it be kept secret from the other creditors of the pledgor.[1] In a suit between two claimants to stock which has been pledged, the pledgee is not a necessary party.[2] A pledgor may release his equity to the pledgee, yet the courts view such agreements with distrust and disfavor, and if advantage was taken of the pledgor or the consideration grossly inadequate, the release will be disregarded and the pledgor allowed to redeem.[3] A judgment creditor of the pledgor may file a bill to reach the equity of redemption in a pledge of stock,[4] or

conspiracy and wrong. The court held also that although the damage was directly to the corporation, yet that indirectly it was a damage to the pledgor, and that hence the pledgor could sue in his own behalf alone, and that the measure of damage is the difference between the market value at the time of suit and what it would have been if the conspiracy had not been set on foot. The court held, however, in the case before it, that the proofs did not sustain the allegations.

1 National H. R. Bank *v.* Chaskin, 28 N. Y. App. Div. 311 (1898). An assignment by a pledgor of stock of his interest in the equity of redemption may be assigned by the assignee by merely writing his name on the back of the same, the entire transaction being in connection with the discounting of a note. Twelfth Ward Bank *v.* Samuels, 71 N. Y. App. Div. 168 (1902); aff'd, 176 N. Y. 593. A pledgor may pledge his equity of redemption and he may do this by a separate instrument without delivering the certificate of stock, that being in the possession of the first pledgee. First Nat. Bank, etc. *v.* Bacon, 113 N. Y. App. Div. 612 (1906); aff'd, 189 N. Y. 533. The purchaser of the equity of redemption of stock which has been pledged is the owner thereof and may be taxed thereon. Central, etc. Co. *v.* Wright, 124 Ga. 630 (1906). The contract of the pledgor of stock to sell the stock to an outside party is legal, where the pledgor obtains the stock from the pledgee and tenders it to the vendee. Hershey *v.* Welch, 96 Minn. 145 (1905).

2 Edwards *v.* Mercantile, etc. Co., 124 Fed. Rep. 381 (1903).

3 Collins *v.* Denny, etc. Co., 41 Wash. 136 (1905), a case where $27,800 worth of stock was pledged for a $3,000 debt. In this case by the original agreement the pledgee was to have the stock if the debt was not paid within four months. See also § 479, *infra*.

4 Ritchie *v.* McMullen, 79 Fed. Rep. 522 (1897). Where a judgment creditor of a person files a bill in equity to reach the equity of that person in a pledge of stock which he has made to other parties, and the pledgees are joined as parties defendant, the accounts and claims between the pledgor and pledgees may be adjusted in the same suit. Ritchie *v.* McMullen, 79 Fed. Rep. 522 (1897). The equity of redemption of the pledgor may be reached by garnishee process, and the property sold by a receiver to pay the pledgee, and the balance to the other creditor, where the pledgee consents and his debt is past due. Kimbrough *v.* Orr Shoe Co., 98 Ga. 537 (1896). An attaching creditor cannot complain that the pledgee, who has prior rights, settled with the pledgor after the attachment and then sold the stock. The creditor must offer to redeem or

may levy an attachment or execution upon it.[1] In a suit by the pledgee to have a judicial sale of the stock, an assignee of the pledgor's interest is a necessary party, where the pledgee knows of such assignment, and the pledge was made merely by delivery of the certificate without any transfer on the back thereof.[2] Where the pledgee is notified by a person that the latter is entitled to the collateral, subject to the pledge, and the pledgee upon payment of the debt returns the collateral to the pledgor, the pledgee is liable to such third person.[3] Where stock is tied up by attachment which is after-

have a sale subject to the pledge. McClintock *v.* Central Bank, etc., 120 Mo. 127 (1894). Where a worthless equity of redemption in land is turned in for stock, and then the stock is pledged with the mortgagee of the land, and then "scrip" is taken from the corporation by the parties pledging the stock, this scrip reciting that it represents the equity of the right to the certificates of stock after the mortgage is paid off, such scrip is valid and may be sold, it having been treated as valid for twenty years, even though it was issued without consideration. Higgins *v.* Lansingh, 154 Ill. 301 (1895). In Michigan garnishee process lies against the pledgee of stock in behalf of a creditor of the pledgor, and enables such creditor to reach the equity in the stock. Old Second Nat. Bank *v.* Williams, 112 Mich. 564 (1897). Where stock is placed in escrow, to become the property of a person in case he is obliged to pay a certain obligation, and he is so obliged to pay, the creditors of the party placing the stock in escrow cannot reach the stock nor redeem it. Pabst, etc. Co. *v.* Montana, etc. Co., 19 Mont. 294 (1897).

1 See § 484, *infra.* The equity of redemption which a pledgor has in stocks which he has pledged to a national bank may be reached by garnishment served on the bank after judgment against the debtor. The national bank act does not forbid such process. Commonwealth *v.* Chestnut, etc. Bank, 189 Pa. St. 606 (1899). Garnishee proceedings against a stockholder's interest in stock which has been pooled and has also been pledged does not affect such pool or pledge, but is made subject to them if they are legal. Hardin *v.* White, etc. Co., 26 Wash. 583 (1901). *Cf.* § 491, *infra.* The interest of the pledgor of stock may be levied upon under execution, and thereupon the officer will sell the pledge free from claims, and the court will direct the payment of the pledgee and the balance to the creditors, under the Georgia statute. People's Nat. Bank *v.* Wheedon, 115 Ga. 782 (1902). Even though the pledgor by a separate instrument assigns to a third party his interest in the stock, and the purchaser files such assignment with the corporation and asks for a transfer, yet a subsequent attachment has precedence, under the Colorado statute, where the debt of the pledgee was paid prior to the service of the execution and the purchaser of the equity of redemption did not obtain or present the certificate of stock for transfer. Isbell *v.* Graybill, 19 Colo. App. 508 (1904).

2 Brown *v.* Hotel Assoc., 63 Neb. 181 (1901).

3 Hughes *v.* Settle, 36 S. W. Rep. 577 Tenn. (1895). In a suit in equity by the pledgor to redeem, the pledgee cannot set up that the pledgor has sold his interest in the pledge to another party, and that another suit is pending brought by that other party for specific performance, and that in such suit the pledgee is a party de-

wards vacated, and in the meantime the stock depreciates in value, the loss can be recovered from the attaching party if the stocks could and would have been sold before the depreciation, if they had not been so tied up. But if such stocks are in pledge, and the pledgor does not pay the loan while the stocks are so tied up, no damages can be recovered.[1]

Where the pledgee allows the pledgor to take the pledge and pledge it for another loan, and then the second pledgee allows the same thing to be done for a third loan, and the third pledgee sells out the pledge, and the second pledgee buys, the first pledgee may redeem from the second by paying both loans.[2] A pledgee may deduct from the proceeds of a sale reasonable expenses in keeping and caring for the pledge, paying taxes and liens, preserving title, or rendering it available.[3] Costs incurred by the pledgee in obtaining judgment against a guarantor of the debt are a lien on the pledge.[4] The pledgee cannot set up the title of a third person as against the pledgor, however tortious the possession of the latter, unless the owner has claimed the pledge and the pledgee has yielded to the claim.[5] A pledgee is not bound to prosecute suits to protect the pledge, nor to sell, and a provision that the pledgee may claim repayment of any sums expended in the prosecution of claims is not an agreement of the pledgee to prosecute.[6] The pledgee need not defend against a replevin suit brought by a person who claims to be

fendant, no proof being given of such sale. Houston, etc. R. R. *v.* Conner, 29 Tex. Civ. App. 259 (1902).

1 Fourth Nat. Bank, etc. *v.* Crescent, etc. Co., 52 S. W. Rep. 1021 (Tenn. 1897).

2 Manhattan Trust Co. *v.* Sioux City, etc. R. R., 65 Fed. Rep. 559 (1895). See s. c., 171 U. S. 474 (1898).

3 Furness *v.* Union Nat. Bank, 147 Ill. 570 (1893). While the pledgee is entitled to defend his title, yet in his suit to foreclose the pledge he cannot be allowed disbursements made to counsel in defending his title in another suit brought by the real owner of the stock, the pledge being in fraud of such owner's rights, but the pledgee being *bona fide.* Work *v.* Tibbits, 87 Hun, 352 (1895). A pledgee of bonds is bound to exercise due diligence in collecting the same and is entitled to be reimbursed for his expense, including attorney's fees. Hanover, etc. Bank *v.* Brown, 53 S. W. Rep. 206 (Tenn. 1899). An attorney who represents pledgors of stock in winding up the affairs of the company may have a lien on the fund realized on such stock prior to the lien of the pledgee. Shirk *v.* Sheridan, 10 Kan. App. 463 (1900). The expenses of a receiver appointed at the instance of a pledgee of pig iron may be prorated between the insolvent company and the pledgee. American, etc. Co. *v.* German, 126 Ala. 194 (1900).

4 Sachs *v.* Ashby & Co., 88 L. T. Rep. 393 (1903).

5 Sedgwick *v.* Macy, 24 N. Y. App. Div. 1 (1897), the court refusing to follow the English rule on this subject.

6 Culver *v.* Wilkinson, 145 U. S. 205 (1892). The pledgee may claim credits for defending the pledge against attacks by lawsuits, and in some

owner of the stock, where the pledgee's attorney advises him that there is no defense.[1] A pledge for any "note or claim against me" applies to a claim against the pledgor's firm.[2] The pledgee cannot be taxed on the stock.[3] Questions relative to the right of pledgees to maintain suits the same as stockholders are considered elsewhere.[4]

§ 469. *Pledgee need not retain or return to the pledgor the identical certificates or shares of stock which were pledged, but must have equal quantity always on hand.*—One share of stock does not differ from another share of the same capital stock. Each is but an undivided interest in the corporate rights, privileges, and property.[5] Accordingly, it is held that a pledgee of stock need not retain in his possession the identical shares of stock which were pledged to him, but that the rights of the pledgor are fully preserved if similar stock is retained by the pledgee until the termination of the pledge.[6] The pledgee must have on hand at all times the full

cases for adding to its value by aiding the subject of the pledge. Cridge's Appeal, 18 Atl. Rep. 1010 (Pa. 1890).

1 Loomis *v.* Reimers, 119 Iowa 169 (1903).

2 Hallowell *v.* Blackstone Nat. Bank, 154 Mass. 359 (1891). A pledge of stock to secure future liabilities does not apply to past liabilities. Franklin Bank *v.* Harris, 77 Md. 423 (1893).

3 See § 564, note, *infra.*

4 See § 735, *infra.*

5 Quoted and approved in Smith *v.* Becker, 129 Wis. 396 (1906). "The certificate of shares of stock is not the property itself, it is but the evidence of property in the shares. The certificate, as the term implies, but certifies the ownership of the property and rights in the corporation represented by the number of shares named. A certificate of the same number of shares, although printed upon different paper and bearing a different number, represents precisely the same kind and value of property as does another certificate for a like number of shares of stock in the same corporation. It is a misconception of the nature of the certificate to say that a return of a different certificate or the right to substitute one certificate for another is a material change in the property right held by the broker for the customer." Richardson *v.* Shaw, 209 U. S. 365 (1908); aff'g 147 Fed. Rep. 659.

6 Caswell *v.* Putnam, 120 N. Y. 153 (1890); Skiff *v.* Stoddard, 63 Conn. 198 (1893); Nourse *v.* Prime, 4 Johns. Ch. 490 (1820); s. c., 7 Johns. Ch. 69 (1823); Horton *v.* Morgan, 19 N. Y. 170 (1859); Barclay *v.* Culver, 30 Hun, 1 (1883); Noyes *v.* Spaulding, 27 Vt. 420 (1855); Atkins *v.* Gamble, 42 Cal. 86 (1871); Price *v.* Grover, 40 Md. 102 (1874); Gilpin *v.* Howell, 5 Pa. St. 41 (1847); Hardenbergh *v.* Bacon, 33 Cal. 356 (1867); Taylor *v.* Ketchum, 35 How. Pr. 289 (1867); Thompson *v.* Toland, 48 Cal. 99 (1874); Le Croy *v.* Eastman, 10 Mod. 499 (1722); Harding *v.* Field, 1 N. Y. App. Div. 391 (1896); Douglas *v.* Carpenter, 17 N. Y. App. Div. 329 (1897); Hubbell *v.* Drexel, 11 Fed. Rep. 115 (1882); Boylan *v.* Huguet, 8 Nev. 345 (1873). *Cf.* Langton *v.* Waite, L. R. 6 Eq. 165 (1868). It is sufficient if the pledgee has at all times in his possession ready for delivery similar certificates for the same number of shares. Bell *v.* Bank of California, 94 Pac. Rep. 889 (Cal. 1908). In the case of Dykers

amount of the stock pledged, whether the debt secured is due or not, since the law will not allow the pledgee to speculate or deal with the stock of another as though it were his own.[1] It is not enough that he can at once procure the stock from one to whom it is loaned,[2] or that he had sufficient on hand for the plaintiff pledgor, but not enough for all the pledgors whom he had at any particular time.[3] The law requires him to set aside as much stock

v. Allen, 7 Hill, 497 (1844), the pledgee at one time seemed to have had no stock on hand. In selling the pledgor's stock on notice for non-payment of the debt, the pledgee need not sell the identical stock pledged. Berlin v. Eddy, 33 Mo. 426 (1863). Where a depository of stock to vote the same for five years agrees to return the stock at the end of that time, or an equal amount of stock, together with dividends, any future assessments on the stock to be paid by the person making the deposit, and, if not paid, then the depository, in case he pays the assessment, to be entitled to repayment from the dividends, with interest, and the assessments are not paid and the stock is sold, and at the end of five years the depository tenders back other stock with assessments paid, the depository is entitled to repayment of such assessments. Moore v. Bank of British Columbia, 106 Fed. Rep. 574 (1901), modified in 125 Fed. Rep. 849. Where an agent with whom stock is deposited transferred in blank causes the same to be transferred to himself on the books of the company and then hypothecates the same, and afterwards dies, the real owner of the stock may claim other stock in the same corporation which such agent had at the time of his death. The identity of the certificates is immaterial. Marshall v. Marshall, 11 Colo. App. 505 (1898). In Mayo v. Knowlton, 134 N. Y. 250 (1892), the court said: "The stock had no ear-mark; one share was the same as another, and could not be identified or distinguished therefrom." Where a customer knows that the broker is insolvent, and has not kept on hand the stock which the customer had deposited on margin, and the broker purchases stock in order to satisfy the demand of the customer, the transaction is a preference, in violation of the statutes of Massachusetts. Weston v. Jordan, 168 Mass. 401 (1897). In Allen v. Dubois, 117 Mich. 115 (1898), it is held that a pledgee is bound to return to the pledgor the identical shares which are pledged, and is liable for conversion if he has sold them, and that it is immaterial that he had on hand at all times and tendered back an equal number of shares. So also in the case of Lamb, etc. Co. v. Lamb, 119 Mich. 568 (1899), where a party claiming to be the real owner of stock filed a bill to compel the holder of such stock to deliver up the same, but it appeared that the defendant had already disposed of the stock before the commencement of the suit, the court refused to grant relief, even though it further appeared that the defendant had other stock in the same corporation equal in amount to the stock in issue.

1 *Ex parte* Dennison, 3 Ves. Jr. 552 (1797); Taussig v. Hart, 58 N. Y. 425 (1874); Thompson v. Toland, 48 Cal. 99 (1874); Hubbell v. Drexel, 11 Fed. Rep. 115 (1882). The pledgor may waive this restriction by express agreement. Ogden v. Lathrop, 65 N. Y. 158 (1875).

2 Allen v. Dykers, 3 Hill, 593 (1842); aff'd, Dykers v. Allen, 7 Hill, 497 (1844); *Ex parte* Dennison, 3 Ves. Jr. 552 (1797).

3 Fay v. Gray, 124 Mass. 500 (1878).

as has been pledged to him. A "loan" of stock returnable on demand transfers the title in one sense, inasmuch as the borrower may return similar stock of the same amount, in place of returning the identical stock, which was loaned to him.[1]

§ 470. *Pledgee's liability on subscription and statutory liability on stock.*[2]—A pledgee who has obtained registry on the corporate books appears to third parties as a full stockholder. Accordingly, in case the corporation becomes insolvent, the registered pledgee is held liable on his stock, as though he were an absolute stockholder. In order to avoid this danger, the law allows the pledgee to have the pledged stock registered on the corporate books in the name of a nominee of the pledgee.[3] Where such a registry is obtained, the pledgee has the advantage of the control of the stock, and at the same time escapes the danger of liability as a stockholder.

§ 471. *Pledgee has no right to sell or repledge the stock even temporarily, except upon notice, unless the debt is assigned with the stock.*—"Equity will not tolerate a separation of the pledge from the debt, and they must stand together, and will force upon a wrong-doer the character of a trustee, and thus compel him to do justice." Such is the language of the New York court of appeals.[4] The pledgee of stock cannot legally part with the possession of the stock by a sale or repledge of it, except as he transfers the debt which the stock secures. If he does so he is guilty of a conversion,[5]

1 Fosdick *v.* Greene, 27 Ohio St. 484 (1875); Dykers *v.* Allen, 7 Hill 497 (1844). See also § 445, *supra.*

2 See § 247, *supra.*

3 Newry, etc. Ry. *v.* Moss, 14 Beav. 64 (1851). See § 466, *supra.*

4 Bennett *v.* Austin, 81 N. Y. 308, 322 (1880). *Cf.* Easton *v.* Hodges, 18 Fed. Rep. 677 (1883).

5 Oregon, etc. Co. *v.* Hilmers, 20 Fed. Rep. 717 (1884); Gass *v.* Hampton, 16 Nev. 185 (1881). Brokers holding a certificate of stock as security for the balance of the purchase price due from the customer are pledgees, and if the broker, in violation of the express contract, repledges or sells such stock without authority from the customer, he is guilty of a conversion, for which trover will lie. Chew *v.* Louchheim, 80 Fed. Rep. 500 (1897). The case of *Ex parte* Sargent, L. R. 17 Eq. 273 (1874), contained a dictum giving a contrary rule; but France *v.* Clark, L. R. 22 Ch. D. 830 (1883), disapproves such dictum and says: "As a general rule the pawnee of chattels has no right to sell them, unless a time was originally fixed for their redemption, and that time has expired, or unless he has made a demand upon the pawnor for the payment of what is due him." Fay *v.* Gray, 124 Mass. 500 (1878), holds that the pledgee has no right to sell, lend, or repledge the stock. In the notes in 21 Am. Law Reg. (N. S.) 454–461, a contention is made that the pledgee should be allowed to repledge, but it is admitted that the weight of authority holds otherwise. The following cases are cited: Merchants' Nat. Bank *v.* Trenholm, 12 Heisk. (Tenn.) 520 (1873); First Nat. Bank *v.* Bryce, 19 Am. L. Reg. (N. S.) 503 (1880); Work *v.* Bennett, 70 Pa. St. 484 (1872); Wood *v.* Hayes, 81 Mass. 375 (1860); Thompson *v.* Patrick, 4 Watts (Pa.), 414 (1835); and see

and in New York state may be arrested.[1] In Pennsylvania it is a penal offense for the pledgee to repledge the stock.[2] Even where, apparently, the pledgor would not be injured by the pledgee's separating the stock from the debt and transferring the stock pledged as collateral security, yet the law rigidly protects the interests of the debtor and pledgor, and will not compel him to submit to the danger of such transfers by the pledgee. There may, of course, be an express agreement or understanding to the contrary.[3] Where an agent has wrongfully pledged his principal's stock, and the pledgee then wrongfully converts the pledge, the principal may ratify

§ 469, *supra*. In Lawrence *v.* Maxwell, 53 N. Y. 19 (1863), the court said: "Ordinarily, and in the absence of an agreement or assent by the pledgor, the pledgee would have no right to use the thing pledged, and a use of it would be illegal. But, under special circumstances depending somewhat upon the nature of the pledge, and in all cases with the assent of the pledgor, express or implied, the property pledged may be used by the pledgee in any way consistent with the general ownership and the ultimate rights of the pledgor." Where the pledgee has an option to purchase the stock, but, instead of purchasing, he repledges it illegally, the pledgor may consider this as an exercise of the option. Upham *v.* Barbour, 65 Minn. 364 (1896). Where the pledgee transfers the stock to another person as security that a proposed contract between the corporation and another corporation will be ratified at a stockholders' meeting, and such other person votes said stock at such stockholders' meeting, the pledgee is guilty of conversion of the stock. Upham *v.* Barbour, 65 Minn. 364 (1896). Where a pledge is made to secure the return of certain stock and bonds to a third party, and the pledgor dies, the pledgee may pledge the securities to bring about the return of such stock and bonds. M'Cartney *v.* Earle, 115 Fed. Rep. 462 (1902).

1 Oregon, etc. Co. *v.* Hilmers, 20 Fed. Rep. 717 (1884); Barry *v.* Calder, 48 Hun, 449 (1888); aff'd, 111 N. Y. 684. See also § 457, *supra*, and § 576, *infra*. A pledgee of bonds may maintain an action for conversion thereof and may cause the arrest of a repledgee who has disposed of such bonds. Blanck *v.* Nelson, 39 N. Y. App. Div. 21 (1899).

2 Act of May 25, 1878, modified as to purchases by broker on margin by act of June 10, 1881 (P. L. 1881, 107). Section 1784 of the code of Alabama forbids an assignment of a pledge without an assignment of the debt it secures. Dexter *v.* McClellan, 116 Ala. 37 (1897).

3 Chouteau *v.* Allen, 70 Mo. 290 (1879). A broker has no right to repledge stock held by him for a customer to secure margins, and, even if the customer authorizes him to repledge, this authority sustains a repledge only to the extent of the amount due from the customer, and the broker must be ready at all times to return the stock to the customer upon the latter paying the debt. In this case it was held also that the repledgee, under the usual transfer in blank on the back of the certificate, is not a *bona fide* pledgee. German Sav. Bank *v.* Renshaw, 78 Md. 475 (1894). The right of the pledgee to repledge may exist by force of a custom understood by both parties. Chamberlain *v.* Greenleaf, 4 Abb. N. Cas. 178 (1878).

the act of his agent and sue the pledgee for conversion. The pledgee may offset the amount actually due him.[1]

A pledgee may assign the principal debt to a third person and "give him the benefit of the collateral securities to secure the payment of the principal debt. So long as nothing is done to deprive the pledgor of the right to redeem on payment of the amount due on the principal debt, the pledgor is not injured."[2] "Nothing is better settled than the right of a transferee of a pledge to hold it until the debt for which it was given is paid."[3] Where a pledgee repledges both the note and the stock, an agreement between the original pledgor and the second pledgee, whereby the second pledgee sells the stock and takes in payment notes of the purchaser, is illegal as regards the rights of the first pledgee. As against the second pledgee the first pledgee is entitled to be credited with the value of the

1 Smith *v.* Savin, 141 N. Y. 315 (1894).

2 Chapman *v.* Brooks, 31 N. Y. 75, 84 (1865); Duncomb *v.* New York, etc. R. R., 84 N. Y. 190, 208 (1881). The pledgee may assign his interest in the pledge and transfer the pledge to such assignee. Overton, Liens, §§ 168, 172; Schoul. Bailm. (2d ed.), § 218, etc. Story, Bailm., § 324, says the pawnee "may sell or assign all his interest in the pawn, or he may convey the same interest conditionally, by way of pawn to another person, without in either case destroying or invalidating his security." See also Talty *v.* Freedman's Sav. etc. Co., 93 U. S. 321 (1876); 2 Kent, Com. 579; Jarvis *v.* Rogers, 13 Mass. 105 (1816); 15 Mass. 389, 408; Mores *v.* Conham, Owen, 123 (1610); Ratcliffe *v.* Davis, 1 Bulst. 29 (1611); Anon., 2 Salk. 522 (1694). In Lewis *v.* Mott, 36 N. Y. 394 (1867), where, after the debt was due and unpaid, the pledgee turned over the debt and security to another without a foreclosure or sale on notice, the court held that the latter could hold the collateral stock until the pledgor tendered the amount of the debt. The latest English cases hold that, although the repledge may be wrong, yet that the pledgor cannot reclaim the stock from the repledgee until the former pays the debt for which the pledge was made. Donald *v.* Suckling, L. R. 1 Q. B. 585 (1866); Halliday *v.* Holgate, L. R. 3 Exch. 299 (1868). Where a broker, holding stock in pledge on a margin, repledges it without the consent of his customer, it has been held that he cannot recover the value of the stock from the customer on a tender of the certificate. Clarkson *v.* Snider, 5 Can. L. T. 587 (1885). In Langton *v.* Waite, L. R. 6 Eq. 165 (1868), the court said that the law was clear that, in the absence of express contract to the contrary, a pawnee cannot sell without the express permission of the owner, and that if he does, the owner can charge him with the excess of the price over the loan. The court, however, seemed to think that the pledgee could repledge the stock. In Gould *v.* Farmers' L. & T. Co., 23 Hun, 322 (1880), the court said that the pledgee might repledge the stock so far as he had an interest in it. A pledgor cannot hold the pledgee liable for selling the note after it became due and unpaid, where the collateral was transferred with the note. Carson *v.* Old Nat. Bank, 37 Wash. 279 (1905).

3 Philler *v.* Yardley, 62 Fed. Rep. 645, 649 (1894).

stock at the time of the sale.[1] Except in New York and Massachusetts, a broker has no right to pledge his customers' securities unless expressly authorized so to do.[2] A receipt given by a broker to a customer reciting first that certain stocks had been deposited as security, and, second, that certain stocks purchased on a margin might be hypothecated, will be strictly construed, and the first mentioned stocks cannot legally be rehypothecated under such receipt; hence the title does not pass except to a *bona fide* pledgee or purchaser, and if they have passed, any surplus in such stocks will be applied to the first mentioned stock.[3]

The liability of a pledgee who turns in the pledge on a reorganization is considered elsewhere.[4]

§ 472. *Purchasers or pledgees of stock from pledgee with notice are not protected.*—A person who purchases or takes in pledge stock which he knows it held in pledge by the person from whom he takes it is not a *bona fide* holder of such stock, and is not entitled to the rights of such. At the best he stands merely in the place of the pledgee from whom he receives the stock. He must restore the stock to the owner in case the pledgee would be obliged to restore it, had no second sale or pledge been made.[5] The second pledgee or vendee, with notice that he was taking pledged stock, has no rights which the first pledgee has not. He is but an equitable assignee of the latter, and can be compelled by the owner to deliver the stock in any case where the first pledgee could be so compelled.[6]

1 Pauly *v.* Wilson, 57 Fed. Rep. 548 (1893).

2 See § 467, *supra.*

3 Thomas *v.* Taggart, 209 U. S. 385 (1908).

4 See § 468, *supra.*

5 Quoted and approved in German Sav. Bank *v.* Renshaw, 78 Md. 475 (1894).

6 Any fact, such as usury in the second transaction, which prevents the second pledgee or purchaser from being a *bona fide* purchaser, applies to a repledgee of stock. The repledgee is not protected. Felt *v.* Heye, 23 How. Pr. 359 (1862); Little *v.* Barker, 1 Hoffm. Ch. 487 (1840). So also in Pennsylvania, where the repledgee takes in consideration of a pre-existing indebtedness. Ashton's Appeal, 73 Pa. St. 153 (1873). In general, see also Duncan *v.* Jaudon, 15 Wall. 165 (1872); Shaw *v.* Spencer, 100 Mass. 382 (1868); Ellis's Appeal, 8 W. N. Cas. (Pa.) 538 (1880); Porter *v.* Parks, 49 N. Y. 564 (1872); Chouteau *v.* Allen, 70 Mo. 290 (1879). A pledgee taking with notice that the pledge is in breach of trust is not protected. Kern's Estate, 176 Pa. St. 373 (1896). Even though it be illegal for an irrigation company to subscribe for the stock of a land company, yet where it does so subscribe and turns in property in payment, and the stock is taken in the name of its secretary, individually and not as secretary, the company may compel him to turn over the stock, even though he has pledged it for his personal debt, the pledgee having taken with knowledge of all the facts. Bear River, etc. Co. *v.* Hanley, 15 Utah, 506 (1897). In Hampton, etc. R. R. *v.*

The same rule applies whether the pledgee assigns both the debt and the stock, or repledges the stock alone.[1] Where a pledgee has been fraudulently induced to sell the stock to a person, the pledgor may file a bill in equity against such person to obtain a retransfer of the stock to himself and also the dividends which have been paid, and need not join the pledgee as a party.[2] A person who receives stock with notice that the holder is under contract obligations to deliver it to another may not be protected.[3] A pledgee who knows at the time he accepts the pledge that the stock is already subject to another lien, takes subject thereto.[4]

Where a bank takes in pledge from a broker stock which the bank knows belongs to a customer of the broker, the bank cannot hold such stock as against the customer, even though the stock was indorsed in blank on the back of the certificates.[5] A pledgee who knows that the pledgor is acting as agent, or that the pledgor holds the stock in pledge, must take notice of the powers of such pledgor.[6] Where the pledgee sells the debt and stock to another person, and the latter sells the stock without the debt, and the purchaser sells the stock to still another person, the various sales being a conspiracy, the pledgor may sue the various purchasers for conversion, and need not tender the debt or make any demand before commencing suit.[7] Where the owner of stock and bonds turns them over to a trust company to sell as it should deem best and return one-half

Bank, 48 S. C. 120 (1897), where a railroad had issued stock and bonds to a finance company for money to be paid in the future, and the finance company had not paid the money, but on the contrary had pledged some of the stock to a bank, the court held that the bank was bound to take notice of a provision in the charter to the effect that no sale of stock should relieve an original owner from his obligations to the company, and hence was not protected as pledgee.

1 Felt *v.* Heye, 23 How. Pr. 359 (1862). The repledgee cannot claim the benefit of the debt not assigned to him. Felt *v.* Heye, 23 How. Pr. 359 (1862). See also Talty *v.* Freedman's, etc. Co., 93 U. S. 321 (1876).

2 Smith *v.* Lee, 77 Fed. Rep. 779 (1896).

3 See §§ 766*c*, 852, *infra*, and § 317, *supra*.

4 Guaranty T. Co. *v.* Atlantic, etc. R. R. 138 Fed. Rep. 517 (1905). A purchaser of certificates of stock who knows that the stock has been pledged is not protected as against the pledgee. New Jersey, etc. Co. *v.* Bodine, 60 Atl. Rep. 387 (N. J. 1905).

5 Westinghouse *v.* German Nat. Bank, etc., 188 Pa. St. 630 (1898). In New York a broker must have either in possession or control an amount of stock equal to that which he is carrying for a purchaser on a margin. If he repledges it without authority and it then passes into the hands of one who takes it with notice of the customer's claim, the customer may reclaim the stock. Strickland *v.* Magoun, 119 N. Y. App. Div. 113 (1907); aff'd, 190 N. Y. 545.

6 Matteson *v.* Dent, 112 Iowa, 551 (1900). See also § 321, *supra.*

7 Usher *v.* Van Vranken, 48 N. Y. App. Div. 413 (1900).

of the proceeds, and the trust company in violation of the trust pledges them for a past-due debt, the remedy of the owner against the pledgee is not for conversion, but for an accounting.[1] The question of what constitutes *bona fide* holdership is discussed elsewhere.[2]

§ 473. ***Bona fide repledgees or purchasers of pledged stock are protected — Pledgor's remedies — Marshaling the assets.***—Where, however, a pledgee of certificates of stock indorsed in blank takes the certificates and sells or pledges them to another, who takes such certificates in good faith and for value, and without notice that his vendor or pledgor held them as a pledge, the purchaser or pledgee from the pledgee is as fully protected in his rights as though the person with whom he dealt was the absolute owner of the stock.[3]

1 Smith *v.* American Nat. Bank, 89 Fed. Rep. 832 (1898).

2 See § 293, *supra.* A stockholder does not transfer his stock by merely putting his name in the first line of a transfer reading "Know all men by these presents that .... do hereby appoint," etc., without signing his name at the end of the transfer, as called for by the form, and hence a purchaser of the certificate from a pledgee of the same is not protected and a suit lies to compel the purchaser to give up the stock, and if the corporation has been merged into another corporation, the purchaser must account for what he received from such other corporation. Treadwell *v.* Clark, 114 N. Y. App. Div. 493 (1906); aff'd, 190 N. Y. 51. In this case when affirmed on appeal it was held that where a certificate of stock is stolen from a pledgee and the transfer on the back is insufficient in that the pledgor's name was written not at the end of the transfer but at the beginning, the pledgor may by a bill in equity redeem the stock from a person who purchased it from the thief. A suit in equity lies inasmuch as an act is involved as to the amount due and the dividends received. The ten-years statute of limitations applies, there being no acquiescence or unreasonable delay. Treadwell *v.* Clark, 190 N. Y. 51 (1907).

3 The important case of McNeil *v.* Tenth Nat. Bank, 46 N. Y. 325 (1871), was on the rights of a *bona fide* repledgee of stock, and fully sustains the general rule. See also Fatman *v.* Lobach, 1 Duer, 354 (1852); Nelson *v.* Owen, 113 Ala. 372 (1896); Wood's Appeal, 92 Pa. St. 379 (1880); Gass *v.* Hampton, 16 Nev. 185 (1881); Mount Holly, etc. Co. *v.* Ferree, 17 N. J. Eq. 117 (1864); Otis *v.* Gardner, 105 Ill. 436 (1883); *Ex parte* Sargent, L. R. 17 Eq. 273 (1874); Cherry *v.* Frost, 7 Lea (Tenn.), 1 (1881), the court saying that in general a pledgee of personal property cannot convey a good title to another; but "if the owner intrusts to another not merely the possession of the property, but also written evidence over his own signature of title thereto and of unconditional power of disposition over it, the case is vastly different." Thus, a pledgee, without notice, of bonds from a pledgor, who turns out to have held the bonds as securities for the cancellation of a mortgage, is protected in his pledge. Saloy *v.* Hibernia Nat. Bank, 39 La. Ann. 90 (1887). Where the owner of stock which is indorsed in blank leaves it with his broker for safe keeping and the broker fraudulently pledges it, the pledgee, being *bona fide*, is protected. Shattuck *v.* American Cement Co., 205 Pa. St. 197 (1903). Where the pledgee of stock

This rule arises, not on the ground that the certificate of stock is negotiable, but for the reason that the owner is held to have enabled his pledgee to sell the stock as the pledgee's own, and that as between the owner and the *bona fide* purchaser or pledgee from the pledgee the owner must bear the loss. The law of estoppel prevents his denying the right of his pledgee to sell or pledge, as against a *bona fide* purchaser or pledgee from the pledgee. So, also, this principle arises under the well-established rule that, where one of two innocent parties must suffer from the fraud of a third, the loss must fall upon him who enabled the third party to perpe-

transfers them into his own name on the books of the company and takes out new certificates, a *bona fide* purchaser or pledgee from him is protected. Westinghouse *v.* German, etc. Bank, 196 Pa. St. 249 (1900). A *bona fide* pledgee of a certificate of stock from an agent having power to pledge, but who had so pledged the stock for purposes not authorized by the owner, is nevertheless protected, and even though such pledgee sells the stock at private sale without notice he cannot be held liable if the stock was not worth more than the debt secured. Brittan *v.* Oakdale, etc., 124 Cal. 282 (1899). A *bona fide* pledgee of fraudulently issued warehouse receipts can enforce them only to the extent of the loan and interest. Corn, etc. Bank *v.* American, etc. Co., 163 N. Y. 332 (1900). In Ortigosa *v.* Brown, 47 L. J. (Ch.) 168 (1878), the court, following the English doctrine that an unregistered transferee of certificates of railway stock has no more rights than his transferrer, refused to protect the unregistered repledgee of stock. A *bona fide* purchaser of pledged stock is protected in his title. Krouse *v.* Woodward, 110 Cal. 638 (1895). Where stock is pledged as collateral, and the pledgee sells to a *bona fide* purchaser without notice, such purchaser is protected, even though he at the same time purchases the note for which the stock is collateral. Strickland *v.* Leggett, 21 N. Y. Supp. 356 (1892). A *bona fide* transferee, absolutely or in pledge from a broker, holding his customer's stock in pledge, is protected to the extent of the transfer, the transferee having no notice of the fact that the stock was held in pledge by the broker. Thompson *v.* Toland, 48 Cal. 99 (1874); Zulick *v.* Markham, 6 Daly, 129 (1875); and see many cases in § 321, *supra*. These cases apply equally whether the person transferring contrary to law is an agent or a pledgee, and equally, also, whether he sells or only repledges. In a decision in Maryland an important distinction is drawn between the rights of a *bona fide* purchaser and a *bona fide* pledgee. It is held that the usual form of transfer on the back of certificates of stock, signed by the stockholder, with the name of the transferee left blank, does not protect a *bona fide* pledgee. The pledgee is chargeable with notice of all the facts and equities. Under this decision it would seem to be necessary in Maryland to enlarge the terms and form of the usual assignment and power of attorney on the back of certificates of stock. German Sav. Bank *v.* Renshaw, 78 Md. 475 (1894), a case wherein a broker holding stock on a margin repledged it at a bank. Where the pledgee repledges stock to a *bona fide* pledgee, and the original pledgor sues the first pledgee for conversion, the original pledgor cannot then sue the repledgee on the theory that the repledge was not properly made. Colton *v.* Oakland Bank, etc., 137 Cal. 376 (1902).

trate the fraud. In Nebraska it has been held that a stockholder whose stock has been wrongfully pledged may enjoin the corporation from allowing a transfer by the pledgee who has applied for the same, and the pledgor need not allege that the pledgee took with notice. It is for the pledgee to intervene and prove that the pledge was *bona fide*.[1] If the pledgee has repledged the stock, the owner can obtain the stock only by paying to the repledgee the amount of the latter's advancement to the first pledgee.[2] In case of a wrongful repledge the pledgor may claim the proceeds or redeem the stock from the second pledgee.[3] Where the second pledgee has sold the stock for non-payment of his debt, the first pledgor may claim the excess, the amount retained by the repledgee being more than the first pledgor's debt.[4] The pledgor of stock, under these rules, has practically no protection as to his stock ex-

1 Reynolds *v.* Touzalin Imp. Co., 62 Neb. 236 (1901).

2 Wood's Appeal, 92 Pa. St. 379 (1880); Fatman *v.* Lobach, 1 Duer, 354 (1852); *Ex parte* Sargent, L. R. 17 Eq. 273 (1874); Cherry *v.* Frost, 7 Lea (Tenn.), 1 (1881), holding, however, that payments on the subscription by the owner subsequently to the repledge do not inure to the benefit of the repledgee. See, in general, Donald *v.* Suckling, L. R. 1 Q. B. 585 (1866); Moore *v.* Conham, Owen, 123 (1610); Ratcliff *v.* Davis, Yelv. 178 (1611); Jarvis *v.* Rogers, 15 Mass. 389 (1819). See s. c., 13 Mass. 105.

3 Chamberlain *v.* Greenleaf, 4 Abb. N. Cas. 178 (1878).

4 *Re* Bonner, 8 Daly, 75 (1878). See also Fowle *v.* Ward, 113 Mass. 548 (1873). Where a broker repledges stock held by him in pledge and then becomes insolvent, the original pledgors may claim a surplus remaining after a sale of the stock by the repledgee. Such surplus does not belong to the estate of the broker. Even though the broker had also pledged with such stock certain securities which had been deposited with him, not in pledge, but to sell, the owner of such securities can share proportionately in such surplus, but has no right superior to the pledgor's. Rhinelander *v.* National City Bank, 36 N. Y. App. Div. 11 (1899). Where the pledgee repledges the stock to a bank and then goes into bankruptcy, and the bank after selling all the securities held by it as pledgee of the bankrupt has a surplus equal to the amount of the stock so repledged, the original pledgor is entitled to such excess. *In re* Swift, 108 Fed. Rep. 212 (1901). Where the pledgee repledges the stock in breach of trust, the original pledgor is entitled to the surplus after the repledgee has sold his stock and paid his debt, even though the original pledgee is in bankruptcy. Hutchinson *v.* Le Roy, 113 Fed. Rep. 202 (1902). Even though a broker repledges the stocks of various customers without authority from them, the pledgee is protected if he had no knowledge of the fact that the broker did not own the stocks; and if the pledgee, after selling out the stocks on notice, has a balance remaining both of money and stocks, the customers prorate as to such balance, even though the stocks of some of them were not sold by the pledgee. This rule is based on the principle that if they all had united in redeeming from the pledgee they would have borne the loss *pro rata*. Whitlock *v.* Seaboard Nat. Bank, 29 N. Y. Misc. Rep. 84 (1899).

cept the honesty and responsibility of his pledgee. The *bona fide* purchaser or pledgee from the pledgee is equally protected whether the certificates of stock are indorsed by the pledgor or vendor, or are indorsed in blank by some previous holder.[1] The repledgee or vendee is held to be a *bona fide* holder, however, only where he would be held so to be in cases of promissory notes and other similar cases.[2] The vendor of stock who retains it as pledgee may, by agreement with the vendee, pledge it to secure a debt of the vendee, and yet have a lien on the stock prior to a second pledge from the vendee.[3] Where a railroad pledges its bonds to a contractor to secure payments to be made to him, and he then pledges the bonds to a person who advances money to a sub-contractor, and such person wrongfully repledges the bonds to a bank to secure those moneys and also other moneys, the original pledgee may hold the second pledgee liable for the illegal pledge to the bank.[4]

The general rule of law is that a pledgee holding various securities may resort to any one security which he chooses. He is not bound to resort to those securities upon which other creditors have no claim.[5] Under such circumstances, however, as give a

1 Gass *v.* Hampton, 16 Nev. 185 (1881).

2 See § 293, *supra*. The word "trustee" on the face of the certificate is notice, and deprives the pledgee of his character of being a *bona fide* holder. See § 325, *supra*. In New York a pledgee is not *bona fide* when he takes bonds in pledge for a precedent debt. Duncomb *v.* N. Y. etc. R. R., 84 N. Y. 190, 204 (1881); Gould *v.* Farmers' L. & T. Co., 23 Hun, 322 (1880). A pledgee of stock for an antecedent debt is not a *bona fide* holder. Shuster *v.* Jones, 58 S. W. Rep. 595 (Ky. 1900). A pledgee is not *bona fide* when the name of another pledgee in the certificate is erased and his own inserted. Denny *v.* Lyon, 38 Pa. St. 98 (1860). Where a party receives from his debtor certain stock as security for the purchase of other stock and holds it for the old debt, and sells it after being notified that it belongs to another party, he is liable to the latter party for conversion. Niles *v.* Edwards, 90 Cal. 10 (1891). A registered municipal bond with coupons attached is negotiable, where the name of the payee is left blank on the face of the bond, even though in books kept for that purpose the name of the registered owner is entered. Hence a purchaser in good faith of such bond is protected, although the bond was stolen. A *bona fide* pledgee is likewise protected. Manhattan Sav. Inst. *v.* N. Y. etc. Bank, 170 N. Y. 58 (1902). A bank may be a *bona fide* pledgee of stock from its cashier, even though such stock is in the name of a third person and is indorsed by the latter. Brady *v.* Mount Morris Bank, 65 N. Y. App. Div. 212 (1901). Even though no transfer of the stock on the books of the company is demanded, a pledge of stock in consideration of the extension of a past due debt may make the pledgee a *bona fide* pledgee. Just *v.* State Sav. Bank, 132 Mich. 600 (1903).

3 Shinkle *v.* Vickery, 130 Fed. Rep. 424 (1904).

4 Interurban etc. Co. *v.* Hayes, 191 Mo. 248 (1905).

5 Jennings *v.* Loeffler, 184 Pa. St.

court of equity power so to do, especially where a repledgee has other collateral for his debt, a court of equity may marshal the assets and compel resort to such other collateral first.[1] Where the pledgee has repledged the stock illegally to *bona fide* holders, the latter, upon being informed of the fact by the first pledgor, are bound to apply the proceeds of the other securities held by them before resorting to the stock owned by him, the first pledgor.[2]

318 (1898). Where stock is pledged to secure several debts, some of which are secured in other ways, the pledgee may apply the proceeds of the pledge to those debts which are not secured by indorsements. Fall River Nat. Bank *v.* Slade, 153 Mass. 415 (1891). Where the pledgor gives the pledgee the right to say which debt or liability the pledge should be applied to, this right cannot be controlled by the court. Donnally *v.* Hearndon, 41 W. Va. 519 (1895). In a suit to foreclose a pledge of stock where the pledgee has other securities also, the court will not compel the pledgee to sell the other securities first. Work *v.* Ogden, N. Y. L. J., May 20, 1890. In a suit by the pledgee to have the pledge sold, it is no defense that he also has real estate security; nor is it a defense that he has been given control of the company. Weiscopt *v.* Newman, 65 S. W. Rep. 808 (Ky. 1901). In New Jersey it has been held, however, that if the pledgee has also other security, an unsecured creditor of the pledgor may compel the pledgee to resort to such other security first. Bishop, etc. Assoc. *v.* Kennedy, 12 Atl. Rep. 141 (N. J. 1887).

1 Gould *v.* Farmers' L. & T. Co., 23 Hun, 322 (1880); Herbert *v.* Mechanics' Bldg. etc. Assoc., 17 N. J. Eq. 497 (1864), reversing, on this point, Mechanics' etc. Assoc. *v.* Conover, 14 N. J. Eq. 219 (1862). Where the pledgee repledges the stock illegally with other stock, the first pledgor may enjoin the second pledgee from selling the stock until the other stock of the pledgee is sold, and an account rendered, and notice of intent to sell the remainder given. Myers *v.* Merchants' Nat. Bank, 16 N. Y. Supp. 58 (1891). The pledgor himself cannot enjoin a sale by the pledgee, unless the pledgee is insolvent. The pledgor's remedy is at law. Park *v.* Musgrave, 2 Thomp. & C. (N. Y.) 571 (1874). Where a broker pledgee, with the assent of the pledgor, has repledged the stock, the second pledgor having no notice of who the first pledgor is, may hold all stocks until all the debts from the second pledgor to him are paid. A person who gave stock to the first broker to sell is preferred to one who purchased stock on a margin. Willard *v.* White, 56 Hun, 581 (1890). Where pledged stock is repledged and sold out by the repledgee, together with various other stock held as collateral by the repledgee, a court of equity will marshal the assets. Smith *v.* Savin, 9 N. Y. Supp. 106 (1890); aff'd, 69 Hun, 311, and 141 N. Y. 315 (1894). Where the pledgee sells the securities and has a surplus, he cannot interplead between two claimants where he is sued by one of them for more than he admits the surplus amounts to. Dodge *v.* Lawson, N. Y. L. J., April 20, 1892. A pledgee need not resort to the pledge in order to obtain payment, and even if the pledgor becomes insolvent the pledgee may sell out the securities. Chemical Nat. Bank *v.* Armstrong, 59 Fed. Rep. 372 (1893), rev'g 50 Fed. Rep. 798 (1892). See also §§ 476, 763, *infra*, and §§ 456, 457, 460, *supra*.

2 The latter cannot object to the mode of selling the other securities. Smith *v.* Savin, 141 N. Y. 315 (1894), holding, moreover, that the first

Where, by custom, a broker repledges the stock of his customer, together with other stock, the customer cannot insist that the broker's stock be first applied to the debt. Where, however, the customer had not authorized the broker to repledge the stock, then the stock owned by the broker and pledged together with the stock of the customer will first be applied to the debt.[1] If a broker wrongfully pledges stock deposited with him for safe keeping together with stock held by him on a margin, the owner of the former stock is entitled to priority as to the equity of such wrongful pledge by the broker.[2] Where a customer delivers stock to a broker and the broker without his consent transfers it into his own name, the customer may claim the new certificate upon satisfactorily identifying the stock.[3] Where a customer pledges his stock with the broker, and the latter wrongfully repledges it and fails, and the customer notifies the repledgee of his claim and demands notice of any

pledgor may hold such second pledgee liable for a sale without notice, there being no waiver of notice. Where the pledgee wrongfully rehypothecates the pledge, together with other securities, the pledgor may pay the debt due to the repledgee and take all the securities and sell them all out, and may also sue the pledgee for conversion. The court will require the peldgor to indorse upon the judgment for conversion a suitable credit for the amount realized out of such sale of the securities by the pledgor. The court said that if a *bona fide* repledgee is informed of the conversion by the original pledgee, the repledgee is then bound, in case he sells out the securities, to turn over the surplus to the repledgor. The court also held that the repledgee, upon receiving notice, was bound to resort to other collateral before selling the collateral wrongfully repledged by the pledgee to the repledgee. A receiver of the pledgee has no greater rights than the pledgee himself. Union Pac. Ry. *v.* Schiff, 78 Fed. Rep. 216 (1897). Where the pledgee wrongfully repledges the securities, and the original pledgor takes up the securities from the repledgee and agrees to protect the repledgee, the original pledgor cannot subsequently repudiate the transaction and hold the repledgee liable for the securities originally repledged. Union Pac. Ry. *v.* Schiff, 74 Fed. Rep. 674 (1896). Where the pledgor sues the pledgee for conversion, in that the pledgee repledged the collateral, and the pledgor obtains judgment for the difference between the value of the stock and the amount due from the pledgor, and subsequently the pledgee or his receiver recovers back some of the stock so repledged, the pledgor cannot reclaim such stock. Deitz *v.* Field, 10 N. Y. App. Div. 425 (1896).

1 Skiff *v.* Stoddard, 63 Conn. 198 (1893), holding also that a customer who deposits stock with a broker to secure a marginal contract may redeem the same from the assignee of the broker for the benefit of the creditors, but the identity of the stock must be established, and that if there is not sufficient stock to satisfy all claims on that class of stock, the stock is prorated among all claimants. As to rights upon the failure of a broker, see § 457, *supra*.

2 Matter of Mills, 125 N. Y. App. Div. 730 (1908).

3 Mould *v.* Importers', etc. Bank, 72 N. Y. App. Div. 30 (1902).

sale, the repledgee is liable if he sells without notice to the former and turns the surplus over to the assignee of the broker.[1]

Where a pledgor becomes insolvent the question often arises as to whether the pledgee may prove his entire claim against the estate, or whether the pledgee must first realize what he can from the pledge and then present a claim for the deficiency only. The rule is now well established, however, that the pledgee may prove his entire claim against the insolvent estate of the pledgor, and may demand his proportionate part of such estate, the same as though he had no collateral security whatsoever.[2] A creditor

1 Le Marchant *v.* Moore, 79 Hun, 352 (1894); aff'd, 150 N. Y. 209.

2 People *v.* Remington, 121 N. Y. 328 (1890). A secured creditor of an insolvent national bank may prove and receive dividends upon the face of his claim as it stood at the time of the declaration of insolvency, without crediting either his collaterals or collections made therefrom after such declaration, subject always to the proviso that dividends must cease when, from them and from collaterals realized, the claim has been paid in full. Merrill *v.* National Bank, etc., 173 U. S. 131 (1899). A holder of collateral may enforce his claim in the ordinary way by judgment and execution against the debtor, without any deduction for his collateral. Chemical Nat. Bank *v.* Armstrong, 59 Fed. Rep. 372 (1893); Lewis *v.* United States, 92 U. S. 618 (1875). A creditor of a corporation who holds collateral security for his debt cannot be compelled to exhaust such security before resorting to the general assets of the corporation for payment. Doe *v.* Northwestern Coal, etc. Co., 78 Fed. Rep. 62 (1896). The pledgee may prove his entire claim against the insolvent pledgor's estate without first resorting to, surrendering, or accounting for the pledge. *Re* Ives, 11 N. Y. Supp. 655 (1890). See also § 763, *infra.* A pledgee is entitled to a dividend from the pledgor's estate without resorting to his pledge and without delivering it up to the estate. Wheeler *v.* Walton, etc. Co., 72 Fed. Rep. 966 (1896). See also § 476, *infra.* The fact that a creditor's claim is secured by mortgage or otherwise does not affect his right to prove for the full amount of the claim, nor does the fact that he has realized part thereof out of the collateral since the date of the receivership; but in the latter case he is entitled to dividends only until the balance of his debt is satisfied. New York Security, etc. Co. *v.* Lombard Inv. Co., 73 Fed. Rep. 537 (1896). The pledgee may file his claim in the probate court against the pledgor's estate, and may then sell the pledge, and will be entitled to participate in the estate without deduction of the amount realized on the sale, unless he would thereby receive more than the whole debt. Furness *v.* Union Nat. Bank, 147 Ill. 570 (1893). Where a pledgee has realized on his security, he participates in the insolvent estate of the pledgor on only the balance remaining due to him. Philadelphia Warehouse Co. *v.* Anniston Pipe Works, 106 Ala. 357 (1895). In Nebraska, the court, after reviewing the conflicting rules in the different states, held that where a creditor held collateral he must deduct from his claim all that he realizes from the collateral, before he can get a dividend, and must also deliver up his collateral to the receiver. State *v.* Nebraska Sav. Bank, 40 Neb. 342 (1894).

Where a corporation assumes a mortgage and then becomes insolvent, the mortgagor is entitled to a divi-

holding collateral must first exhaust that before holding the stockholders liable on their subscription liability, there being other creditors.[1]

§ 474. *Pledges by agents, trustees, executors, etc., legally and in breach of trust.*—It is within the power of an executor or administrator to pledge shares of stock belonging to the estate, and the pledgee is protected even though he knew that the executor pledged it as an executor.[2] The fact that stock is specifically bequeathed to the executors as trustees does not prevent the executors selling or pledging such stock, and the pledgee or purchaser is protected

dend from its assets on the whole mortgage debt existing at the time of such assumption, even though the mortgagor has foreclosed and realized a part of the debt. Matter of Simpson, 36 N. Y. App. Div. 562 (1899); aff'd, 158 N. Y. 720. Collateral security furnished by the stockholders to a corporate creditor is not to be deducted before the claim participates in the assets of the insolvent corporation, although the rule is different in Maryland where the security was furnished to the corporation itself. Rogers *v.* Citizens', etc. Bank, 93 Md. 613 (1901). Where the stockholder has died and his estate is being distributed, the portion going to the corporation by reason of its lien will not be decreased by the amount of dividends. *In re* Hovey's Estate, 198 Pa. St. 385 (1901). Under the New Hampshire statutes the holder of a mortgage as security for a note cannot prove the full amount of the note in insolvency proceedings, but must first deduct the value of the security; but the rule is otherwise as to an indorsement made by the insolvent party. Bank Com'rs *v.* Security, etc. Co., 70 N. H. 536 (1901). A creditor having security is entitled to his dividends from the general estate in addition to his dividends from the collateral. Detroit T. Co *v.* State Bank, 114 N. W. Rep. 327 (Mich. 1907). In distribution a person holding collateral is entitled to a part of the general estate without considering the collateral. Buttler *v.* Commonwealth, etc. Co., 67 Atl. Rep. 514 (N. J. 1907). A secured creditor in Mississippi can participate in the general assets only after he has credited the value of the collateral. Kretschmar *v.* First Nat. Bank, 43 S. Rep. 474 (Miss. 1907).

1 Welch *v.* Sargent, 127 Cal. 72 (1899). Even though a corporate creditor has realized a part of his debt under the stockholders' statutory liability, yet he may participate in the assets of the corporation as though no part of his debt had been paid. Sacramento Bank *v.* Pacific Bank, 124 Cal. 147 (1899).

2 Goodwin *v.* American Nat. Bank, 48 Conn. 550 (1881); Wood's Appeal, 92 Pa. St. 379 (1880); Carter *v.* Manufacturers' Nat. Bank, 71 Me. 448 (1880); § 329, *supra;* Manhattan Bank *v.* Walker, 130 U. S. 267 (1889). A pledgee from an executor is protected. Gottberg *v.* U. S. Nat. Bank, 13 N. Y. Supp. 841 (1890). If a pledge of stock by an executor is illegal, the pledgee is not protected where, not trusting to the executor's power as executor, he causes the stock to be transferred first to a legatee. Moore *v.* American L. & T. Co., 115 N. Y. 65 (1889). Pledgees from the trustee for antecedent debts are not *bona fide* holders without notice, even though the form of a public sale was gone through. Darling *v.* Potts, 118 Mo. 506 (1893).

and need not inquire into the necessity of the sale or pledge.[1] Where stock is specifically bequeathed to an executor as trustee, and five years thereafter the executor is discharged, but continues as trustee, and two years thereafter he fraudulently pledges the stock as executor, the pledgee is not protected, since the lapse of time was sufficient to put him on inquiry.[2] Where an executor pledges, for his personal debt, stock belonging to the estate, in breach of trust, the pledgee is not protected, even though the corporation issued a new certificate to the pledgee, by mistake, as absolute owner, and he cannot hold the corporation liable for retaining the new certificate, upon its being delivered for transfer to a purchaser with notice.[3] A trustee, on the other hand, has no implied power to pledge or sell corporate stock belonging to the trust.[4] Express power to a trustee to sell and reinvest does not give him power to pledge.[5] An agent's pledges of his principal's stock, in breach of his duty as agent, follow the same rules as where a pledgee repledges the stock given to him in pledge. A *bona fide* holder for value and without notice is protected, while one who takes with notice is not protected. Where, however, the one taking stock in pledge from an agent knows that the latter is acting as agent, he is bound to inquire whether the principal has authorized his agent to pledge the stock, since a power to pledge cannot be presumed from a power to sell.[6] The express power of an agent to sell securities is revoked by the death of the principal, and if he sells thereafter he is liable for damages in conversion.[7] Where an agent wrongfully repledges the stock belonging to his principal and then assigns for the benefit of creditors, and his assignee obtains repossession of the stock by realizing on other securities which were pledged with it, the original owner of the stock may reclaim it.[8] The right of corporations and persons to give and take stock in pledge is considered elsewhere.[9] The authority of a guardian given by the court to sell stock does not authorize him to

1 Schell *v.* Deperven, 198 Pa. St. 600 (1901); Schell *v.* Deperven, 198 Pa. St. 591 (1901). See also § 329, *supra*.

2 Schell *v.* Deperven, 198 Pa. St. 591 (1901). See also § 329, *supra*.

3 Davis *v.* National, etc. Bank, 50 Atl. Rep. 530 (R. I. 1901). Where an executor pledges stock for his own debt, the pledgee knowing the fact so to be, the latter becomes trustee, and the statute of limitations does not run against redemption until after the pledgee has notified the *cestui que trust* of the estate that he holds the stock adversely. Marshall's Estate, 138 Pa. St. 285 (1890). As to who is a *bona fide* holder, see § 293, *supra*.

4 See §§ 323–327, *supra*.

5 First Nat. Bank *v.* Nat. Broadway Bank, 156 N. Y. 459 (1898).

6 See ch. XIX, § 321, *supra*.

7 Matter of Mitchell, 36 N. Y. App. Div. 542 (1899); aff'd, 161 N. Y. 654.

8 Woodside *v.* Graffiin, 91 Md. 422 (1900).

9 See ch. XIX, *supra*.

pledge the stock.[1] Power of an agent to sell does not give him power to pledge for his own use, and where the corporation with knowledge of the facts allows a transfer it is liable to the owner.[2] The power of a corporate agent to sell bonds does not give him power to pledge them even to secure corporate debts. Holders not *bona fide* are not protected.[3] A *bona fide* pledgee of stock indorsed in blank on the back is protected.[4]

Even though brokers in sending stock to a customer endorse it in blank and entrust it to a messenger, and the messenger converts it to his use by having other brokers sell it in good faith, yet such latter brokers are liable to the customer for the value of the stock.[5]

Where the cashier of a bank abstracts bonds held in pledge by the bank, and pledges them for his own purposes, and his administrator pays the debt in order to redeem the bonds, the bank may claim the bonds without repaying what the administrator has paid out.[6] A bucket-shop keeper may be required to restore trust funds which one of his customers has used in gambling in stocks.[7]

§ 475. *Pledgor's remedies.*—The pledgor cannot enjoin a sale of the pledge by the pledgee or by a repledgee, unless the pledgee is insolvent. The pledgor's remedy is at law.[8] The fact that a pledgor claims that the pledgee owes him more money than he owes the pledgee is not sufficient to sustain a bill in equity to enjoin the pledgee from selling the stock in order to pay the amount due. Some other ground of equitable jurisdiction must be set forth.[9]

1 O'Herron *v.* Gray, 168 Mass. 573 (1897).

2 Read *v.* Cumberland Tel. etc. Co., 93 Tenn. 482 (1894).

3 Shaw *v.* Saranac, etc. Co., 144 N. Y. 220 (1904.) Where one party authorizes another party to pledge the former's stock for a certain purpose, and the latter pledges it for a different purpose, the pledgee is not protected if he took the stock with notice. Bowen *v.* Cleary, 35 S. W. Rep. 281 (Ky. 1896).

4 Gilbert *v.* Erie Bldg. Assoc., 184 Pa. St. 554 (1898).

5 Hall *v.* Wagner, 111 N. Y. App. Div. 70 (1906).

6 Rinaker *v.* Dollar, etc. T. Co., 69 Atl. Rep. 43 (Penn. 1908).

7 Joslyn *v.* Downing, etc. Co., 150 Fed. Rep. 317 (1906). See also § 452, *supra*.

8 Park *v.* Musgrave, 2 Thomp. & C. (N. Y.) 571 (1874). *Cf.* note 1, p. 1231, *infra*. Even though the pledgee of bonds has repledged the bonds illegally, yet the pledgor cannot enjoin the repledgee from selling the bonds where there is no allegation that the original pledgee is insolvent. Syracuse, etc. Ry. *v.* Salt Springs, etc. Bank, 28 N. Y. Misc. Rep. 619 (1899). A pledgee of rights to subscribe cannot be enjoined from selling the same on non-payment of the debt, if he is solvent. Ehrich *v.* Grant, 111 N. Y. App. Div. 196 (1906).

9 Elliott *v.* Sibley, 101 Ala. 344 (1893). In a suit in equity by a stockholder to enjoin a sale of his stock by the corporation for a debt due the corporation, the corporation is a necessary party defendant. The complainant must aver a readiness to pay whatever may be found due. Elliott *v.* Sibley, 101 Ala. 344 (1893). In a

Where the pledgee of stock has been guilty of a conversion of it, the pledgor's remedy against him is generally by an action at law for damages. He need not tender to the pledgee the amount of the debt secured by the pledge, since the pledgee may recoup to that extent and thus decrease the damages of the pledgor.[1] Where the

sale by a bank as pledgee, the bank cannot be enjoined on the ground that the president had secretly agreed that the collateral would not be resorted to. Breyfogle *v.* Walsh, 71 Fed. Rep. 898 (1894). Where the pledgee illegally includes another debt in his claims and advertises the stock for sale, and a bill is then filed to enjoin the sale and to redeem, and the pledgee then offers to take the amount justly due, but does not give the pledgor reasonable time in which to pay, and the sale takes place, and the pledgee buys the stock and then sells a part of it, the pledgor in the bill so filed may have damages for the value of all the stock with interest, less the amount justly due. Blood *v.* Erie, etc. Loan Co., 164 Pa. St. 95 (1894). An injunction against a pledgee disposing of stock owned by a certain party, or an attachment upon the interest of that party, does not prevent the pledgee selling the stock if such stock really belonged to the wife of that party. Fourth Nat. Bank, etc. *v.* Crescent, etc. Co., 52 S. W. Rep. 1021 (Tenn. 1897).

1 Allen *v.* Dykers, 3 Hill (N. Y.), 593 (1842); aff'd, Dykers *v.* Allen, 7 Hill (N. Y.), 497; New York, etc. R. R. *v.* Davies, 38 Hun, 477 (1886); Work *v.* Bennett, 70 Pa. St. 484 (1872); Neiler *v.* Kelley, 69 Pa. St. 403 (1871); Langton *v.* Waite, L. R. 6 Eq. 165 (1868); Felt *v.* Heye, 23 How. Pr. 359 (1862); Lewis *v.* Graham, 4 Abb. Pr. 106 (1857); Cortelyou *v.* Lansing, 2 Caines' Cas. 200 (1805); Fisher *v.* Brown, 104 Mass. 259 (1870). However, a later case in Massachusetts—Cumnock *v.* Newburyport Sav. Inst., 142 Mass. 342 (1886)—holds that a tender of payment of a debt is necessary to enable a pledgor to maintain trover for a conversion of property pledged, unless the lien created by the pledge has been otherwise discharged. "After the sale by the pledgee, the pledgor need not make a tender of the amount due nor a demand of the securities before bringing his action. . . . A formal tender of the amount of the notes would have been a useless ceremony, such as the law never requires." Fletcher *v.* Dickinson, 89 Mass. 23 (1863). Where the customer sues the broker for selling the stock illegally, the broker may set up the amount due from the customer, not by way of recoupment, but by way of a lien on the stock. Farrar *v.* Paine, 173 Mass. 58 (1899). A sale by a pledgee without notice is a conversion, and the pledgor may sue for the value of the stock without tendering the debt, but the pledgee may recoup to the extent of a debt. Feige *v.* Burt, 118 Mich. 243 (1898). A pledgor's vendee may tender the amount of the debt and demand the stock as a condition of payment. Trover lies for a refusal of pledgee to deliver. The pledgee is liable for depreciation of stock after such tender. An attachment of stock against the pledgor, but after sale by him, is no defense to the pledgee. Tender is sufficient without paying the money into court. Loughborough *v.* McNevin, 74 Cal. 250 (1887). See also Thompson *v.* St. Nicholas Nat. Bank, 113 N. Y. 325 (1889); aff'd, 146 U. S. 240, and § 461, *supra*. The pledgee sued for conversion may set off the debt due him. Van Shaick *v.* Ramsey, 90 Hun, 550 (1895). Where the pledgee buys the security at the public sale and then sells it, and then sues the pledgor for the deficiency on the first sale, the pledgor may claim a set-off

pledgee sells the debt and stock to another person and the latter sells the stock without the debt, and the purchaser sells the stock to still another person, the various sales being a conspiracy, the pledgor may sue the various purchasers for conversion, and need not tender the debt or make any demand before commencing suit.[1] The pledgor's damages are measured by the market value of the stock at the time of the conversion, together with interest and subsequent damages.[2] The pledgor may be barred from his action for damages by a waiver of the particular act of conversion by the pledgee.[3] He has the option of ratifying the transaction and claiming the proceeds, or he may repudiate the sale and sue for conversion,[4] and in New York state may arrest the pledgee.[5] The remedy at law may be on contract or in tort.[6] The statute of limi-

for the full value of the securities wrongfully resold, and need not make a tender. Rush *v.* First Nat. Bank, 71 Fed. Rep. 102 (1895), reviewing the authorities on tender in such cases. A suit against a pledgee for conversion of stock with a demand for judgment for the difference between the amount due on the debt and the value of the stock, plus dividends, without asking for a redemption of the stock or transfer thereof, is at law and not in equity. Brightson *v.* Claflin Co., 108 N. Y. App. Div., 284 (1905). Where the pledgee gives notice of intent to sell but withdraws it, he must give another notice before selling, and if he sells without such further notice the pledgor may sue for the stock without paying any money into court. Furber *v.* National, etc. Co., 118 N. Y. App. Div., 263 (1907). Under the California code, the pledgor, in order to redeem, must tender the amount due, even though the pledgee has converted the stock. Bell *v.* Bank of California, 94 Pac. Rep. 889 (Cal. 1908).

1 Usher *v.* Van Vranken, 48 N. Y. App. Div. 413 (1900).

2 See ch. XXXV, *infra*. In Fowle *v.* Ward, 113 Mass. 548 (1873), the court said the damages should be "a sum of money which would enable him to purchase seventeen new shares to replace those which have been taken from him, with such additional sum as would indemnify him for the dividends which he has lost since the sale, and also an equitable allowance for interest." Where the pledgee refuses to deliver up the stock upon a tender of the debt he is liable in damages for the value of the stock on the day of the tender and demand, less the amount tendered. Franklin Bank *v.* Harris, 77 Md. 423 (1893).

3 See cases in note 2, p. 1234, *infra*.

4 Atkins *v.* Gamble, 42 Cal. 86, 91 (1871). If there are several pledgors, and the pledge is redeemed, and the pledgee, at the request of one of the pledgors, transfers the stock to third parties, the pledgee is liable to the other pledgors for the loss incurred thereby. Magnus *v.* Queensland Nat. Bank, L. R. 36 Ch. D. 25 (1887); aff'd, L. R. 37 Ch. D. 466.

5 See § 471, *supra*.

6 The form of a complaint or declaration in an action by a pledgor against a pledgee for the conversion of the stock held in pledge may be in tort or in *assumpsit*, but not in both. Stevens *v.* Hurlbut Bank, 31 Conn. 146 (1862). It is a conversion for the pledgee to retain the stock after the principal of the debt is paid, nothing being said about interest. Kullman *v.* Greenebaum, 92 Cal. 403 (1891). A complaint which, after stating that shares of stock had been pledged to

tations commences to run as against the pledgor from the date when the debt becomes due.[1] An illegal sale of the pledge by the pledgee is a conversion, and a complaint for such conversion will not be construed as a complaint for breach of contract.[2] The pledgor may, if he prefers, begin suit in a court of equity, when the pledgee has converted the stock, and compel him either to replace the stock or give compensation in damages. The jurisdiction of a court of equity in such a case has been denied,[3] but in certain cases may be

defendant, avers that "defendant, in consideration of the premises, then and there undertook and promised to plaintiff" to hold the stock only as pledgee, but that, in violation of its promise, defendant sold and converted the stock to its own use, without giving plaintiff notice of the sale, and in which plaintiff seeks to recover as damages the full value of the shares alleged to have been converted, though informal, is good as a complaint in case. Sharpe *v.* Birmingham Nat. Bank, 87 Ala. 644 (1888). This case discussed also the difference between *assumpsit* and case in such an action. In Butts *v.* Burnett, 6 Abb. Pr. (N. S.) 302 (1869), involving the arrest of a broker who had sold the pledge before the note was due, the court said: "It is very questionable, I think, whether a demand after default in payment of the debt for which property is pledged as security will render a refusal to deliver the pledged property a tortious conversion of it. No doubt the pledgor can redeem upon a tender of the debt, or he may recover the difference between the value of the pledge and the debt. But to lay the foundation for an action for conversion, I am of opinion that an offer and demand must be made on the day, and is not sufficient if made after the day on which the debt has become payable." As to the complaint in an action by a pledgor against the pledgee for not returning goods pledged, see 2 Chitty, Pl. 69; Stanton *v.* Collier, 3 El. & Bl. 274 (1854). An answer is not good where it merely denies the conversion and does not deny the possession by the defendant of certain stocks belonging to the plaintiff, nor the tender of the balance due, nor the demand for such stocks, nor the non-delivery of the same. Dubois *v.* Sistare, N. Y. L. J., Dec. 9, 1890. See Smith *v.* Savin, 141 N. Y. 315 (1894). Where the repledgee converts the stock the remedy for conversion is with the first pledgee, not with the first pledgor. Thompson *v.* Toland, 48 Cal. 99 (1874). *Contra*, Smith *v.* Savin, 69 Hun, 311 (1893). See s. c., 9 N. Y. Supp. 106, and 141 N. Y. 315. A pledge of stock to secure future liabilities does not secure past liabilities. If the pledgee refuses to surrender the stock on demand and tender, the pledgor may recover the value of the stock on that day, less the amount tendered. Franklin Bank *v.* Harris, 77 Md. 423 (1893). Where the pledgor learns of the illegality of the sale after he has commenced suit for the surplus, he will be allowed to amend and sue for conversion. Smith *v.* Savin, 141 N. Y. 315 (1894).

1 Wheeler *v.* Breslin, 47 N. Y. Misc. Rep. 507 (1905). See § 476, *infra*. The statute of limitations applies to a suit of the pledgor against the pledgee, even though the suit is in equity, and involves also an accounting, conversion being alleged. Bell *v.* Bank of California, 94 Pac. Rep. 889 (Cal. 1908).

2 Smith *v.* Hall, 67 N. Y. 48 (1876), distinguishing Austin *v.* Rawdon, 44 N. Y. 63 (1870).

3 Lacombe *v.* Forstall's Sons, 123 U. S. 562 (1887); Genet *v.* Howland, 45 Barb. 560 (1866). A pledgee cannot

sustained on the ground that only a court of equity can compel a retransfer of the stock or an accounting of the dividends declared while the pledge was running, or an accounting by third persons to whom the pledgee has assigned the debt and pledge, or enjoin an illegal transfer of the stock.[1] A pledgor may by suit in equity

maintain a bill in equity to redeem unless the items are numerous or technical, and the fact that incidentally a discovery is sought is not sufficient in itself. De Bevoise *v.* H. & W. Co., 67 N. J. Eq. 472 (1904). The remedy of the pledgor is at law after a tender, not by bill in equity to redeem. Doak *v.* Bank of the State, 6 Ired. L. (N. C.) 309 (1846). Where the pledgee has sold the stock; the pledgor cannot compel him to restore it by a bill in equity, even though he alleges that the sale was to a person who holds the stock as trustee for the pledgee. The pledgor's remedy is at law. Hinckley *v.* Pfister, 83 Wis. 64 (1892). A bill in equity does not lie for damages due to an illegal sale of stock by a pledgee. Henry *v.* Travelers' Ins. Co., 45 Fed. Rep. 299 (1891). A pledgor cannot file a bill in equity to hold the pledgee liable for selling the stock in violation of the pledge, there being no disputed accounts. Roland *v.* Lancaster, etc. Bank, 135 Pa. St. 598 (1890); Angus *v.* Robinson, 62 Vt. 60 (1890). It is well settled that a bill in equity will not ordinarily lie to redeem property from a pledge. Kemp *v.* Westbrook, 1 Ves. Sr. 278 (1749); Story, Eq. Jur., § 1032. The reason is obvious. The legal title to the thing pledged does not pass to the pledgee, as it does to a mortgagee in possession in the case of a mortgage. The pledgor retains the legal title and parts only with possession and a special property. Jones, Pledges, § 552. He has therefore a legal right to redeem, and upon tendering the amount due to the pledgee he may bring replevin for the collateral or an action to recover its value. It is only when his legal remedies are insufficient that the pledgor can come into equity. Jones, Pledges, § 556, and cases cited. Even though a stockholder pledges his stock to secure a debt of the corporation, and such stock is sold out, yet he is not entitled to an equal amount of stock from the corporation, but is merely a creditor of it. Dempster *v.* Rosehill etc. Co., 206 Ill. 261 (1903).

1 Bryson *v.* Rayner, 25 Md. 424 (1866); Conyngham's Appeal, 57 Pa. St. 474 (1868); Hasbrouck *v.* Vandervoort, 4 Sandf. 74 (1850); Koons *v.* Jeffersonville Nat. Bank, 89 Ind. 178 (1883); Smith *v.* Anderson, 8 Tex. Civ. App. 188 (1894); Maynard *v.* Tilden, 28 Fed. Rep. 688 (1886). A sale with a right to repurchase may amount to a pledge and the party may maintain a bill in equity to recover back the stock in payment, it appearing that it has no ascertainable market value and has a peculiar value to plaintiff, greater than the market value at the time of transfer. Eichbaum *v.* Sample, 213 Pa. St. 216 (1906). Even though a pledgor signs a written agreement that on nonpayment of the debt the pledgee may sell the stock at public or private sale with or without notice to the pledgor, yet a sale on an exchange at which the public cannot bid, will be set aside at the instance of the pledgor, and if the pledgor has resold the stock, the pledgor in a suit in equity instituted to redeem the pledge may be given damages equal to the difference between the debt and the market value of the stock, which may be the price at which the pledgee has resold the same. The pledgee is not entitled to have a jury estimate such damage. Such a suit in equity lies if, at the time of instituting it, the pledgor did not know that the pledgee

compel the pledgee to deliver up the stock in pledge, and if the had resold the stock, the stock being in a private corporation, and constituting a majority. No tender of the debt is necessary if the pledgee denies the right of the pledgor to redeem. Hagan *v.* Continental Nat. Bank, 182 Mo. 319 (1904). A guarantor of a note secured by stock may take up the debt and the pledgor may maintain a bill in equity to redeem. Hinckley *v.* Colvin, 84 N. E. Rep. 174 (Ill. 1908). A pledgor cannot maintain a bill in equity to redeem when he knows that the pledgee no longer has possession and cannot return the pledge. Bell *v.* Bank of California, 94 Pac. Rep. 889 (Cal. 1908). An action to redeem may be sustained in equity where the transaction is a complicated one. Higgins *v.* Lansingh, 154 Ill. 301 (1895). Where the pledgee has transferred the stock held in pledge, and is insolvent, the pledgor may file a bill in equity, and bring in all parties interested. Nelson *v.* Owen, 113 Ala. 372 (1896). Where the pledgor borrows the money from a third party to pay a debt, and the lender does pay the debt, but takes the collateral without authority and pledges it for its own debt, the original pledgor may file a bill to obtain the possession of the stock and also obtain the dividends that have been paid. If the second pledgee claims to be a *bona fide* holder of the stock, those facts must be specially pleaded in defense. Maxwell *v.* Foster, 64 S. C. 1 (1902). In a suit in equity by the pledgor to redeem, the pledgee cannot set up that the pledgor has sold his interest in the pledge to another party, and that another suit is pending brought by that other party for specific performance, and that in such suit the pledgee is a party defendant, no proof being given of such sale. Houston, etc. R. R. *v.* Conner, 29 Tex. Civ. App. 259 (1902). Where the pledge has been sold by the pledgee and the amount due is in dispute, the pledgor may file a bill in equity against the pledgee and the purchaser with notice and the corporation to redeem it, and he need not make any tender of the amount due, provided he offers in his complaint to pay any amount found due. Treadwell *v.* Clark, 73 N. Y. App. Div. 473 (1902). Where a transaction is adjudged to be a loan and not a sale, and the defendant is ordered to return the stock, it is error to add an alternative money judgment for the value of the stock. Fanny Rawlings Min. Co. *v.* Tribe, 29 Colo. 302 (1902). A pledgor in contracting with the pledgee to obtain a release of the stock on a settlement of the debt for less than the full sum is not bound to disclose the fact that the corporation was about to be sold out at a high price which would have paid the whole debt. The pledgor may file a bill in equity to redeem the stock on the payment of the sum agreed upon. Chicora, etc. Co. *v.* Dunan, 91 Md. 144 (1900). A cross-bill in equity by a pledgee to have the debt determined and have a sale made was involved in Troendle *v.* Van Nortwick, 98 Fed. Rep. 785 (1900). Where a pledge of stock is deposited with a third party, according to the contract of pledge, such third party need not be joined in a suit by the pledgor against the pledgee to redeem. Baeck *v.* Meinken, 33 N. Y. Misc. Rep. 371 (1900). A broker cannot interplead between his customer and an indorser of the customer's note, in regard to stocks deposited with the broker by the customer, even though the administrator of the indorser claims that he has an interest in such stock. Post *v.* Emmett, 40 N. Y. App. Div. 477 (1899). Where the pledgor files a bill to redeem and the pledgee claims that the stock is sold and not pledged, and the court decides that the transaction was a pledge and decrees the amount to be paid by the pledgor to redeem, and the pledgee then appeals

pledgee has sold the pledged stock, but has similar stock, he may

and pays assessments on the stock pending the appeal, the pledgee may recover back such assessments from the pledgor, even though the judgment was affirmed on appeal. Irvine *v.* Angus, 93 Fed. Rep. 629 (1899). The question of the ownership of bonds as between a pledgor and pledgee and subsequent holders cannot be contested in the foreclosure of the mortgage securing the same, prior to the decree, but on the distribution of the proceeds of the foreclosure sale that question can then be litigated. Sioux City, etc. Ry *v.* Manhattan T. Co., 92 Fed. Rep. 428 (1899). The pledgor may file a bill to reach the excess realized by the pledgee on a sale of the collateral, and in such suit may enjoin the assignee of the pledgee from using such excess to pay other debts of the pledgee. Adams *v.* Ball, 24 N. Y. App. Div. 69 (1897). A pledgor may maintain a suit in equity to redeem his stock, and the judgment may order the pledgee to deposit the certificate of stock in court. Colburn *v.* Riley, 11 Colo. App. 184 (1898). The pledgee must return the stock and stock dividends and account for money dividends. Vaughan *v.* Wood, 1 M. & K. 403 (1833). A court of equity has power to decree the return of pledged stock and money deposited as collateral. Post *v.* Simmons, 9 N. Y. Supp. 112 (1890); Brown *v.* Runals, 14 Wis. 693 (1861). A pledgor may file a bill in equity to have a surplus delivered up and the notes for which the collateral was given delivered up also. Cahoon *v.* Bank of Utica, 7 N. Y. 486 (1852), rev'g 7 How. Pr. 134. In England an action to redeem a pledge of stock is to be tried without a jury, even though the defendant sets up a counter claim of false representations. Lynch *v.* Macdonald, L. R. 37 Ch. D. 227 (1887). Where the pledgee is about to sell the stock and denies the pledge, the pledgor may enjoin the sale. Thielens *v.* Dialogue, 19 Atl. Rep. 970 (N. J. 1890). For other cases sustaining the jurisdiction on the ground that an injunction was proper, see Hower *v.* Weiss, etc. Co., 55 Fed. Rep. 356 (1893); Myers *v.* Merchants' Nat. Bank, 16 N. Y. Supp. 58 (1891). The pledgor cannot enjoin a sale by the pledgee on the ground that the sale will be at a sacrifice. Park *v.* Musgrave, 2 Thomp. & C. (N. Y.) 571 (1874). Where a purchaser of stock agrees to give a long-time note with the stock as security, and subsequently, for the accommodation of the vendor, a short-time note with the stock as security is delivered to a third person named by the vendor, and the vendor then obtains possession of the stock and note, and, after the short-time note becomes due, proposes to collect the note and sell out the stock, the pledgor may enjoin the sale of the stock. In this case the stock was of uncertain value, and represented a controlling interest in the company, and damages for its conversion would not have been an adequate remedy. The court held that an action for replevin was not adequate, inasmuch as, in order to bring replevin, the pledgor would have to tender the debt, which, according to the original agreement, was not yet due. Hower *v.* Weiss, etc. Co., 55 Fed. Rep. 356 (1893). "If, for instance, the collaterals consist of shares of stock which have been transferred into the pledgee's name upon the books of a corporation, an action in equity will lie, for the reason that such an action is necessary to secure the retransfer of the shares. So equity may be invoked where an accounting or a discovery is needed or where the pledgee has assigned the pledge." Stokes *v.* Stokes, N. Y. L. J., Nov. 15, 1892, p. 375. See also cases in note 2, p. 1234. A purchaser of stock who makes a partial payment and gives back the stock as collateral security cannot

be compelled to transfer the latter.[1] An unreasonable delay or laches on the part of the pledgor will bar his remedy against the pledgee.[2] But delay in bringing suit to redeem pledged property

abandon the contract and claim such part of the stock as the payment already made would pay for, on the ground that the seller has obtained control of the corporation and is guilty of a breach of trust. The fact that the seller as pledgee has sold the stock and bought it in himself is immaterial, inasmuch as such sale is illegal. Reid *v.* Caldwell, 110 Ga. 481 (1900); s. c., 114 Ga. 676 (1902).

1 Krouse *v.* Woodward, 110 Cal. 638 (1895). Where an agent with whom stock is deposited transferred in blank causes the same to be transferred to himself on the books of the company and then hypothecates the same, and afterwards dies, the real owner of the stock may claim other stock in the same corporation which such agent had at the time of his death. The identity of the certificates is immaterial. Marshall *v.* Marshall, 11 Colo. App. 505 (1898). See also § 469, *supra*. A pledgor cannot have a sale by the pledgee on notice set aside on the ground that the pledgor expected an extension of time to pay the debt. Haines *v.* Barber, 113 N. Y. App. Div. 696 (1906).

2 A delay by the pledgor for twenty-five years in filing a bill to redeem is fatal. Kase *v.* Burnham, 206 Pa. St. 330 (1903). Where the corporation is sued by a claimant of stock and it applies to the court to be allowed to interplead between such claimant and a pledgee of the certificates, if the court refuses such interpleader and gives judgment for the first claimant, and for twenty years the pledgee takes no action, and in the meantime the corporation issues new certificates to the claimant, the pledgee cannot maintain a suit for the stock. Pottsville Bank *v.* Minersville, etc. Co., 211 Pa. St. 566 (1905). A delay of the pledgor in demanding back the collateral, for ten years after paying the note, is a bar to a recovery. Brown *v.* Bronson, 93 N. Y. App. Div. 312 (1904). The right to redeem continues unless the pledgee has demanded redemption. White River, etc. Bank *v.* Capital, etc. Co., 77 Vt. 123 (1904). Laches in claiming stock is no bar, unless there is an estoppel, and the pledgee has altered his position by reason thereof. Groeltz *v.* Cole, 128 Iowa 340 (1905). Eight years' delay by the pledgor in complaining of the refusal of the pledgee to deliver up the stock on tender of the debt, the stock having subsequently declined in value, was held to be fatal in Merriam *v.* Childs, 93 Mo. 131 (1887). Where the pledgor's executor, for value received, sells the pledgor's interest to the pledgee, long lapse of time after full knowledge of the facts by all parties will raise a presumption in favor of the pledgee's complete ownership. Lockwood *v.* Brantly, 1 Silvern. 187 (1886); s. c., 103 N. Y. 680. As to the statute of limitations, see Maynard *v.* Tilden, 28 Fed. Rep. 688, 703 (1886); Child *v.* Hugg, 41 Cal. 519 (1891), where long delay was held to be a bar; also § 476 *infra*. In Greene *v.* Dispeau, 14 R. I. 575 (1884), a pledge of stock was treated as a mortgage, and the right to redeem was held to be barred six years after the date of the mortgage. A pledgor waives informality of the notice, where, after the sale, he, as an officer of the corporation, enters a transfer of the stock to the one who purchased at the sale. Downer *v.* Whittier, 144 Mass. 448 (1887). Four years' delay in complaining is fatal. Receiving the benefit of the sale is a waiver of objections. McDowell *v.* Chicago Steel Works, 124 Ill. 491 (1888). Although the pledge gives no public notice of the sale, and although he purchases

does not constitute laches, when the debt is kept alive until the suit is begun.[1]

Where the pledgor has an opportunity to sell the pledged stock for a sum sufficient to pay the debt and requests the pledgee to deliver the stock for that purpose and the pledgee refuses and sues on the note, and the stock becomes worthless, the pledgee is liable for the value thereof where the request was made.[2] Under the English bankrupt law if the pledgor has committed an act of bankruptcy by assigning, the pledgee is not bound to deliver up the securities to the pledgor and the assignee, even though the full amount of the debt is tendered.[3] Tender of the debt when or after it be-

the stock at the sale, yet the pledgor ratifies the sale by acquiescing and by negotiating to buy the stock. Hill *v.* Finigan, 77 Cal. 267 (1888). The statute of limitations is no bar to an action to redeem a pledge of stock, unless the statute was set running by demand of payment and notice of intent to sell. Gilmer *v.* Morris, 35 Fed. Rep. 682 (1888). See s. c., 80 Ala. 78. In the case of a pledge of stock to secure future advances, the statute of limitations begins to run against the right of the pledgor to redeem from the time when the pledgee, by some positive act, repudiates the pledge and claims the property as his own, or improperly disposes of it. Gilmer *v.* Morris, 43 Fed. Rep. 456 (1890). If the pledge is recognized by extension to other debts, the statute of limitations runs from the latter date. Gilmer *v.* Morris, 46 Fed. Rep. 333 (1891). This case, Gilmer *v.* Morris, in 80 Ala. 78, arose again in Billing *v.* Gilmer, 60 Fed. Rep. 332 (1894), rev'g Gilmer *v.* Billings, 55 Fed. Rep. 775. The statute of limitations runs against a receipt reciting a first payment on stock "standing in my name but owned by him, and he remaining responsible for the balance of the installments when called in," there being no agreement as to the future disposition of the stock and of dividends. Cone *v.* Dunham, 59 Conn. 145 (1890). A pledge is not legally abandoned although no demand is made for it during a long lapse of time. Cridge's Appeal, 18 Atl. Rep. 1010 (Pa. 1890). As to redemption, laches, etc. see Schouler, Bailm. (2d ed.), § 250. As to the rule in New York, see Bailey *v.* Chamberlain, N. Y. D. Reg., July 23, 1888, and Miner *v.* Beekman, 50 N. Y. 337 (1872). The pledgee cannot claim that he has held the stock, adversely to the pledgor, for a time more than sufficient to give him title to it under the statute of limitations. He is not allowed to assert that he holds the stock adversely. Cross *v.* Eureka Lake, etc. Co., 73 Cal. 302 (1887). The ten years' statute of limitations applies and does not commence to run until the pledgor has demanded the stock, where the amount due is in dispute. Treadwell *v.* Clark, 73 N. Y. App. Div. 473 (1902). Where a person delivering stock to another claims that it was to secure the latter for a debt of the former which the latter had paid, but the latter claims the stock is his own, and the former delays three years before commencing legal proceedings to redeem, he is bound to explain the cause of his delay. Blanton *v.* Chalmers, 158 Fed. Rep. 907 (1908).

1 Higgins *v.* Lansingh, 154 Ill. 301 (1895).

2 National Exchange Bank *v.* Kilpatric, 102 S. W. Rep. 499 (Mo. 1907).

3 Ponsford, etc. Co. *v.* Union, etc. Bank, Lim., 95 L. T. Rep. 333 (1906).

comes due releases the pledge.[1] The pledgee need not deliver up part of the security upon receiving a partial payment unless the pledge agreement so provides.[2] Where the pledgor makes tender of the amount which he considers due and demands the pledge, and the pledgee refuses the tender and does not state that the amount is too small, the pledgee is guilty of a conversion.[3] A pledgor cannot compel his pledgee to sell the stock and apply the proceeds to the debt by a notice to make such a sale.[4] The pledgee is not liable to the pledgor for depreciation in the value of the stock, there being no agreement that the pledgee was to sell it.[5] When the pledgee causes the stock to be sold, the pledgor is entitled to the surplus proceeds of the sale remaining after the debt and the expenses of the sale have been paid, and such surplus cannot be applied by the pledgee to another debt,[6] except possibly by way of set-off. If the officers of a

1 A tender of the amount due before sale redeems pledged stock and stops the sale. Winkler *v.* Magdeburg, 100 Wis. 421 (1898). An unconditional tender of the amount due the pledgee releases the pledge and entitles the pledgor to the stock. Tom Boy, etc. Co. *v.* Green, 11 Colo. App. 477 (1898); Hyams *v.* Bamberger, 10 Utah, 3 (1894). If the pledge has been converted and was worth more than the debt, the pledgor need not tender the debt before suit. Lowe *v.* Ozmun, 3 Cal. App. 387 (1906).

2 Herman Goepper & Co. *v.* Phœnix etc. Co., 115 Ky. 708 (1903).

3 Latta *v.* Tutton, 122 Cal. 279 (1898). Where the pledgee does not return the securities, on the debt being paid by services, in accordance with an agreement, the pledgee is guilty of conversion. Scrivner *v.* Woodward, 139 Cal. 314 (1903).

4 Lawrence *v.* Maxwell, 53 N. Y. 19 (1873); Robinson *v.* Hurley, 11 Iowa, 410 (1860); O'Neill *v.* Whigham, 87 Pa. St. 394 (1878); Rozet *v.* McClellan, 48 Ill. 345 (1868); Smouse *v.* Bail, 1 Grant (Pa.), 397 (1856); Taggard *v.* Curtenius, 15 Wend. 155 (1836); Fisher *v.* Fisher, 98 Mass. 303 (1867); Napier *v.* Central, etc. Bank, 68 Ga. 637 (1882), holding, however, that where the pledgee does not sell, because he and others were "bearing" the market, there may be an element of fraud which gives a cause of action. The pledgor cannot by request compel the pledgee to sell. Minneapolis, etc. Co. *v.* Betcher, 42 Minn. 210 (1889). If there is no agreement so to do, the pledgee is not bound to sell, although requested to do so by the pledgor. Furness *v.* Union Nat. Bank, 147 Ill. 570 (1893). A guarantor of a note cannot defend on the ground that the note is secured by collateral which should first be sold. Knickerbocker T. Co. *v.* Coyle, 139 Fed. Rep. 792 (1905).

5 Lake *v.* Little Rock, etc. Co., 77 Ark. 53 (1905). The pledgee is not liable for depreciation in the value of the pledge even after the debt becomes due. Adoue, etc. *v.* Hutches, 32 Tex. Civ. App. 559 (1903). See also § 476, *infra.*

6 And the pledgor's assignee for the benefit of creditors may claim it. The pledgee bank has no banker's lien on the surplus for other debts. Brown *v.* New Bedford Sav. Inst., 137 Mass. 262 (1884). A pledgee bank cannot refuse to deliver back the stock to pledgor who tenders the amount due, on the ground that the pledgee owes it still another debt. McIntire *v.* Blakeley, 12 Atl. Rep. 325 (Pa. 1888).

pledgee bank refuse to deliver back the pledged stock upon a tender of the debt, they are liable personally in damages to the pledgor.[1]

A pledgor cannot defend against a note on the ground that the collateral security has been converted, unless such defense is in the way of a set-off or counter-claim or it is alleged that the stock has value or that the pledgee has sustained damage.[2] The measure of damages on an illegal sale is considered elsewhere.[3]

§ 476. *Pledgee's remedies when debt secured is not paid—Sale and deficiency.*—Where shares of stock are pledged as collateral security for a debt, and the debt is not paid, and the pledgee wishes to apply the stock to the payment of the debt, he has the right to pursue either one of two remedies.

First. He may file a bill in equity for the foreclosure and sale of the pledge.[4] In a decree foreclosing a pledge of stock the ques-

1 McIntire *v.* Blakeley, 12 Atl. Rep. 325 (Pa. 1888). A pledgee cannot, on sale of the pledge, apply the excess to another debt due him from the pledgor, who died before the sale was made. Peters *v.* Nashville Sav. Bank, 86 Tenn. 224 (1887).

2 Wills *v.* Rowland & Co., 117 N. Y. App. Div. 122 (1907). A pledgor cannot defeat an action by the pledgee on the debt by showing that the pledgee has converted the pledge. See §§ 461, 475, 458, note, *supra*. In an action by the pledgee for the debt, the pledgor may set up a conversion of the stock pledged. Donnell *v.* Wyckoff, 49 N. J. L. 48 (1886).

3 See ch. XXXV, *infra*.

4 Where a bond issued by a state recites that it is secured by an equal amount of stock in a railroad company, the holder of such bond may file a bill to foreclose on that amount of stock and need not join other bondholders as parties defendant. South Dakota *v.* North Carolina, 192 U. S. 286 (1904), holding also that where no certificates of stock have been issued to the pledgor, the pledgee may foreclose by a suit in equity. A pledgee may sue on the debt or file a bill for foreclosure or sell the pledge without judicial process on reasonable notice to the pledgor. White River, etc. Bank *v.* Capital, etc. Co., 77 Vt. 123 (1904), holding also that the pledgee may maintain a bill to foreclose the pledge where the corporation claims a lien prior to the pledge; and that a pledgor is not a necessary party to foreclosure where he expressly consents to the decree. That a suit to foreclose lies, see also Page *v.* Boggess, 41 N. Y. Misc. Rep. 46 (1903). Where a pledgee brings suit to obtain possession of the pledge, which had been wrongfully diverted, and during the suit the pledge becomes worthless, a supplemental complaint may be served alleging that fact and demanding the value of the pledge at the time demand was made therefor. Central T. Co. *v.* West India, etc. Co., 109 N. Y. App. Div. 517 (1905). Where the pledgee obtains a judgment directing the sale of the pledge "upon the curb" in New York, judgment being silent as to any notice of the sale, and the pledgee then sells the stock in small lots and on different dates and without notice, the pledgor cannot complain if he delayed a year before objecting to such sale. Violett *v.* Horbach, 119 N. Y. App. Div. 373 (1907). A suit in equity to foreclose a pledge of stock was sustained in Meyerholtz *v.* Paxton, 94 Pac. Rep. 78 (Cal. 1907). The pledge may be made to secure the carrying out of a contract, and a court of equity will foreclose it although the

tion of judgment for a deficiency may be left open to be determined, if there is a deficiency.[1] A suit to foreclose a pledge of stock need

damages are unliquidated. Vaupell *v.* Woodward, 2 Sandf. Ch. 143 (1844). A person holding and carrying stock for himself and others may file a bill in equity to bring about a sale and an adjustment of the accounts. Evans *v.* Goodwin, 132 Pa. St. 136 (1890). A suit to foreclose a pledge of stock may be in equity, and after judgment a suit cannot be maintained at law on the debt secured. Brigel *v.* Creed, 65 Ohio St. 40 (1901). In a suit by an attaching creditor to determine the priority of his rights over an unregistered pledgee, the court has no power to decree a sale of the pledge and the distribution of the assets. McClung *v.* Colwell, 107 Tenn. 592 (1901). In a suit by a corporation to foreclose a pledge of stock made to it to secure the payment of a call on the stock, the pledgor cannot set up in defense that secret commissions had been paid to some of the stockholders upon the purchase of property by the corporation. Irving, etc. Assoc. *v.* Watson, 41 Or. 95 (1902). A contractor cannot by a bill in equity compel the company to allow him to complete his contract, even though the company is insolvent and is about to make a contract with other parties and to dispose of securities pledged to the first contractor. Strange *v.* Richmond R. R., 93 Fed. Rep. 71 (1899). In a suit by a pledgee to have a sale of bonds held in pledge, a defendant may file a cross-bill setting forth that the bonds were illegally issued and that the complainant is not a *bona fide* holder. Alessandro Irr. Dist. *v.* Savings & Trust Co., 88 Fed. Rep. 928 (1898). Where a firm has pledged stock and afterwards passes into the hands of a receiver, an action subsequently commenced by the pledgee to foreclose his lien must make the assignee a party defendant. Denny *v.* Cole, 22 Wash. 372 (1900). A suit lies for judgment on a note, and for a sale of the collateral and the application to the judgment of the amount realized on such sale. Farmers', etc. Bank *v.* Rogers, 1 N. Y. Supp. 757 (1888). There is a dictum in Ritchie *v.* McMullen, 79 Fed. Rep. 522, 535 (1897), to the effect that where a pledgee enters into a conspiracy to depreciate the pledged stock the pledgee cannot maintain a bill to foreclose the pledge. A court of equity has no power to enforce a pledge unless there was a trust or confidential relations. Young *v.* Mercantile T. Co., 140 Fed. Rep. 61 (1905); aff'd, 145 Fed. Rep. 39. A mortgage given in pledge may be foreclosed by bill in equity. Anderson *v.* Olin, 145 Ill. 168 (1893). In a suit between the pledgor and the pledgee, each side demanding affirmative relief, the court may decree that stock is held as collateral and order a sale to satisfy the claim. Zellerbach *v.* Allenberg, 99 Cal. 57 (1893). Where the pledge was made without a written transfer of the certificate a suit in equity is the only remedy. Robinson *v.* Hurley, 11 Iowa, 410 (1860); Merchants' Nat. Bank *v.* Hall, 83 N. Y. 338 (1881); Smith *v.* Coale, 34 Leg. Int. 58 (1877); Blouin *v.* Hart, 30 La. Ann. 714 (1878); Johnson *v.* Dexter, 2 MacArthur, 530 (1876), and § 465, *supra*. In England a deposit of a certificate of stock is an equitable mortgage and not a pledge, and hence while foreclosure would not lie as regards a pledge, it does lie as regards such an equitable mortgage. Harrold *v.* Plenty, [1901] 2 Ch. 314.

1 South Dakota *v.* North Carolina, 192 U. S. 286 (1904). A court of equity in foreclosing a pledge on stock may render a judgment for any deficiency. Commercial, etc. Bank *v.* Grant, 73 Neb. 435 (1905). In a suit to foreclose a pledge of stock, a judgment for de-

not be brought at the domicile of the corporation, but may be brought at the domicile of the pledgor,[1] or wherever the certificates of stock are held in pledge. Certificates of stock represent the stock itself sufficiently to sustain a suit commenced by substituted service for the purpose of establishing and foreclosing a pledgee's lien, even though the corporation is located in another state.[2] In an action to foreclose a pledge of stock, persons claiming a lien thereon are proper parties defendant, and it is sufficient to allege that they claim some lien.[3]

Second. The pledgee may give notice to the pledgor of an intent to sell the stock, and may so sell it without any judicial proceedings, and apply the proceeds to the payment of the debt.[4] No ex-

ficiency cannot be asked against a part of the defendants. Plankinton *v.* Hildebrand, 89 Wis. 209 (1895).

1 State *v.* King County Super. Ct., 13 Wash. 607 (1896).

2 Merritt *v.* American Steel Barge Co., 79 Fed. Rep. 228 (1897). See also § 363, *supra.*

3 Plankinton *v.* Hildebrand, 89 Wis. 209 (1895).

4 Quoted and approved in American, etc. Co. *v.* Pacific, etc. Co., 34 Wash. 10 (1904). Guinzburg *v.* H. W. Downs Co., 165 Mass. 467 (1896); Story, Bailm., 9th ed. (1877), § 310, saying: "The law as at present established leaves an election to the pawnee. He may file a bill in equity against the pawnor for a foreclosure and sale; or he may proceed to sell *ex mero motu,* upon giving due notice of his intention to the pledgor. In the latter case, if the sale is *bona fide* and reasonably made, it will be equally obligatory as in the first case." The leading case, allowing this remedy of the pledgee against the pledge, is Tucker *v.* Wilson, 5 Bro. Parl. Cas. 193 (1714), rev'g 1 P. Wms. 261. In Brown *v.* Ward, 3 Duer, 660 (1854), the court said: "Since the time of the case of Hart *v.* Ten Eyck [2 Johns. Ch. 62—1816], before Chancellor Kent, the right of the pledgee to sell after the debt is due, upon reasonable notice, has been unquestioned, and a custom has grown up, and has been sanctioned by the courts, of selling stocks at the Merchants' Exchange." To same effect, Diller *v.* Brubaker, 52 Pa. St. 498 (1866); Finney's Appeal, 59 Pa. St. 398 (1868); Easton *v.* German-American Bank, 127 U. S. 532 (1888); Mount Holly, etc. Co. *v.* Ferree, 17 N. J. Eq. 117 (1864), where the court said: "A sale of a pledge by the pawnee, where reasonably and *bona fide* made, and after notice to the pawnor, is equally obligatory as if made by judicial process," 2 Kent's Com. 582, saying that the pledgee "may file a bill in chancery and have a judicial sale under a regular decree of foreclosure, . . . and he may sell without judicial process, upon giving reasonable notice to the debtor to redeem;" Sitgreaves *v.* Farmers', etc. Bank, 49 Pa. St. 359 (1865); Stearns *v.* Marsh, 4 Denio, 227 (1847); Markham *v.* Jaudon, 41 N. Y. 235, 241 (1869); Drury *v.* Cross, 7 Wall. 299 (1868). The parties may provide for any manner of disposing of the pledge to satisfy the claim upon it which is not in contravention of statute, against public policy, or fraudulent. In McNeil *v.* Tenth Nat. Bank, 46 N. Y. 325, 334 (1871), it is said: "The distinction between a lien and a pledge is said to be that a mere lien cannot be enforced by sale by the act of the party, but that a pledge is a lien with a power of sale superadded." The pledgee's power of attorney to

press power to sell need be contained in the memorandum of pledge in order to authorize the latter remedy. It exists by force of law.

The pledgee, however, is not bound to pursue either remedy merely because the debt is due and unpaid.[1] He need not sell the stock upon the maturity of the note secured, nor is he liable because the stock declines in value.[2] He may sue on the debt with-

sell is coupled with an interest and is not revokable. Renshaw *v.* Creditors, 40 La. Ann. 37 (1888). A person secured by a pledge of stock in another's name may sue the latter for the amount received by the latter on a sale of the stock.' Maynard *v.* Lumberman's Nat. Bank, 11 Atl. Rep. 529 (Pa. 1887). Although the pledgee has not advanced all that he agreed to, yet, where he ceased advances after the pledgor's default in paying the part already advanced, the pledgee may proceed to sell the pledge after notice. Midland Ry. *v.* Loan, etc. Co., N. Y. L. J., May 24, 1890. The pledgee cannot be enjoined from selling the pledge on notice, merely because by legal proceedings he has injured the value of the pledge. Midland Ry. *v.* Loan, etc. Co., N. Y. L. J., May 24, 1890. A pledgee who has brought an action to foreclose his pledge may nevertheless abandon the suit and resort to his remedy of a sale after notice. Midland Ry. *v.* Loan, etc. Co., N. Y. L. J., May 24, 1890. A sale by a pledgee will not be enjoined merely because the corporation is in insolvency proceedings in another state and the sale has been enjoined by courts of that state. Union Cattle Co. *v.* International Trust Co., 149 Mass. 492 (1889). A mortgage of stock is the same as a pledge of stock in that the mortgagee may sell the stock upon default and after proper notice. Deverges *v.* Sandeman, etc. Co., [1902] 1 Ch. 579. The agreement of the pledgee not to dispose of the pledge does not prevent a sale after default. Kelley *v.* Root, 74 N. Y. App. Div. 499 (1902). Even though the pledgee, after the note was due, told the pledgor that he wished payment within a few days and the pledgor said he would pay whenever the pledgee wished, this is not a legal agreement to postpone the sale. Thornton *v.* Martin, 116 Ga. 115 (1902). A pledgee cannot acquire title by notifying the pledgor that the stock will be forfeited if the debt is not paid within a certain time. Groeltz *v.* Cole, 128 Iowa 340 (1905). Where stock is pledged to secure a note and is sold by the pledgee, the proceeds must be applied to that note and not to any other purpose. Iowa Nat. Bank *v.* Cooper, 101 N. W. Rep. 459 (Iowa 1904). Where the pledgee sells at one price and secretly receives a higher one, the pledgor may hold him liable for the latter. McKee *v.* Smith, 68 Atl. Rep. 1026 (Penn. 1908).

1 O'Neill *v.* Whigham, 87 Pa. St. 394 (1878); Rozet *v.* McClellan, 48 Ill. 345 (1868); Palmer *v.* Hawes, 73 Wis. 46 (1888).

2 Simonton *v.* Sibley, 122 U. S. 220 (1887); Palmer *v.* Hawes, 73 Wis. 46 (1888). See also § 475, *supra.* Where one company buys out another and assumes the debts of the latter, a creditor of the latter company may assign his claim as collateral security, but the pledgee is not bound to institute suit to collect such claim, and is not liable for failure so to do, even though the claim is finally lost. Sampson *v.* Fox, 109 Ala. 662 (1896). The pledgee is not liable for not selling the collateral, even though the collateral declines in value, especially where the pledgor made no request that such sale be made. Henry, etc. Co. *v.* Shæffer, 173 Mass. 443 (1899).

out resorting to or tendering back the stock.[1] The pledgor cannot compel him to sell by merely giving him notice so to do.[2] Nor is the pledgee bound to sell on non-payment of the debt, although the memorandum of pledge expressly authorizes a sale, but he may file a bill in equity to foreclose instead of pursuing the other remedy.[3] A surety on a note secured by collateral is not discharged by the failure of the pledgee to sell when the note becomes due, no such demand having been made by the surety.[4] But where the pledgee is secured by two pledges, one from his debtor and one from an outsider, and he releases the former, he thereby releases the latter.[5] In an action at law against a pledgor on a debt, the judgment need not provide for a return of the pledge upon payment of the debt.[6] The pledgee's remedy by attaching the stock and selling it at an execution sale is his remedy as a creditor and not as a pledgee of the person

1 Taylor *v.* Cheever, 72 Mass. 146 (1856); Butman *v.* Howell, 144 Mass. 66 (1887). A broker or pledgee need not sell the stock held as collateral before bringing an action against the pledgor for the amount due, nor does a broker's custom compel it. De Cordova *v.* Barnum, 130 N. Y. 615 (1892). A pledgee having sold the stock, and there still being a balance due him from the pledgor, may sue for such balance, and need not allege that the sale was on due notice and demand. Wallace *v.* Berdell, 24 Hun, 379 (1881). Where stock pledged to secure a note is to be transferred as payment in case the note is not paid, the pledgee may sue on the note if the pledgor has not transferred the stock. Fullerton *v.* Mobley, 15 Atl. Rep. 856 (Pa. 1888). The pledgee may sue on the debt before selling the collateral. Sinclair *v.* Weekes, 41 S. W. Rep. 107 (Tex. 1897). As to the duties of the pledgee towards an indorser of the note, see Payne *v.* Commercial Bank, 14 Miss. 24 (1846). • Misrepresentations by a pledgee of stock as to the value of the stock, made after its pledge, are no defense for the pledgor when sued on the debt. Palmer *v.* Hawes, 73 Wis. 46 (1888). The maker of a note is liable personally, although it recites that it is secured by stock as collateral "without recourse." Rathburn *v.* Jones, 47 S. C. 206 (1896). A pledgee of an underwriter's agreement may have difficulty in tendering performances to the underwriters. Litchfield, etc. Society *v.* Dibble, 67 Atl. Rep. 476 (Conn. 1907).

2 See § 475, *supra.*

3 Cornick *v.* Richards, 3 Lea (Tenn.), 1 (1879); Coffin *v.* Chicago, etc. Co., 4 Hun, 625 (1875).

4 Cromwell *v.* Rankin, 97 S. W. Rep. 415 (Ky. 1906).

5 *In re* Sanderson, 150 Fed. Rep. 236 (1907).

6 Robertson *v.* Sully, 2 N. Y. App. Div. 152 (1896), reversed on another point in 157 N. Y. 624. The pledgee may sue on the debt and obtain a judgment and need not tender the stock held in pledge, and the judgment need not contain a provision that the stock should be surrendered on payment of the judgment. French *v.* McCarthy, 125 Cal. 508 (1899). The purchaser of a note may enforce the same without producing collateral which is recited in the note itself, where it is shown that such collateral was to secure several notes and had been returned to the payor in connection with the other notes and new collateral substituted therefor. Haskell *v.* Africa, 68 N. H. 421 (1896). See § 335.

indebted to him.[1] Where the pledgee obtains judgment on a note which is secured by the stock and then causes the stock to be sold out by the sheriff under levy of execution, such sale, however, not being made in accordance with the statutes, this is the same as selling the stock without notice and amounts to a conversion thereof.[2] A pledgee cannot, by obtaining judgment on his claim, reach the pledge by a judgment creditor's bill.[3] A pledgee may prove his entire claim against the insolvent estate of the pledgor, and obtain his proportionate part thereof.[4] Or the pledgee may sell out the collateral in accordance with law and then sue for the deficiency.[5] A pledgee may sell at public sale on notice, even though a receiver of the pledgor has been appointed.[6] Even though bankruptcy proceedings are instituted against the pledgor, yet the bankruptcy court has no power to enjoin the pledgee from selling the pledge in accordance with the terms of the pledge itself.[7] A pledgee of bonds

1 Lee *v.* Citizens' Nat. Bank, 2 Cin. Super. Ct. (Ohio), 298 (1872). His remedies as a pledgee are not released or affected by his pursuit of other remedies. See Sickles *v.* Richardson, 23 Hun, 559 (1881). While a pledgee waives the pledge if he levies an attachment on the stock, yet a garnishee process, general in its intent, does not have that effect. Hudson *v.* Bank of Pine Bluff, 75 Ark. 493 (1905). Judgment on the debt does not release the stock pledged. "Until the debt is paid, the pledgor, under the terms of the bailment, has no right to have the pledge given up to him." Donnell *v.* Wyckoff, 49 N. J. L. 48 (1887). See also Hill *v.* Beebe, 13 N. Y. 556, 563, 567 (1856). See next note.

2 Feige *v.* Burt, 118 Mich. 243 (1898). Where the pledgee levies an attachment, service on the non-resident pledgor must be made in accordance with the statute. Owens *v.* Atlanta, etc. Co., 122 Ga. 521 (1904). While a pledgee waives the pledge if he levies an attachment on the stock, yet a garnishee process, general in its intent, does not have that effect. Hudson *v.* Bank of Pine Bluff, 75 Ark. 493 (1905). Where the pledgee causes the sheriff to sell the pledge on a judgment obtained upon the debt, the pledge relationship ceases to exist, even though it turn out that the sale was illegal and void. Latta *v.* Tutton, 122 Cal. 279 (1898). Where the pledgee brings suit on the debt and attaches the stock he thereby waives his lien, and even though the attachment is illegal and void for insufficient service, yet his rights as pledgee are not thereby restored. H. B. Claflin Co. *v.* Bretzfelder, 69 Ark. 271 (1901). Even though a pledgee brings suit on a debt and levies on the stock he does not thereby lose his rights as pledgee. Croft *v.* Colfax, etc. Co., 113 Iowa, 455 (1901). A person holding stock in pledge may waive his rights as pledgee and attach the property of his debtor. Parberry *v.* Woodson Sheep Co., 18 Mont. 317 (1896), citing Drake on Attachments, 7th ed., § 35.

3 Shaw *v.* Monson, etc. Co., 96 Me. 41 (1901).

4 See § 473, *supra*.

5 See § 473, *supra*. See also § 763, *infra*, as to pledges of bonds.

6 Fidelity, etc. T. Co. *v.* Roanoke, etc. Co., 81 Fed. Rep. 439 (1896). See also Moore *v.* Potter, 155 N. Y. 481 (1898); Dudley *v.* Gould, 6 Hun, 97 (1875).

7 *In re* Browne, 104 Fed. Rep. 762 (1900).

of the corporation cannot be enjoined from selling the same, although dissolution proceedings are pending.[1] The death of the pledgor does not entitle his administrator to take the stock from the pledgee, or to claim the dividends without payment of the debt.[2] Even though the pledgor has died and the pledgee has filed a claim against the estate which has been allowed, the pledgee may sell at public auction on notice.[3] Where stock is held as collateral to a debt, the statute of limitations does not run as against the pledge, and, although the debt itself is barred, the court may order the stock sold to satisfy the debt.[4] Complicated questions arise where stock is held by one person as security for a debt due to another person. These questions, as well as those arising from a trustee of a mortgage holding stock under the mortgage, are considered elsewhere.[5]

§ 477. *Notice of sale of stock by pledgee to apply to debt secured—Waiver of notice.*—In case the pledgee pursues the remedy of selling the stock without any judicial proceedings, he must give the pledgor reasonable notice of the intent to sell and of the time and place of sale.[6] A sale without a notice is a conversion of the stock.[7]

1 Matter of Binghamton Gen. El. Co., 143 N. Y. 261 (1894).

2 Fulton *v.* National Bank, 26 Tex. Civ. App. 115 (1901). See also § 473, *supra.*

3 Bell *v.* Mills, 123 Fed. Rep. 24 (1903), holding also that the statutes of California relative to publication of notice do not require the notice to state that the stock is pledged stock.

4 Zellerbach *v.* Allenberg, 99 Cal. 57 (1893). See also § 475, *supra.* Although the statute of limitations has run against the debt the pledgor cannot compel the pledgee to give up the pledge unless the debt is paid. Gage *v.* Riverside Trust Co., 86 Fed. Rep. 984 (1898). A lien may be enforced, even though the debt is barred by the statute of limitations. Commonwealth *v.* Standard, etc. Co., 201 Pa. St. 103 (1902). A pledgee may bring suit to realize upon his security, even though the principal debt is barred by the statute of limitations. London, etc. Bank *v.* Mitchell, [1899] 2 Ch. 161. The fact that stocks are deposited as collateral security to a note does not prevent the statute of limitations running against the note. *Re* Hartranft's Estate, 153 Pa. St. 530 (1893). Although the debt is barred by the statute of limitations, the pledgee may compel the corporation to transfer the stock to him on the books. Miller *v.* Houston City St. Ry., 55 Fed. Rep. 366 (1893). A pledgee may enforce payment of his debt by sale of stock held as collateral security therefor, even though the debt itself may be barred by the statute of limitations. Tombler *v.* Palestine Ice Co., 17 Tex. Civ. App. 596 (1897). The statute of limitations does not commence to run against the pledgor until he has notice that the pledgee claims the stock absolutely. Davis *v.* Hardwick, 94 S. W. Rep. 359 (Tex. 1906).

5 See § 317, *supra.*

6 "To authorize the defendants to see the stock purchased, they were bound, first, to call upon the plaintiff

7 Fowle *v.* Ward, 113 Mass. 548 (1873); Hempfling *v.* Burr, 59 Mich. 294 (1886); Illinois Nat. Bank *v.* Baker, 128 Ill. 533 (1889); Feige *v.* Burt, 118 Mich. 243 (1898).

The pledgee must demand payment of the debt secured by the pledge of stock, and a waiver of notice of sale is not a waiver of a right to have such a demand made.[1] But where the time of payment is fixed by the note, no demand of payment need be made before sale of the pledge.[2] Where the indorser of a note deposits collateral as security, the collateral may be sold, although notice of non-payment of the note is not given to him.[3] A notice of intent to sell, however, is equivalent to a demand of payment.[4] A broker's custom to the effect that no notice is necessary is illegal and void.[5] The time and place of the proposed sale must be specified in the notice.[6] In New York the rule is clearly adhered to that the relation

to make good his margin; and, failing in that he was entitled, secondly, to notice of the time and place where the stock would be sold; which time and place, thirdly, must be reasonable." Markham *v.* Jaudon, 41 N. Y. 235, 243 (1869). See also Stratford *v.* Jones, 97 N. Y. 586 (1885); Baker *v.* Drake, 66 N. Y. 518 (1876); Conyngham's Appeal, 57 Pa. St. 474 (1868); Stearns *v.* Marsh, 4 Denio, 227 (1847); Neiler *v.* Kelley, 69 Pa. St. 403 (1871); Cushman *v.* Hayes, 46 Ill. 145 (1867). A joint owner is entitled to notice. Clark *v.* Sparhawk, 2 W. N. Cas. 115 (1875); s. c., 5 Fed. Cas. 928. Even where the pledgee obtains a judgment directing the sale of the pledge "upon the curb" in New York, judgment being silent as to any notice of the sale, and the pledgee then sells the stock in small lots and on different dates and without notice, the pledgor cannot complain if he delayed a year before objecting to such sale. Violett *v.* Horbach, 119 N. Y. App. Div. 373 (1907).

1 Lewis *v.* Graham, 4 Abb. Pr. 106 (1857); Brass *v.* Worth, 40 Barb. 648 (1863); Wilson *v.* Little, 2 N. Y. 443, 448 (1849), saying: "It is well settled that where no time is expressly fixed by contract between the parties for the payment of a debt secured by a pledge, the pawnee cannot sell the pledge without a previous demand of payment, although the debt is technically due immediately." Genet *v.* Howland, 45 Barb. 560 (1866). A provision that the note shall become due on demand, with the right to the pledgee to sell the pledge without further notice, requires a demand before sale. A demand at the place of payment is insufficient if the payor did not know of the demand. Smith *v.* Shippers', etc. Co., 45 S. Rep. 533 (La. 1907), holding also that the purchaser of a pledge at a sale made without proper demand or notice to the pledgor is not protected, and if the note is also assigned to him he is merely subrogated in the place of the pledgee.

2 Franklin Nat. Bank *v.* Newcombe, 1 N. Y. App. Div. 294 (1896); aff'd, 157 N. Y. 699.

3 Fiske *v.* Williams, 4 N. Y. App. Div. 487 (1896).

4 Nabring *v.* Bank of Mobile, 58 Ala. 204 (1877). So also of notice of intent to foreclose. Goodrich *v.* Willard, 68 Mass. 203 (1854). Demand of payment may be made by long urging for payment, even though the word "demand" is not used. Carson *v.* Iowa, etc. Co., 80 Iowa, 638 (1890). The giving of a note to a broker pledgee does not extend the time within which the pledgor was to deposit further margin. Gould *v.* Trask, 10 N. Y. Supp. 619 (1890).

5 Markham *v.* Jaudon, 41 N. Y. 235 (1869).

6 Conyngham's Appeal, 57 Pa. St. 474 (1868); Genet *v.* Howland, 45 Barb. 560 (1866); Canfield *v.* Minneapolis,

between a stock-broker and his customer is that of pledgor and pledgee, even though the stock-broker advances the whole purchase price without requiring any margin, and hence a sale by the broker on a notice of intent to sell without specifying the time and place is a conversion, there being no waiver by the customer.[1] Where a person agrees to pay a certain part of any deficiency if the pledge when sold is not sufficient to pay the note, and the pledgee notifies such a guarantor of intent to sell the pledge, but delays for two years, the guarantor is not liable as the sale was not made within a reasonable time after the demand.[2] Even though the pledgor has died and the pledgee has filed a claim against the estate which has been allowed, the pledgee may sell at public auction on notice. The statutes of California relative to publication of notice do not require the notice to state that the stock is pledged stock.[3] Where the note for which stock is pledged is made and delivered and payable in Massachusetts, and the pledge was also made there, and the stock is in a small Massachusetts corporation and is not known elsewhere, it is unreasonable for the pledgee to fix the place of sale in New York, even though the pledgee is a New York corporation; but where the pledgor, on receiving notice of the proposed sale, does not make any protest or objection to the place of sale, and takes no action whatsoever in regard to it, the pledgor waives any objection on this account.[4] The time between the service of the notice and the time when the sale is to take place must be reasonable in length, so as to give the debtor an opportunity to obtain money to pay the debt.[5]

etc. Assoc., 14 Fed. Rep. 801 (1883); modified on another point in 121 U. S. 295. See Schouler, Bailm., 2d ed., § 229. It has been held in Maryland that a notice of the place is unnecessary. Worthington *v.* Tormey, 34 Md. 182 (1870). But such decision would be unsafe, and probably would not be followed elsewhere.

1 Content *v.* Banner, 184 N. Y. 121 (1906).

2 Chelsea Sav. Bank *v.* Slater, 78 Conn. 137 (1905). Where the pledgee gives notice of intent to sell but withdraws it, he must give another notice before selling, and if he sells without such further notice the pledgor may sue for the stock without paying any money into court. Furber *v.* National, etc. Co., 118 N. Y. App. Div., 263 (1907).

3 Bell *v.* Mills, 123 Fed Rep. 24 (1903).

4 Guinzburg *v.* H. W. Downs Co., 165 Mass. 467 (1896). The place of sale of a pledge may be in the county where the pledgee resides, even though the debt is payable in another county in which the pledgor resides. Thornton *v.* Martin, 116 Ga. 115 (1902).

5 In Maryland F. Ins. Co. *v.* Dalrymple, 25 Md. 242 (1866), a week's notice was held sufficient. Lewis *v.* Graham, 4 Abb. Pr. 106 (1857), holding that thirty-four days, where the pledgor resides in Illinois and the sale is to be in New York, is sufficient; Bryan *v.* Baldwin, 7 Lans. 174 (1872); aff'd, 52 N. Y. 232, holding that two days was sufficient; Stevens *v.* Hurlbut Bank, 31 Conn. 146 (1862), holding that a sale on the same day

Four days' notice is sufficient, although the sale is made in New York and the pledgor resides in Boston.[1] A notice by a newspaper advertisement is insufficient.[2] It is not sufficient notice to the pledgor to send him a printed copy of the public notice of sale, the pledged stock being included in a large amount of other stock, and there being nothing to indicate an intent to sell nor to indicate that the pledgor was interested.[3] The notice must be served personally, and it seems that it cannot be served on one who has charge of the pledgor's office for the transaction of business.[4] A sale of bonds as collateral security, in violation of the agreement as to the notice to be given, does not release a surety on the note secured by the bonds, but discharges him only to the extent of the actual value of the bonds.[5]

By an express agreement the pledgor may waive his right to notice of the time and place of the sale.[6] The pledgee's right by

is unreasonable and the notice insufficient. See other cases in §§ 457, 458, *supra;* Willoughby *v.* Comstock, 3 Hill, 389 (1842), where two days was held sufficient; Edwards, Bailm., § 285. Notice by the pledgee of merchandise that he will sell the same on the following day at half-past twelve o'clock is insufficient where such notice was merely mailed and is not received until ten o'clock the next morning by the pledgee, and the advertisement of the sale was on that morning and on the evening before. Such notice did not give the defendant an opportunity to redeem the property or save his equity. Jacoby *v.* S. Jacoby & Co., 103 Fed. Rep. 473 (1900). As to place of sale, see §§ 458, 476, *supra.*

1 Guinzburg *v.* H. W. Downs Co., 165 Mass. 467 (1896).

2 Lewis *v.* Graham, 4 Abb. Pr. 106 (1857); and see § 119, *supra.*

3 McCutcheon *v.* Dittman, 23 N. Y. App. Div. 285 (1897), modified in 164 N. Y. 355.

4 Bryan *v.* Baldwin, 52 N. Y. 232 (1873). *Cf.* Milliken *v.* Dehon, 27 N. Y. 364 (1863).

5 Vose *v.* Florida R. R., 50 N. Y. 369 (1872).

6 Maryland F. Ins. Co. *v.* Dalrymple, 25 Md. 242 (1866); Genet *v.* Howland, 45 Barb. 560 (1866); and see §§ 459, 462, *supra;* Milliken *v.* Dehon, 27 N. Y. 364 (1863); Stevens *v.* Hurlbut Bank, 31 Conn. 146 (1862); Hyatt *v.* Argenti, 3 Cal. 151 (1853); Wheeler *v.* Newbould, 16 N. Y. 392 (1857); Stenton *v.* Jerome, 54 N. Y. 480 (1873); Wicks *v.* Hatch, 62 N. Y. 535 (1875); Butts *v.* Burnett, 6 Abb. Pr. (N. S.) 302 (1869). The pledgor of stock may, by the terms of the agreement creating the pledge, waive his right to notice of sale for non-payment of the debt. Jeanes's Appeal, 116 Pa. St. 573 (1887). Formerly the validity of a waiver was doubted. Campbell *v.* Parker, 9 Bosw. 322 (1862); Wilson *v.* Little, 2 N. Y. 443 (1849); Gilpin *v.* Howell, 5 Pa. St. 41 (1846); Hanks *v.* Drake, 49 Barb. 186 (1867); overruled on another point in 41 N. Y. 243; Sterling *v.* Jaudon, 48 Barb. 459 (1867). Authority to the pledgee to sell "at public or private sale, at his discretion," thirty days after notice, waives notice of sale. McDowell *v.* Chicago Steel Works, 124 Ill. 491 (1888). Notice may be waived. Chouteau *v.* Allen, 70 Mo. 290 (1879). In Huiskamp *v.* West, 47 Fed. Rep. 236, 249 (1891), where the pledgee was authorized to sell before maturity and without notice if the security be-

written agreement to sell at private sale without notice is waived by him if he does anything which reasonably causes the pledgor to

came insufficient, the court held that "the pledgee could not make sale of the collateral until after the default in the payment of the note, without notice and demand of payment to the pledgor." See also s. c., *sub nom.* West *v.* Huiskamp, 63 Fed. Rep. 749 (1894). Where the pledgees are given power to sell "in such manner as they, in their discretion, may deem proper, without notice," a sale without notice after the maturity of the loan is legal. Williams *v.* United States Trust Co., 133 N. Y. 660 (1892). The sale by a pledgee under an agreement, whereby he sold without notice, was upheld in McDougall *v.* Hazelton, etc. Co., 88 Fed. Rep. 217 (1898). The pledgor may, subsequently to the making of the pledge, release his right to redeem. He may agree that the pledgee may sell the pledge at any time at private sale, and that the proceeds shall, after repayment of the amount loaned, be divided equally between the pledgor and pledgee. Rutherford *v.* Massachusetts Mut. Ins. Co., 45 Fed. Rep. 712 (1891). Under the statute of California notice of the time and place of sale may be waived by the pledgor. Lowe *v.* Ozmun, 3 Cal. App. 387 (1906). The fact that the pledgee, under a waiver of notice, of demand, and of public sale, sells the stock and debt to an enemy of the corporation, does not invalidate the sale. Carson *v.* Iowa, etc. Co., 80 Iowa, 638 (1890). Although the pledgor agrees that the pledgee may sell part of the pledge without notice upon default, this does not release the remainder of the pledge from being additional security for the debt. Bank of Africa *v.* Salisbury, etc. Co., L. R. 17 App. Cas. 281 (1892). Where a corporation authorizes its agent to pledge its bonds, the agent may make the pledge on the usual terms as to selling the bonds in case of default. Morris, etc. *v.* East Side Ry., 104 Fed. Rep. 409 (1900), rev'g 95 Fed. Rep. 13. Where a majority of the stockholders and also the directors have ratified a sale by a pledgee of property of the corporation, a minority stockholder cannot cause the sale to be set aside, inasmuch as the pledgor might have originally consented to the sale. Macon, etc. R. R. *v.* Shailer, 141 Fed. Rep. 585 (1905). A special agreement authorizing the pledgee to sell is not waived by the fact that the pledgee does not exercise that right when the note becomes due, but does exercise it afterwards. Louisville, etc. Co. *v.* Thomas, etc. Co., 68 S. W. Rep. 2 (Ky. 1902). Where the pledgor waives demand and notice of the time and place of sale, the pledgee, after the debt is due, may sell without demand and without notice. Thornton *v.* Martin, 116 Ga. 115 (1902).

The following is a sample of a note and waiver:

"$——. NEW YORK, ——, 19—.

"—— after date —— promise to pay to the order of ——, —— dollars, at ——, for value received, with interest at the rate of —— per cent. per annum, having pledged to the said —— —— the following securities: ————, the market value of which is now $——, with the right on their part from time to time to demand such additional collateral security as they may deem sufficient should the market value thereof decline, and also hereby give them a lien for the amount of all the said liabilities upon all the property or securities given unto or left in their possession by the undersigned, and also upon any balance of the deposit account of the undersigned with them. Upon —— failure to comply with any such demand, this obligation shall forthwith become due, with full power and authority to them or their assigns in case of such default or of the non-payment of any of the liabilities above mentioned at maturity, to sell, assign and deliver the whole, or any part of such securities, or any substitutes therefor or additions thereto, at any brokers' board, or at public or

understand that such special agreement is waived.[1] Such contracts are frequently entered into with stock-brokers by customers buying stock on a margin. But an express power to the pledgee to sell the pledge on certain contingencies is not a waiver of a right to notice.[2] Nor is a mere memoranda on an account stated from a broker to a customer that the broker reserves the right to close out transactions when margins are running out, without further notice, a waiver by the customer of his right to notice and demand for margin.[3] Irregularities in the notice may be waived. Thus, where a person, upon being presented with his account, does not object, but promises to pay the amount, he thereby waives his right to object to a sale as being without notice.[4] Even though a pledgee sells the stock prior to the date on which he gave notice that he would sell it, yet, if the pledgor, knowing the facts, directs the application of the proceeds of the sale and accepts a statement of it, he cannot afterwards complain.[5] The rights and duties of a trustee holding stock as security under a mortgage are considered elsewhere.[6]

§ 478. *Formalities of sale.*—A sale of stock on notice by a pledgee, for the purpose of applying the proceeds to the pledgor's debt, must be at public auction.[7] A private sale is unauthorized and illegal,

private sale, at their option, at any time or times thereafter without advertisement or notice to —— and with the right on their part to become purchasers thereof at such sale or sales, freed and discharged of any equity of redemption. And after deducting all legal or other costs and expenses for collection, sale and delivery, to apply the residue of the proceeds of such sale or sales so made, to pay any, either or all of said liabilities, as to them shall be deemed proper, returning the overplus to the undersigned; and —— will still remain liable for any amount so unpaid. The undersigned do hereby authorize and empower them at their option, at any time, to appropriate and apply to the payment and extinguishment of any of the above-named obligations or liabilities, whether now existing or hereafter contracted, any and all moneys now or hereafter in their hands, on deposit or otherwise, to the credit of or belonging to the undersigned, whether the said obligations or liabilities are then due or not due. ——— ———."

1 Toplitz *v.* Bauer, 161 N. Y. 325 (1900).

2 Stevens *v.* Hurlbut Bank, 31 Conn. 146 (1862); Lewis *v.* Graham, 4 Abb. Pr. 106 (1857). See also Wilson *v.* Little, 2 N. Y. 443 (1849); Genet *v.* Howland, 45 Barb. 560 (1866); Stenton *v.* Jerome, 54 N. Y. 480 (1873). *Cf.* Milliken *v.* Dehon, 27 N. Y. 364 (1863). But an express power to sell on a specified day is held to waive right of notice. Bryson *v.* Rayner, 25 Md. 424 (1866).

3 Bosoian *v.* Hubbard, 121 N. Y. App. Div. 510 (1907).

4 Gillett *v.* Whiting, 141 N. Y. 71 (1894).

5 Granger *v.* Fidelity, etc. Co., 198 Pa. St. 428 (1901).

6 See § 317, *supra*.

7 Conyngham's Appeal, 57 Pa. St. 474 (1868); Rankin *v.* McCullough, 12 Barb. 103 (1851); Genet *v.* Howland, 45 Barb. 560 (1866); Ogden *v.* Lathrop, 65 N. Y. 158 (1875); Terry *v.* Birmingham Nat. Bank, 93 Ala. 599 (1891); s. c., 99 Ala. 566. An express power to sell has been held to authorize a private sale. Bryson *v.* Rayner, 25 Md. 424 (1866). Or a sale at a brokers' board. Bryson *v.* Rayner, 25 Md. 424 (1866). A private sale of collateral held by a receiver

even though the utmost market price is obtained.[1] But a special contract by which the pledgor authorizes the pledgee to sell without notice and at public or private sale has been upheld.[2] Unless

cannot be made, even by order of the court. *In re* Earle, 92 Fed. Rep. 22 (1899). A sale must be public and on public notice, such as is usual at the place of sale in respect to auction sales of similar property. Lowe *v.* Ozmun, 3 Cal. App. 387 (1906).

1 Castello *v.* City Bank of Albany, 1 N. Y. Leg. Obs. 25 (1842). *Cf.* Nabring *v.* Bank of Mobile, 58 Ala. 205 (1877). The pledgee's right to object is waived by long delay. Hayward *v.* National Bank, 96 U. S. 611 (1877). In Willoughby *v.* Comstock, 3 Hill, 389 (1842), it was held that the pledgee's failure to object when he received notice of intent to sell at a brokers' board was fatal. A *bona fide* pledgee of a certificate of stock from an agent having power to pledge, but who had so pledged the stock for purposes not authorized by the owner, is nevertheless protected, and even though such pledgee sells the stock at private sale without notice he cannot be held liable if the stock was not worth more than the debt secured. Brittan *v.* Oakdale, etc., 124 Cal. 282 (1899).

2 Williams *v.* United States Trust Co., 133 N. Y. 660 (1892); s. c., 14 N. Y. Supp. 502. A private sale by the pledgee in accordance with an agreement authorizing such sale was upheld in Smith *v.* Lee, 84 Fed. Rep. 557 (1898), where the price realized was, under the circumstances, a fair price. In this case a third party had substituted his stock for the stock of the original pledgor, and the court held that the substituted stock was subject to the terms of the original agreement of pledge as to mode of sale. A private sale in accordance with the contract allowing said sale was held in Dullnig *v.* Weekes, 40 S. W. Rep. 178 (Tex. 1897), not to be invalid, where the amount realized was greater than the market value. The court held also that a waiver of advertisement or notice waived any notice to the pledgor and also to the public. See also § 477, *supra.* Where the pledgor becomes insolvent and assigns for the benefit of creditors, his assignee may agree with the pledgee that the stock be sold at private sale by the assignee. Durfee *v.* Harper, 22 Mont. 354 (1899). A contract by which the pledgee may sell at public or private sale, either with or without notice, is valid and a sale at private sale without notice is good. Lowe *v.* Ozmun, 3 Cal. App. 387 (1906). A private sale authorized by the pledge agreement is legal. Arbogast *v.* American, etc. Bank, 125 Fed. Rep. 518 (1903). Even though a pledgor signs a written agreement that on non-payment of the debt the pledgee may sell the stock at public or private sale with or without notice to the pledgor, yet a sale on an exchange at which the public cannot bid will be set aside at the instance of the pledgor, and if the pledgor has resold the stock, the pledgor in a suit in equity instituted to redeem the pledge may be given damages equal to the difference between the debt and the market value of the stock, which may be the price at which the pledgee has resold the same. The pledgee is not entitled to have a jury estimate such damage. Such a suit in equity lies if, at the time of instituting it, the pledgor did not know that the pledgee had resold the stock, the stock being in a private corporation and constituting a majority. No tender of the debt is necessary if the pledgee denies the right of the pledgor to redeem. Hagan *v.* Continental Nat. Bank, 182 Mo. 319 (1904). A provision in a pledge of an insurance policy that the pledgee may sell it at public or pri-

there is such a special contract, the pledgee cannot have the sale made at a brokers' board or in a stock exchange, since only the members of the association are allowed to bid for stocks sold therein, while the law requires that the public shall be allowed to bid at a pledgee's sale.[1] Frequently a special agreement is made between the pledgor and pledgee, especially between a customer and his stock-broker, whereby the pledgee is allowed to sell at a brokers' board.[2] Such an agreement, however, does not authorize a private sale at a brokers' board.[3] The usual printed agreement which a bank requires a pledgor to sign will be construed in favor of the pledgor, inasmuch as the agreement is drawn by the pledgee. A provision that the pledge shall apply to all liabilities of the pledgor to the bank does not include a claim which the bank purchases.[4] A sale is valid though the stock is sold for only a small part of its value.[5] The fact that there is only one bidder does not render the sale invalid.[6] The pledgor in selling must "exercise reasonable

vate sale upon default, or surrender it to the company, may be waived by agreement, declaration, or course of conduct indicating that an opportunity would be given to redeem. Toplitz *v.* Bauer, 161 N. Y. 325 (1900). Where by contract the pledgee has the right to make a private sale and he does so with the knowledge of the pledgor, the sale is valid. Rose *v.* Doe, 89 Pac. Rep. 135 (Cal. 1907).

1 Brass *v.* Worth, 40 Barb. 648 (1863); Rankin *v.* McCullough, 12 Barb. 103 (1851). A sale in another state is legal. King *v.* Texas, etc. Ins. Co., 58 Tex. 669 (1883). A sale on an exchange where the public are not admitted to bid is not a sufficient sale. Hagan *v.* Continental Nat. Bank, 182 Mo. 319 (1904).

2 Wicks *v.* Hatch, 62 N. Y. 535 (1875). See ch. XXV, *supra.* A pledgee may show a sale by proving that he sent it to a broker who reported the sale, and the pledgee credited the pledgor with the proceeds and notified him thereof, to which the pledgor assented. Smith *v.* Becker, 129 Wis. 396 (1906).

3 Allen *v.* Dykers, 3 Hill, 593 (1842); aff'd, Dykers *v.* Allen, 7 Hill, 497 (1844).

4 Gillet *v.* Bank of America, 160 N. Y. 549 (1899).

5 See § 850, *infra.* A *bona fide* purchaser at a pledgee's sale is protected, though he purchased for less than the real value of the stock, and though a receiver had previously been appointed of the pledgor's property and it had been transferred to the receiver. Dudley *v.* Gould, 6 Hun, 97 (1875). Even though stock actually worth $5,000 is sold on public execution for $9, yet the sale cannot be attacked collaterally, but can be set aside only in a direct proceeding for that purpose. Howard *v.* Corey, 126 Ala. 283 (1900). A pledgee is not justified in selling the pledge for just enough money to pay the debt where the pledge is known to have more than double that value, and where the pledgee, although a *bona fide* holder, had learned that the pledge had been made in breach of trust by the pledgor, especially where the pledgee buys at the sale. Foote *v.* Utah, etc. Bank, 17 Utah, 283 (1898). As to a sacrifice sale by a trustee of a mortgage, see § 317, *supra.*

6 Guinzburg *v.* H. W. Downs Co., 165 Mass. 467 (1896).

skill and diligence in order to get the value of the property."[1] Where stock is sold on a mortgage foreclosure, it should be sold "by offering the shares in small blocks, and then as a whole, and taking the bid which aggregates the larger sum."[2] But a sale in small blocks is not required at common law.[3] Where an Oregon corporation pledges its bonds in California to secure notes payable in California, the law of California applies as to the mode of selling such bonds on default of the pledgor.[4]

§ 479. *If the pledgee himself purchases at the sale, then the sale is voidable.*—It is a well-established rule that, where a pledgee pursues the remedy of selling the stock upon notice, the pledgee himself is disqualified from purchasing the stock.[5] The rule is based on the principle that the pledgee owes a duty to the pledgor, and

1 Guinzburg *v.* H. W. Downs Co., 165 Mass. 467 (1896). Where a Boston pledgee of stock in a street railway in New Hampshire, having a market value in New Hampshire of $50 a share, sells out the stock in Boston, where it is not known, and buys it in at $10 a share, he is liable for the full value of the stock, even though it afterwards becomes worth nothing, and he offers to give it up, it appearing that he might have sold it to outsiders at its face value. Jennings *v.* Moore, 189 Mass. 197 (1905). See also § 479, *infra.* In the case Hagan *v.* Continental Nat. Bank, 182 Mo. 319 (1904), the court held that a private sale by the pledgee, under a special contract, must be made fairly and with a view to the advantage of the pledgor as well as of the pledgee. The sale was set aside in that case because it was made "for the benefit of whom it may concern" instead of a full statement of the circumstances being made, and also because the pledgee bought in for $5,000 the pledged stock, and the pledgee had then resold it for $30,000. A pledgee who is given power to manage the stock and sell cannot easily be held liable in damages for mismanagement, even though it turns out that he sold for much less than the stock was worth. Hewitt *v.* Steele, 118 Mo. 463 (1893). See also Minneapolis Trust Co. *v.* Menage, 73 Minn. 441 (1898).

2 Toler *v.* East Tennessee, etc. Ry., 67 Fed. Rep. 168, 181 (1894). Where the pledgee obtains a judgment for the sale of the pledge "upon the curb" in New York, judgment being silent as to any notice of the sale, and the pledgee then sells the stock in small lots and on different dates and without notice, the pledgor cannot complain if he delayed a year before objecting to such sale. Violett *v.* Horbach, 119 N. Y. App. Div. 373 (1907).

3 Even though the sheriff, under execution, sells a large block of stock in one lot, instead of dividing and selling it in small lots, and even though such sale realizes $12,000, whereas the levy was for only $1,000, yet the purchaser is protected in his purchase. Connecticut, etc. Ry. *v.* Morris, 14 S. C. Rep. (Can.) 318 (1887); Morris *v.* Connecticut, etc. Ry., L. R. 2 Q. B. 303 (1886). The court may order a receiver to sell shares of stock held by the receiver in one block instead of in parcels if the court deems best. First Nat. Bank *v.* C. Bunting Co., 7 Idaho 387 (1900).

4 Morris, etc. *v.* East Side Ry., 104 Fed. Rep. 409 (1900), rev'g 95 Fed. Rep. 13.

5 Easton *v.* German-American Bank, 127 U. S. 532 (1888); Bryan *v.* Baldwin, 52 N. Y. 232 (1873), the court

will not open the door to possible devices of the pledgee for purchasing the stock for himself at a low price. The pledgee cannot purchase, either directly or indirectly, in his own name or in the name of another.[1] The effect of a purchase by the pledgee for himself is that the whole proceeding of the pledgee for subjecting the pledge to the payment of the debt is utterly futile, and voidable at the election of the pledgor. The pledgor, however, may elect to abide by the sale.[2] The pledgor cannot claim that the pledgee has converted the stock by purchasing at the sale,[3] but he

saying: "The plaintiff, being pledgee of the stock, and in that character exposing it for sale, could not become the purchaser unless the defendant assented to such purchase. . . . This sale to the plaintiff was not void, but voidable at the election of the defendant;" Maryland F. Ins. Co. *v.* Dalrymple, 25 Md. 242 (1866). Nor can he buy where the pledge is being sold on a forfeiture sale for non-payment of calls. Freeman *v.* Harwood, 49 Me. 195 (1859). See also Sickles *v.* Richardson, 23 Hun, 559 (1881); where the sale of propety pledged was on an attachment. The pledgor's silence may constitute a ratification of the pledgee's purchase. Carroll *v.* Mullanphy Sav. Bank, 8 Mo. App. 249 (1880). If the pledgee is a corporation its president cannot purchase for it. Star F. Ins. Co. *v.* Palmer, 41 N. Y. Super. Ct. 267 (1876). Lewis *v.* Graham, 4 Abb. Pr. 106 (1857), holds that a special partner of the pledgee firm may purchase. And see ch. XXV, § 450, *supra*. *Cf.* Finney's Appeal, 59 Pa. St. 398 (1868). Where a pledgee bank having a right to sell at private sale and without notice sells the pledge through its president, who buys the pledge himself, and the president openly pays the bank for it, long delay on the part of the bank in complaining is fatal. Raymond *v.* Palmer, 41 La. Ann. 425 (1889). Even though the attorney for the pledgee buys a pledge at public sale and afterwards resells it to the pledgee, yet if there is no proof that the transaction was a mere device the sale is valid. Steelman *v.* Weiskittel, 88 Md. 519 (1898). Where a bank holds $300,000 of first-mortgage bonds issued to the bank by the corporation itself, for a debt of about $175,000 and transfers the same to another party, who advertises and sells the bonds under the terms of the pledge, even though the purchaser borrows the money from the bank in order to make payment, the sale is not thereby invalidated. Morris, etc. *v.* East Side Ry., 104 Fed. Rep. 409 (1900), rev'g 95 Fed. Rep. 13. As against a surety on a note the acts of the pledgee in foreclosing the pledge and purchasing the same and also attaching other stock held in pledge and selling it on execution, are not valid, the pledge being worth more than the amount of the notes. Crosby *v.* Woodbury, 89 Pac. Rep. 34 (Col. 1905).

1 Minneapolis Assoc. *v.* Canfield, 121 U. S. 295 (1887). He cannot buy in the name of a dummy. Rush *v.* First Nat. Bank, 71 Fed. Rep. 102 (1895).

2 Appeal of Hibernia Nat. Bank, 47 La. Ann. 643 (1895).

3 Bryan *v.* Baldwin, 52 N. Y. 232 (1873). If the pledgee buys it in, there is no conversion. The pledge continues. Terry *v.* Birmingham Nat. Bank, 93 Ala. 599 (1891); s. c., 99 Ala. 566. If the pledgee purchases at the sale, the pledgor may either ratify or disaffirm the sale, but cannot treat it as a conversion. Winchester *v.* Joslyn, 31 Colo. 220 (1903). Where the pledgee buys at a sale he cannot be held liable for conversion so long as he retains the property, unless the

may disregard the notice and sale and the whole proceeding as being ineffectual and voidable. The pledge relationship continues as though no attempt had been made by the pledgee to subject the pledge to the payment of the debt.[1] Where the pledgee buys the security at the public sale and then sells it, and then sues the pledgor for the deficiency on the first sale, the pledgor may claim a set-off for the full value of the securities wrongfully resold, and

pledgor demands the return of the same and offers to perform his part of the contract; but where the pledgee sells a part of the property he is liable for conversion without any demand or offer of performance by the pledgor. Glidden *v.* Mechanics' Nat. Bank, 53 Ohio St. 588 (1895). Where the pledgee purchases at the sale the sale is void, but does not amount to a conversion of the securities. First Nat. Bank *v.* Hall, 22 N. Y. App. Div. 356 (1897).

1 Bryson *v.* Rayner, 25 Md. 424 (1866); Middlesex Bank *v.* Minot, 45 Mass. 325 (1842); Hestonville, etc. R. R. *v.* Shields, 3 Brewst. (Pa.) 257 (1869). If the pledgee purchases at the sale the pledge continues. The pledgor does not waive his rights by settling in ignorance that the pledgee purchased. Sharpe *v.* Birmingham Nat. Bank, 87 Ala. 644 (1888). If the pledgee buys, the pledge continues unless the pledgor confirms the sale. Hyams *v.* Bamberger, 10 Utah, 3 (1894). Where the pledgee buys in the stock himself, it is the same as though no sale had taken place, and the corporation is not liable for allowing a transfer of the stock to such pledgee. First Nat. Bank *v.* Mings, 11 Tex. Civ. App. 302 (1895). Where a pledgee buys for himself, and subsequently takes the stock into his possession, the pledge continues, and he cannot sell a second time without due notice. Leahy *v.* Lobdell, etc. Co., 80 Fed. Rep. 665 (1897). A pledgee of bonds who buys them in at his own sale as pledgee still holds them in pledge. Duncomb *v.* N. Y. etc. R. R. 84 N. Y. 190, 204 (1881). Even though a national bank, as pledgee of a national bank stock which stands on the books of the latter bank in the name of the pledgor, sells the stock on notice and buys it in at a nominal figure, yet if the pledgee does not have the stock transferred to himself on the books of the bank he cannot be held liable thereon, the pledgee having soon after the sale waived its rights as a purchaser at such sale. Robinson *v.* Southern, etc. Bank, 180 U. S. 295 (1901). Where the pledgee of stock sells it out and buys it in himself, and at the annual election votes the stock by proxy, even though the stock still stands on the corporation books in the name of the pledgor, and the pledgor claims that the sale is illegal and that the directors elected by the pledgee's vote intend to take action detrimental to the corporation, such pledgor is entitled to an injunction against such directors acting as directors. Reynolds *v.* Bridenthal, 57 Neb. 280 (1898). A purchaser of stock who makes a partial payment and gives back the stock as collateral security cannot abandon the contract and claim such part of the stock as the payment already made would pay for, on the ground that the seller has obtained control of the corporation and is guilty of a breach of trust. The fact that the seller as pledgee has sold the stock and bought it in himself is immaterial, inasmuch as such a sale is illegal. Reid *v.* Caldwell, 110 Ga. 481 (1900); 114 Ga. 676. Where the trustee of a mortgage makes a loan to the mortgagor on the bonds secured by the mortgage and then sells out the collateral and

need not make a tender.[1] Under the statutes of California the pledgee at a public sale may buy in the stock; [2] while in Massachusetts by statute a pledgee is prohibited from purchasing at his own sale.[3] Where a pledge is foreclosed by legal proceedings similar to those for the foreclosure of chattel mortgages, either party may bid at the public judicial sale.[4] Even though the pledgee is authorized by special contract with the pledgor, to sell at public or private sale without notice, yet he cannot buy for himself, notwithstanding he has sold the note with the collateral to another person who makes the sale.[5] The pledgor may authorize the pledgee to purchase at the sale and retain the pledge,[6] but the pledgee must not take an undue

buys it in himself, he can upon foreclosure enforce the bonds only to the extent of the amount loaned and interest. Knickerbocker Trust Co. *v.* Penacook Mfg. Co., 100 Fed. Rep. 814 (1900).

1 Rush *v.* First Nat. Bank, 71 Fed. Rep. 102 (1895), reviewing the authorities on tender in such cases. Where the pledgee sues for the balance due on the note after a sale of the pledge, and the pledgor sets up a counterclaim that the pledgee had sold the stock "for the use of defendant and converted to its own use," the pledgor thereby ratifies the sale, and is entitled only to the purchase price of the stock, and not its actual value. Terry *v.* Birmingham Nat. Bank, 99 Ala. 566 (1893).

2 McAulay *v.* Moody, 128 Cal. 202 (1900). Under the California code the pledgee may purchase at a public sale of the pledge. Lowe *v.* Ozmun, 3 Cal. App. 387 (1906).

3 Lord *v.* Hartford, 175 Mass. 320 (1900).

4 Pewabic Min. Co. *v.* Mason, 145 U. S. 349 (1892). A pledgee may purchase at a judicial sale. Anderson *v.* Messenger, 146 Fed. Rep. 929 (1906). The pledgee of stock cannot claim title to it on the ground that the pledgor was a receiver and purchased the stock at a receiver's sale. Groeltz *v.* Cole, 128 Iowa 340 (1905). In Newport, etc. Bridge Co. *v.* Douglass, 12 Bush (Ky.), 673, 720 (1877), the pledgee of bonds from the company issuing them obtained a foreclosure of the pledge by suit, and bought the bonds in, and was then held to be the absolute owner of them.

5 Greer *v.* Lafayette, etc. Bank, 128 Mo. 559 (1895).

6 Chouteau *v.* Allen, 70 Mo. 290 (1879). See also Farmers', etc. Co. *v.* Toledo, etc. Co., 54 Fed. Rep. 759 (1893), where bonds were bought in. A pledgee cannot himself purchase the stock at the sale, but the pledgor may lawfuly contract so as to allow the pledgee to purchase at such sale, or may ratify such purchase after it has been made. If there is no such contract or ratification, however, the sale is void, and the parties remain in the same position as though no sale had taken place. Appleton *v.* Turnbull, 84 Me. 72 (1891). Under a power of sale authorizing a pledgee to purchase, and waiving notice of sale, the pledgee may purchase, and it is immaterial that the sale took place at a time when stocks and bonds had declined in a panic. The pledgee need not wait for a favorable condition of the market. Franklin Nat. Bank *v.* Newcombe, 1 N. Y. App. Div. 294 (1896); aff'd, 157 N. Y. 699. A provision in a contract of pledge that the pledgee may, at a sale for non-payment, buy in the stock for himself, is legal. Manning *v.* Schriver, 79 Md. 41 (1894). In Fidelity, etc. T. Co. *v.* Roanoke, etc. Co., 81 Fed. Rep. 439

advantage of such an opportunity.[1] A contract by which the pledgee may sell at private sale means an actual sale and not a taking over of the property by the pledgee himself.[2] Under a contract authorizing the pledgee to buy at a sale of the collateral, he may buy even at a much less price than the market price, where the sale was public and the pledgee was given full notice of the same with an opportunity to stop the sale by advancing more collateral, especially where the notice of sale was fully advertised in the papers and the place of sale was a public exchange where such sales were usually made.[3] Stock held in pledge to secure a debt cannot be sold before the debt is due,[4] unless there is a special contract to that effect. The pledgor may release his equity to the pledgee.[5] A court of equity scrutinizes closely, however, a contract between pledgor and pledgee

(1896), the court sustained a purchase by the pledgee himself, where the agreement of pledge authorized him to sell at public or private sale and without notice or demand of payment. Where the pledgee sells bonds held as collateral and buys them in, he may enforce them for their full par value instead of to the extent of only his claim. Atlantic Trust Co. *v.* Woodbridge, etc. Co., 86 Fed. Rep. 975 (1897).

1 Even though the agreement or pledge allows the pledgee to sell at public or private sale and purchase for himself, and he does purchase at public sale, the sale is not legal unless it was fairly made and he acted in good faith to protect the pledgor, and a delay of three years in complaining is not fatal. Perkins *v.* Applegate, 85 S. W. Rep. 723 (Ky. 1905). Where a Boston pledgee of stock in a street railway in New Hampshire, having a market value in New Hampshire of $50 a share, sells out the stock in Boston, where it is not known and buys it in at $10 a share, he is liable for the full value of the stock, even though it afterwards becomes worth nothing, and he offers to give it up, it appearing that he might have sold it to outsiders at its face value. Jennings *v.* Moore, 189 Mass. 197 (1905). See also § 478, *supra.*

2 Lowe *v.* Ozmun, 3 Cal. App. 387 (1906).

3 Farmers', etc. Bank *v.* Venner, 192 Mass. 531 (1906), holding also that an error in the notice of sale describing the bonds as six per cent. instead of five per cent. is immaterial.

4 Illinois Nat. Bank *v.* Baker, 128 Ill. 533 (1889).

5 Thomas *v.* Coffin, 62 Fed. Rep. 665 (1894); Small *v.* Saloy, 42 La. Ann. 183 (1890). A pledgor may pledge the securities pledged, and the sale may be to the pledgee. The sale may be oral and will be upheld, the debt being canceled thereby. Brown *v.* Farmers' L. & T. Co., 117 N. Y. 266 (1889). *Cf.* Ryle *v.* Ryle, 41 N. J. Eq. 582 (1886). Where the owner of stock has pledged all of it to different parties and arranges with one of them to take up all the stock, and the latter does so, and for several years treats it as his own, and the lower court finds that the agreement was that the pledgee should own it, the upper court will not disturb the decision, especially where the pledgor claims that he transferred the stock to avoid paying other creditors. Hukill *v.* Yoder, 189 Pa. St. 233 (1899). Where an agreement whereby stock is pledged to secure a note provides that the pledgee may buy the stock at a fixed price on or before a certain date, a transferee of the note

for transfer of title, and will set it aside if there is any ground for believing that it is a harsh contract, brought about by the position of vantage occupied by the pledgee.[1] Notwithstanding a pledge provides that if the debt is not paid within a certain time the stock shall belong to the pledgee, this does not give complete title to the pledgee upon non-payment of the debt, but merely gives him an

and pledgee cannot exercise such option by notice to the original pledgee. The notice must be to the pledgor. Rumsey *v.* Lentz, 59 Ohio St. 189 (1898). A written agreement between the pledgor and pledgee by which the note is canceled, in consideration of the stock being sold and transferred absolutely to the pledgee, is legal, unless the agreement is an unconscionable one. Cunningham *v.* Jones' Ex'rs, 108 Ky. 728 (1900). Even though garnishee process has been served upon the pledgee of stock for a debt of the pledgor, yet the pledgor and pledgee may agree that the stock shall belong to the pledgee in cancellation of the debt. Such agreement is not illegal if the debt was the full value of the stock at the time, and even though subsequently the pledgee, upon selling the stock for more than the debt, pays the surplus to the pledgor, the creditor issuing the garnishee process cannot complain. Steiner *v.* First, etc. Bank, 127 Ala. 595 (1900). Receiving the surplus in ignorance of illegality is no waiver. Allen *v.* American, etc. Assoc., 49 Minn. 544 (1892); Sharpe *v.* Birmingham Nat. Bank, 87 Ala. 644 (1888). A creditor of an individual cannot set aside a sale by the latter of his stock to a pledgee and indorser of notes, even though such sale was at a figure much less than the price at which said pledgee finally sold the stock after putting in additional money. Davis *v.* Yoder, 173 Pa. St. 138 (1896). In Fox *v.* Hartford, etc. R. R., 70 Conn. 1 (1897), the pledgor sold the pledge to the pledgee. Where an insolvent pledgor sells the pledge to the pledgee for the debt itself, $7,000, the transaction is legal, even though a jury find that the stock was worth $1,500 more. Wachovia L. & T. Co. *v.* Forbes, 102 N. C. 355 (1897).

1 Ritchie *v.* McMullen, 79 Fed. Rep. 522 (1897). Under the New Hampshire statutes, when a corporation is wound up under insolvency proceedings, all claims are allowed as of the same date, interest being added for those past due, and a rebate of interest made on those not yet due. An assignee in insolvency cannot agree that a trustee to whom the corporation pledged mortgages as security for debentures shall purchase such securities at a price named. Bank Com'rs *v.* New Hampshire, etc. Co., 69 N. H. 621 (1899). A pledgor may release his equity to the pledgee, yet the courts view such agreements with distrust and disfavor, and if advantage was taken of the pledgor or the consideration grossly inadequate, the release will be disregarded and the pledgor allowed to redeem. Collins *v.* Denny, etc. Co., 41 Wash. 136 (1905), a case where $27,800 worth of stock was pledged for a $3,000 debt. In this case by the original agreement the pledgee was to have the stock if the debt was not paid within four months. A release, by the board of directors of a corporation mortgagor, of the equity of redemption to the mortgagee, is not binding on the corporation. Brinkerhoff, etc. Co. *v.* Boyd, 192 Mo. 597 (1905). A pledgor who has transferred his equity to the pledgee in cancellation of the debt, cannot have the transaction set aside where it is not alleged that he could have obtained more for the stock or was kept in ignorance of its value or did not know its worth. Wetherell *v.* Johnson, 208 Ill. 247 (1904).

option.[1] Even though a corporation, when it mortgages its mortgage bonds, gives an option to the mortgagee to purchase the bonds, such option cannot be enforced, because a mortgagee is not allowed at the time of making a loan to contract for the purchase of mortgaged property. The rule is different where a day or more intervenes between the two contracts.[2]

1 Colonial T. Co. *v.* McMillan, 188 Mo. 547 (1905). The owner of stock may pledge it to secure his agreement that he will form a corporation to take over certain property, and he may agree that the stock shall be forfeited to the pledgee if the agreement is not carried out. Electric, etc. Co. *v.* Smith, 113 N. Y. App. Div. 615 (1906).

2 Samuel *v.* Jarrah, etc. Corp. Ltd., [1904] A. C. 323. Where the pledgor agrees to sell the stock to the pledgee, but the corporation claims a lien and refuses to transfer it, and for three years the pledgee does nothing and the stock quadruples in value, specific performance will not be granted at the instance of the pledgee. Schimpff *v.* Dime, etc. Bank, 208 Pa. St. 380 (1904).

CHAPTER XXVII.

LEVY OF ATTACHMENT AND EXECUTION UPON SHARES OF STOCK.

§ 480. *An execution at common law could not reach shares of stock.*—A share of stock is in the nature of a chose in action, and at common law a chose in action could not be reached by or made subject to a levy of execution. Consequently it has been uniformly held by the courts that at common law a levy of execution could not be made on shares of stock. Unless, therefore, the process of execution has been extended by statute so as to reach such prop-

erty, the stock of a judgment debtor cannot be made subject to the payment of his debts by means of an execution.[1] An attachment, being entirely statutory, can be levied on shares of stock only when the words of the statute declare that an attachment may be levied on such property.[2]

§ 481. *Nor, it seems, could a court of equity subject stock to the payment of debts, except when it had been conveyed away fraudulently.*—There is some doubt whether a court of equity has power to subject a judgment debtor's choses in action to the payment of his debts, where the only ground for the interference of the court is that, unless it does interfere, such property cannot be reached by the judgment creditor. In New York, previous to the statutes regulating this subject, the jurisdiction of a court of equity therein was emphatically denied in one case,[3] and with equal emphasis declared to exist in another case.[4] The English authorities are quite

[1] Van Norman *v.* Jackson Circuit Judge, 45 Mich. 204 (1881); Feige *v.* Burt, 118 Mich. 243 (1898); Armour etc. Co. *v.* St. Louis Nat'l B'k, 113 Mo. 12 (1892); Nashville T. Co. *v.* Weaver, 102 Tenn. 66 (1899); Daniel *v.* Gold Hill, etc. Co., 28 Wash. 411 (1902); Goss, etc. Mfg. Co. *v.* People, 4 Ill. App. 510 (1879); Blair *v.* Compton, 33 Mich. 414 (1876); Slaymaker *v.* Bank of Gettysburg, 10 Pa. St. 373 (1849); Foster *v.* Potter, 37 Mo. 525 (1866); Howe *v.* Starkweather, 17 Mass. 240 (1821); Nabring *v.* Bank of Mobile, 58 Ala. 204 (1877); Denton *v.* Livingston, 9 Johns. (N. Y.) 96 (1812), per Chancellor Kent; Nashville Bank *v.* Ragsdale, Peck (Tenn.), 296 (1823). Even where the stock is held to be real estate. Cooper *v.* Dismal Swamp Canal Co., 2 Murph. (N. C.) 195 (1812). *Cf.* Gue *v.* Tidewater Canal Co., 24 How. (U. S.) 257 (1860). In the District of Columbia, stock in an incorporated company cannot be subjected to the process of attachment or of execution. Barnard *v.* Insurance Co., 4 Mackey, 63 (1885). At an early day, when the nature of stock was little understood, an attachment was attempted on the corporate property for the debts of a stockholder. It failed. Williamson *v.* Smoot, 7 Mart. (La.) 31 (1819). Stock cannot be taken on a tax warrant. Barnes *v.* Hall, 55 Vt. 420 (1883). *Cf.* McNeal *v.* Mechanics', etc. Assoc., 40 N. J. Eq. 351 (1885); Smith *v.* Northampton Bank, 58 Mass. 1 (1849). A tax collector cannot levy on and sell stock under the law relative to attachments. Kennedy *v.* Mary Lee, etc. Ry., 93 Ala. 494 (1891); and § 566, *infra.* Execution against a corporation cannot be levied on stock owned by the corporation itself, such stock having been purchased by it under statutory authority at a forfeiture sale for nonpayment of calls. Robinson *v.* Spaulding, etc. Co., 72 Cal. 32 (1887). An attachment of stock does not prevent a sale of property by the corporation. Gottfried *v.* Miller, 104 U. S. 521 (1881). The question of whether an execution may be levied on a seat in an exchange is considered in ch. XXIX, *infra.*

[2] Plimpton *v.* Bigelow, 93 N. Y. 592, 602 (1883); Merchants' Mut. Ins. Co. *v.* Brower, 38 Tex. 230 (1873).

[3] Donovan *v.* Finn, 1 Hopk. Ch. 59, 67 (1823). See also 2 Dan. Ch. Pr., p. 1037, n.

[4] Storm *v.* Waddell, 2 Sandf. Ch. 495, 511 (1845).

uniform in holding that a court of equity has no such jurisdiction.[1] And in America, for the most part, a similar conclusion is arrived at.[2] Where, however, the debtor has conveyed away his stock for the purpose of defrauding his creditors, a court of equity will aid the judgment creditor, inasmuch as it has jurisdiction in matters involving fraud.[3]

1 Dundas *v.* Dutens, 1 Ves. Jr. 196 (1790); Bank of England *v.* Lunn, 15 Ves. Jr. 569 (1809); Grogan *v.* Cooke, 2 Ball & B. (Ir. Ch.) 230 (1812); Nantes *v.* Corrock, 9 Ves. Jr. 182 (1803); McCarthy *v.* Goold, 1 Ball & B. (Ir. Ch.) 387 (1810), applying the same rule to dividends. In King *v.* Dupine, 2 Atk. 603, n. (1744), a court of equity subjected to the payment of a debt the debtor's reversionary interest in an annuity. In Horn *v.* Horn, Ambl. 79 (1749), the court refused aid, inasmuch as the debtor had been imprisoned under a *capias ad satisfaciendum.*

2 Williams *v.* Reynolds, 7 Ind. 622 (1856); Disborough *v.* Outcalt, 1 N. J Eq. 298, 306 (1831); McFerran *v.* Jones, 2 Litt. (Ky.) 219 (1822); Erwin *v.* Oldham, 6 Yerg. (Tenn.) 185 (1834). *Contra,* dictum, Watkins *v.* Dorsett, 1 Bland's Ch. (Md.) 530 (1828). In Brightwell *v.* Mallory, 10 Yerg. (Tenn.) 196 (1836), the proceeding was statutory.

3 Taylor *v.* Jones, 2 Atk. 600 (1743), holding that the debtor's transfer of stock in trust was in fraud of creditors; Hadden *v.* Spader, 20 Johns. (N. Y.) 554 (1822); Scott *v.* Indianapolis Wagon Works, 48 Ind. 75 (1874); Van Norman *v.* Jackson Circuit Judge, 45 Mich. 204 (1881); Lathrop *v.* McBurney, 71 Ga. 815 (1883); Gillett *v.* Bate, 86 N. Y. 87 (1881); State Bank *v.* Gill, 23 Hun, 410 (1881), and § 484, *infra;* Skowhegan Bank *v.* Cutler, 49 Me. 315 (1860); State *v.* Warren F. & M. Co., 32 N. J. L. 439 (1868); Bayard *v* Hoffman, 4 Johns. Ch. 450 (1820); Moore *v.* Metropolitan Nat. Bank, 55 N. Y. 41 (1873); Colbert *v.* Sutton, 5 Del. Ch. 294 (1880). The fraudulent transferee must be made a party defendant. Hyatt *v.* Swivel, 52 N. Y. Super. Ct. 1 (1885). But the fraudulent transferee is not liable unless he has accepted the stock. Skowhegan Bank *v.* Cutler, 49 Me. 315 (1860); Cartmell's Case, L. R. 9 Ch. App. 691 (1874). Acceptance is a question of fact. Pim's Case, 3 De G. & S. 11 (1849). The transferee is not allowed to claim that the transfer was to defeat creditors. Smith *v.* Forty-nine, etc. Min. Co., 14 Cal. 242 (1859). The judgment creditor who institutes the suit in equity has priority in the distribution of the proceeds of his suit. See Freeman on Executions (2d ed.), § 434. The pledgor may by an instrument in writing assign his equity of redemption to one of his creditors. Such assignment need not be recorded as a chattel mortgage, and is not fraudulent, even though it be kept secret from the other creditors of the pledgor. National H. R. Bank *v.* Chaskin, 28 N. Y. App. Div. 311 (1898). A pledgee cannot, by obtaining judgment on his claim, reach the pledge by a judgment creditor's bill. Shaw *v.* Monson, etc. Co., 96 Me. 41 (1901). The fact that the transferee of a certificate of stock does not have it transferred on the corporate books is no proof of fraud in the transfer, even though the transferrer was insolvent when he sold the stock. Culp *v.* Mulvane; 66 Kan. 143 (1903). See also § 484, *infra.* A stockholder who assigns certificates of stock to his wife and places them in a box in his possession in which he keeps her papers, is not guilty of a fraud as against his subsequent creditors, even though he did not actually deliver the certifi-

§ 482. *By statutory provisions executions are generally sufficient to reach the debtor's stock—Strict compliance necessary.*—Nearly all of the states of the Union have enacted statutes extending the scope of executions so as to subject to them all choses in action, including shares of stock in a corporation. Frequently special provisions are made applicable to stock, and prescribing the steps which are necessary to render the levy of execution effectual. Where an execution is levied in accordance with such statutes, its provisions must be substantially complied with, and, if not complied with, the sale is not merely voidable, but is wholly unauthorized and void. The mode of sale is particularly scrutinized by the courts.[1] It is fatal to the levy and sale if the sheriff fails to give

cates to her and she did not know of the assignment. *In re* Hedley, 156 Fed. Rep. 314 (1907).

[1] Blair *v.* Compton, 33 Mich. 414 (1876), holding that where the sheriff sold without knowing or stating how many shares of stock the debtor owned, and which were being sold, the sale was void. See also People *v.* Goss, etc. Mfg. Co. 99 Ill. 355 (1881), reversing Goss, etc. Mfg. Co. *v.* People, 4 Ill. App. 510 (1879). The procedure in levy of execution on stock as laid down by the charter of the corporation supersedes the procedure of a previous general statute. Titcomb *v.* Union M. & F. Ins. Co., 8 Mass. 326 (1811). And a statute which is subsequent to the charter supersedes in this respect the latter. Howe *v.* Starkweather, 17 Mass. 240 (1821). The sheriff need not sell the stock in parcels, but may sell the whole at once. Morris *v.* Connecticut etc. R. R. (Montreal), L. R. 2 Q. B. 303 (1886). Even though the sheriff sells in one lot a large block of stock under execution instead of dividing and selling it in small lots, and even though such sale realizes $12,000, whereas the levy was for only $1,000, yet the purchaser is protected in his purchase. Connecticut, etc. Ry. *v.* Morris, 14 S. C. Rep. (Can.) 318 (1887). The court may order a receiver to sell shares of stock held by the receiver in one block instead of in parcels if the court deems best. First Nat. Bank *v.* C. Bunting & Co., 7 Idaho 387 (1900). See also § 489, *infra.* An execution sale of stock will be set aside where it was made with an intentional concealment of the sale from the stockholder, the execution debtor. Voorhis *v.* Terhune, 50 N. J. L. 147 (1888). If no notice is given to the debtor of the levy on his stock, a sale under the attachment is not good. Commercial Nat. Bank *v.* Farmers', etc. Bank, 82 Iowa, 192 (1891). A levy and sale of "all the shares" which defendant owns is not good. The number of shares must be ascertained and stated. Keating *v.* Stone, etc. Co., 83 Tex. 467 (1892). A statute must be substantially complied with, and a failure to give notice to the corporation as required by the statute is fatal to the attachment. Deutschman *v.* Byrne, 64 Ark. 111 (1897). Inasmuch as shares of stock cannot be levied upon at common law, a levy thereon can be made only in strict compliance with the statute, and if the process is a garnishee process the levy is not good, and even a sale under such a levy conveys no title. H. B. Claflin Co. *v.* Bretzfelder, 69 Ark. 271 (1901). The statute authorizing sale under execution must be substantially complied with. Feige *v.* Burt, 118 Mich. 243 (1898). The title of a purchaser of stock at execution sale is not affected by the failure of the sheriff

to the corporation the notice that is generally required by statute,[1] or if the sale by the sheriff is not made promptly as advertised in accordance with the statute.[2] The sale itself is not complete until the sheriff gives the proper instruments of title to the purchaser, and until then the corporation is not obliged to recognize the latter as having any rights.[3] A court of equity will not compel a corporation to allow a transfer of stock by a purchaser at an execution sale, where the price paid at such sale is so small as to shock the conscience of the court.[4] A person who buys stock at an execution sale thereof and takes the sheriff's certificate therefor and presents the same to the corporation for transfer, thereby becomes a stockholder to the extent at least of being liable for any unpaid part of the subscription price of such stock.[5] Where the pledgee brings suit on the debt and attaches the stock he thereby waives his lien, and even though the attachment is illegal and void for insufficient serv-

to show in his return that he levied before selling. McFall *v.* Buckeye, etc. Assoc., 122 Cal. 468 (1898). The procedure prescribed by statute for attaching shares of stock must be strictly followed. Leonhard *v.* John Hope, etc. Co., 21 R. I. 449 (1899). A judgment creditor of a corporation may cause its treasury stock to be sold on execution. Coit *v.* Freed, 15 Utah, 426 (1897). Stock is personal property, and may be seized under an execution. Brock *v.* Ruttan, 1 C. P. (Can.) 218 (1851). The sheriff need not indorse on his levy a description of the stocks. *Re* Braden's Estate, 165 Pa. St. 184 (1895). A substantial compliance with the formalities prescribed by the statute is sufficient. Scott *v.* Houpt, 73 Ark. 78 (1904).

1 Princeton Bank *v.* Crozer, 22 N. J. L. 383 (1850), where no notice was given, but the stock was merely mentioned in the inventory returned by the sheriff. Oral notice by the sheriff to the corporation that stock has been attached is insufficient. Moore *v.* Marshalltown, etc. Co., 81 Iowa, 45 (1890); Barthell *v.* Hencke, 99 Wis. 660 (1898). Service of the writ upon a corporation must be upon the *de facto* officers and not the *de jure* officers. Barthell *v.* Hencke, 99 Wis. 660 (1898). An execution sale of stock may be valid although the notice of levy may have been irregular. Croft *v.* Colfax, etc. Co., 113 Iowa, 455 (1901).

2 Titcomb *v.* Union M. & F. Ins. Co., 8 Mass. 326 (1811), and Howe *v.* Starkweather, 17 Mass. 240 (1821), where the sale was made after the proper day, without a re-advertisement, and consequently was held to be void. The court said: "The sale of them upon execution not being justifiable at common law, the statute must be strictly pursued to give any property to the purchaser." An execution sale of stock at nine o'clock at night, when few are present, is void. McNaughton *v.* McLean, 73 Mich. 250 (1889).

3 Morgan *v.* Thames Bank, 14 Conn. 99 (1840).

4 See §§ 489, 850, *infra*.

5 Basting *v.* Northern Trust Co., 61 Minn. 307 (1895). And is also liable on the statutory liability attaching to such stock. Oswald *v.* Minneapolis Times Co., 65 Minn. 249 (1896). A dictum in Sturges *v.* Stetson, 1 Biss. 246 (1858); s. c., 23 Fed. Cas. 311, says that the purchaser at execution sale is liable on the unpaid subscription the same as his debtor was.

ice, yet his rights as pledgee are not thereby restored.[1] Where the pledgee obtains judgment on a note which is secured by the stock and then causes the stock to be sold out by the sheriff under levy of execution, such sale, however, not being made in accordance with the statutes, this is the same as selling the stock without notice and amounts to a conversion thereof.[2] If an attachment is vacated and in the meantime has depreciated in value, the attaching creditor may be liable for the damages.[3]

§ 483. *Attachment of stock as allowed by the statutes of the various states.*—The states of the Union have quite generally passed statutes providing for the attachment of a debtor's property where the debtor is a non-resident or is guilty of a fraud, or where other facts exist which bring the case within the attachment statute. Inasmuch as in modern times a large part of the property of individuals consists of shares of stock in corporations, the attachment statutes generally provide specially for the attachment of stock, and give specific directions in reference to the steps necessary to be taken in making such attachment.[4] In New York an attachment

1 H. B. Claflin Co. *v.* Bretzfelder, 69 Ark. 271 (1901). See also § 476, *supra.*

2 Feige *v.* Burt, 118 Mich. 243 (1898).

3 See § 484, *infra.*

4 Where both an attachment and an execution on stock are allowed by statute, the former is said to be the preferable remedy when the corporation has a lien on the stock or there is a claimant to the stock. Weaver *v.* Huntingdon, etc. Coal Co., 50 Pa. St. 314 (1865); Lex *v.* Potter, 16 Pa. St. 295 (1851). An attachment of stock covers the dividends also. Upon vacating the attachment damages may be recovered. Jacobus *v.* Monongahela Nat Bank, 35 Fed. Rep. 395 (1888). Under the Vermont statutes, which prohibit preferences acquired within a specified time before an adjudication of insolvency, a bank in Vermont, which on November 1st attaches stock in New Mexico which was owned by an insolvent person in Vermont, is not entitled to the preference obtained thereby, where a creditor's petition against the insolvent was filed in Vermont October 28th, even though the bank sold its claim and the attachment to a third person. The bank and its officers may be held liable to the assignees in insolvency for the amount paid for the stock at the sale in New Mexico, the stock itself having been bought in for the benefit of the assignees. Hazen *v.* Lyndonville Nat. Bank, 70 Vt. 543 (1898). Stock may be sold under an attachment in New Mexico. Hazen *v.* Lyndonville Nat. Bank, 70 Vt. 543 (1898). Under the statutes of Idaho stock may be seized by levy of attachment or execution. Wells *v.* Price, 6 Idaho, 490 (1899). Under the confiscation acts of the United States of 1861 and 1862, stock owned by a rebel in a Michigan railroad could be condemned by giving notice of seizure to the railroad corporation. This amounted to an attachment or garnishment. Miller *v.* U. S., 11 Wall. 268 (1870). By a statute in Rhode Island in suits in equity a writ of attachment may be levied upon stock the same as in suits at law. Ladd *v.* Franklin, etc. Co., 24 R. I. 311 (1902). The statute may provide for the sale of stock at the place where the corporation exists, in

of stock is provided for; but an execution without a previous attachment is not allowed.[1] Where certificates of stock and other property are transferred to a trustee who issues transferable trustees' certificates therefor, of the par value of $5,000 each, with various provisions for the sale of the property and a distribution of the proceeds, or for the transfer to a corporation and a distribution of the stock, the legal title is thereby conveyed, and hence, the holders of the certificates having only an equitable interest in the property, an attachment cannot be levied on such trustees' certificates, under the New York statute, by serving the process on the trustee, no service having been made upon the holder of the certificates.[2] A pool of stock, however, does not prevent a creditor of one of the participants causing to be sold on execution his debtor's interest in the stock, such sale to be subject to the pooling contract if it is lawful.[3] It has been held that shares of stock may be attached under the general provisions of an attachment law which does not specify shares of stock as being subject to an attachment.[4] The formalities

case the taxes upon such stock are not paid. A purchaser of the outstanding certificates after the assessment has been made takes subject to the tax and tax seizure. Parker *v.* Sun Ins. Co., 42 La. Ann. 1172 (1890). Under the English statutes, 1 & 2 Vict., c. 110, §14, and 3 and 4 Vict., c. 82, § 1, stock in any public company standing in the name of any person against whom judgment shall have been obtained, whether "in his own right or in the name of any person in trust for him," may be charged by a judge's order with the payment of the amount of the judgment. The statute says: "The interest of any judgment debtor, whether in possession, remainder, or reversion, and whether vested or contingent," may be so reached. Cragg *v.* Taylor, L. R. 2 Exch. 131 (1867); Baker *v.* Tynte, 2 El. & E. 897 (1860). Stock may be reached by supplementary proceedings in Ohio. Ball *v.* Towle Mfg. Co., 67 Ohio St. 306 (1902). In Delaware in attaching stock, the return of the corporation is sufficient if a certificate is given. No answer as garnishee is required. Mann *v.* Perr, 4 Pen. (Del.) 279 (1903).

1 Code Civ. Proc., §§ 647, 649–651. See 4 Wait's Pr. 36*j*. Stock may be reached, however, by supplementary proceedings. See, in general, Barnes *v.* Morgan, 3 Hun, 703 (1875); O'Brien *v.* Mechanics,' etc. Ins. Co., 56 N. Y. 52 (1874); Smoot *v.* Heim, 1 N. Y. Civ. Pro. 208 (1881)—cases arising under the attachment law; Simpson *v.* Jersey City, etc. Co., 47 N. Y. App. Div. 17 (1900), holding that the New York statute that the copy of the warrant and the notice should be served upon the president of the corporation applied only to domestic corporations; aff'd, 165 N. Y. 193 (1900).

2 Montgomery *v.* McDermott, 103 Fed. Rep. 801 (1900).

3 Hardin *v.* White, etc. Co., 26 Wash. 583 (1901).

4 Chesapeake, etc. R. R. *v.* Paine, 29 Grat. (Va.) 502 (1877), where stock was held to be included under the word "estate," and the procedure prescribed for garnishment was followed and upheld. So also Curtis *v.* Steever, 36 N. J. L. 304 (1873), where an attachment of stock was upheld though the statute merely allowed attachment of "rights and credits." In Haley *v.* Reid, 16 Ga. 437 (1854), how-

prescribed by the statute must be complied with fully, as in the case of a levy of execution upon stock.[1] It has been held that a state statute authorizing the levy of an attachment upon stock does not apply to stock in a national bank, and that it is doubtful whether a state statute may legally authorize an attachment on national-bank stock.[2] There are many decisions, however, where such an attachment or execution has been levied.[3] In England by statute stock is reached by a judgment creditor by a "charging order" granted by the court, but this does not apply to bonds owned by the judgment debtor.[4] A stockholder whose stock has been attached cannot sue the attaching creditor for malicious prosecution in attaching the stock.[5]

§ 484. *Levy of attachment or execution upon stock held in pledge or by trustee, and on stock which the debtor has fraudulently transferred away.*—Whether or not an execution can be levied on stock which has been fraudulently transferred away by the judgment debtor depends upon the wording of the statute allowing the levy of execution on stock. If it allows a levy on all interests of the debtor, whether legal or equitable, then the fraudulent transfer may be disregarded and the stock seized as though still standing in the name of the judgment debtor.[6] If, however, the statute does not expressly provide for a levy on an equitable interest, the judgment creditor's remedy is not an execution, but a suit in equity to

ever, an attachment of stock was not allowed where the statute allowed levy "upon the estate both real and personal." See also Merchants' Mut. Ins. Co. *v.* Brower, 38 Tex. 230 (1873). It has been held that there can be no attachment of stock under a statute which allows an attachment of "real and personal property." Foster *v.* Potter, 37 Mo. 525 (1866). Shares of stock are "personal property" subject to attachment, although the statutes provide only for levy of execution upon them. Union Nat. Bank *v.* Byram, 131 Ill. 92 (1889). The ordinary attachment statute authorizing the attachment of shares of stock is not applicable to shares of stock in a club organized for lawful sporting purposes, and being more in the nature of a statutory joint-stock association than a corporation. Lyon *v.* Denison, 80 Mich. 371 (1890).

1 Stamford Bank *v.* Ferris, 17 Conn. 259 (1845), where the attachment failed because the sheriff did not leave a copy of the writ, duly indorsed, with the corporation, even though the cashier of the corporation was absent. A transfer subsequent to such irregular attachment is valid and carries title. See also § 484, *infra.*

2 Sowles *v.* National U. Bank, 82 Fed. Rep. 696 (1897). An attachment in accordance with a state statute may be levied upon stock in a national bank. Oldacre *v.* Butler, 116 Ala. 652 (1898).

3 See cases in notes to § 487, *infra.*

4 Sellar *v.* Chas. Bright & Co., Ltd., [1904] 2 K. B. 446.

5 Eldred *v.* Ripley, 97 Ill. App. Rep. 503 (1901).

6 Scott *v.* Indianapolis Wagon Works, 48 Ind. 75 (1874). *Cf.* State *v.* Warren Foundry, etc. Co., 32 N. J. L. 439 (1868).

set aside the fraudulent transfer.[1] So also an attachment may be levied on shares of stock when the words of the attachment statute are so broad as to render subject to the attachment all equitable interests of the debtor whose stock is attached. In many of the states where the debtor has transferred his stock for the purpose of defrauding his creditors, an attachment may be levied on the stock.[2] The judgment creditor may also institute a suit in equity to set aside the fraudulent transfer and subject the stock to the payment of the judgment.[3] Under the usual statutes, an attachment or execution may be levied upon stock, where the stock has been mortgaged or pledged, and the attaching creditor is seeking to reach merely the equity of redemption.[4] An injunction against

1 Van Norman *v.* Jackson Circuit Judge, 45 Mich. 204 (1881). See § 481, *supra.*

2 Beckwith *v.* Burrough, 14 R. I. 366 (1884); New London Nat. Bank *v.* Lake Shore, etc. Ry., 21 Ohio St. 221 (1871), holding also that the attachment is good, even though the corporation denies that the defendant owns any stock therein; Curtis *v.* Steever, 36 N. J. L. 304 (1873), the court saying that the attachment is good, since the fraudulent transfer is void; and holding that the transferee may bring suit for trespass, and that the attaching creditor may then set up the fraud in defense; Massey *v.* Yancey, 90 Va. 626 (1894). *Cf.* State *v.* Warren Foundry, etc. Co., 32 N. J. L. 439 (1868). See also § 482, *supra.* Where the owner of stock has made a bogus sale of the same, the purpose being to transfer the property in fraud of creditors, a judgment creditor may cause an execution to be levied on the stock and the stock sold. M'Donald *v.* First, etc. Bank, 116 Fed. Rep. 129 (1902). Where an insolvent debtor transfers all his property to trustees for the benefit of creditors, excepting certain shares of stock which are transferred to them in trust in order not to render the trustees liable thereon, and ten years later a creditor levies on the equity in such stock, causes its sale, and purchases at a nominal figure, equity will not compel the corporation to transfer the stock to such creditor on the corporate books. Randolph *v.* Quidnick Co., 135 U. S. 467 (1890).

3 See § 481, *supra.*

4 Foster *v.* Potter, 37 Mo. 525 (1866); Manns *v.* Brookville Nat. Bank, 73 Ind. 243 (1881); Edwards *v.* Beugnot, 7 Cal. 162 (1857), holding also that, if the mortgage is recorded on the corporate books, notice must be served on the mortgagee also; and that, where one attachment was served on the corporation and another on the mortgagee, the latter attachment prevails and takes the surplus; Norton *v.* Norton, 43 Ohio St. 509 (1885), holding that the court will order the stock to be sold, the pledgee paid, and the balance held under the attachment. See also Vantine *v.* Morse, 104 Mass. 275 (1870); New England M. Ins. Co. *v.* Chandler, 16 Mass. 275 (1820). *Cf.* Cooke *v.* Hallett, 119 Mass. 148 (1875); Kyle *v.* Montgomery, 73 Ga. 337 (1884); Seeligson *v.* Brown, 61 Tex. 114 (1884), and § 468, *supra.* Nabring *v.* Bank of Mobile, 58 Ala. 204 (1877), holds that an execution cannot reach an equity of redemption. See also § 491, *infra.* Under the South Carolina statutes a pledgor's equity of redemption in stock may be attached. Pelzer, etc. Co. *v.* Pitts, etc., 57 S. E. Rep. 29 (S. C. 1907). If a purchaser at an execution sale purchases merely a nom-

a pledgee disposing of stock owned by a certain party, or an attachment upon the interest of that party, does not prevent the pledgee selling the stock if such stock really belonged to the wife of that party.[1] An attachment is not the best remedy for a pledgee who wishes to subject the pledge to the payment of the debt.[2] His better remedy is by foreclosure or a public sale on notice to the pledgor. Dividends on the stock which is attached follow the stock, and are covered by the attachment.[3] An attachment on stock standing on the books in a debtor's name is not good where it is shown that in fact he held the stock as trustee for another.[4] Even though a partnership allows stock owned by it to stand on the books of the company in the name of one of the partners, yet an attachment against him and levied on such stock does not give the attaching creditor priority over the rights of the partnership.[5] Where the stock has been transferred on the corporate books to a pledgee, and afterwards the debt has been paid, the stock cannot be attached for debts due from the pledgee.[6] There can be no attachment of stock as the property of an unregistered holder through whom title has passed to another.[7] Even though a party subscribes for stock, but with his consent the corporation issues it directly to others on their original subscriptions, this is not a transfer from the original sub-

inal equity of redemption and pays a fair price for the same, the court will order the corporation to allow a transfer to him in order that he may so redeem. See dictum in Randolph *v.* Quidnick Co., 135 U. S. 457 (1890). As to marshaling the assets, see § 473, *supra.* As to the remedy of garnishment to reach stock or the equity of redemption in pledged stock, see § 491, *infra.*

1 Fourth Nat. Bank, etc. *v.* Crescent, etc. Co., 52 S. W. Rep. 1021 (Tenn. 1897).

2 Lee *v.* Citizens' Nat. Bank, 2 Cin. Super. Ct. (Ohio), 298, 312 (1872). See §§ 476, 482, *supra.*

3 Jacobus *v.* Monongahela, etc. Bank, 35 Fed. Rep. 395 (1888); Moore *v.* Gennett, 2 Tenn. Ch. 375 (1875).

4 Mowry *v.* Hawkins, 57 Conn. 453 (1889). Execution or garnishee process cannot be levied on stock held by an individual as trustee where the debt is his individual debt. Nor can it be levied on the dividend from such stock. So held where stock was owned by a city in trust for the citizens. Hitchcock *v.* Galveston Wharf Co., 50 Fed. Rep. 263 (1890). An execution levied on stock held by a treasurer standing in his own name is not good, the judgment being against him personally. Nashville T. Co. *v.* Weaver, 102 Tenn. 66 (1899).

5 New York, etc. Co. *v.* Francis, 96 Fed. Rep. 266 (1899); modified 101 Fed. Rep. 16.

6 Beckwith *v.* Burrough, 13 R. I. 294 (1884).

7 Thus, where A the registered stockholder, transfers the certificate of stock to B and B transfers it to C and C obtains registry directly from A there can be no attachment of the stock against B. Lippitt *v.* American, etc. Co., 15 R. I. 141 (1885). An attachment against a person who held the certificate of stock, but was not a stockholder of record, was upheld in Matusevitz *v.* Citizens', etc. Co., 19 Mont. 368 (1897).

scriber, and hence the stock cannot be attached as his stock.[1] Where an execution is levied upon a certificate of stock found among the assets of a deceased judgment debtor, such stock being in the name of another person and indorsed by the latter in blank, the administrator may file a bill to enjoin the execution until the real ownership of the stock can be ascertained in order that the question of title may be settled to prevent a sacrifice of the stock.[2] In Missouri an attachment may be levied on stock standing in the name of another.[3] But in Michigan an attachment cannot be levied on stock standing in a person's name as trustee, for a debt due from the real owner of the stock, even though the trustee is merely an agent. Attachment reaches a legal interest only.[4] A wife who allows stock bought with her money to stand for several years in her husband's name, in order to give him credit, may be estopped from asserting her ownership as against his creditors.[5] Where the corporation has a lien on stock for debts due from the stockholder to the corporation, it may enforce the lien by an attachment.[6] Where stock is tied up by attachment which is afterwards vacated, and in the meantime the stock depreciates in value, the loss can be recovered from the attaching party if the stocks could and would have been sold before the depreciation, if they had not been so tied up. But if such stocks are in pledge, and the pledgor does not pay the loan while the stocks are so tied up,

1 Scott *v.* Houpt, 73 Ark. 78 (1904).

2 Nashville T. Co. *v.* Weaver, 102 Tenn. 66 (1899).

3 Tufts *v.* Volkening, 122 Mo. 631 (1894).

4 Gypsum, etc. Co. *v.* Kent Circuit Judge, 97 Mich. 631 (1893). Under the Michigan statutes a levy of execution cannot reach stock which stands on the books of the company in the name of the pledgee of a judgment debtor. Feige *v.* Burt, 118 Mich. 243 (1898). Where the real owner of stock turns it over to his agent or trustee to look after the stock, the stock itself being put in the name of the agent or trustee as absolute owner, and the stock is subsequently attached for a debt of such agent or trustee and sold thereunder, the real owner of the stock may hold the agent or trustee liable for the value of the stock. Long delay is not a bar so long as the agent does not deny the agency or trusteeship. Hovey *v.* Bradbury, 112 Cal. 620 (1896). Where a judgment creditor levies on stock standing in the name of a "dummy" for the debtor, the corporation may practically interplead between such creditor and an alleged *bona fide* holder of the stock. A court of equity has jurisdiction in order to decree a transfer. Spencer *v.* James, 10 Tex. Civ. App. 327 (1895).

5 Hamlen *v.* Bennett, 52 N. J. Eq. 70 (1893). Even though the wife allows her stock to stand in the name of her husband, yet, if the stock belongs to her and she has the certificates, she may maintain a bill in equity to enjoin his judgment creditors from selling the stock and to compel the corporation to allow a transfer of the stock to her, but she must show that no fraud or injury resulted to her husband's creditors. Magerstadt *v.* Schaefer, 213 Ill. 351 (1904).

6 Sabin *v.* Bank of Woodstock, 21 Vt. 353 (1849). See also § 530, *infra.*

no damages can be recovered.[1] It is a question whether a decrease in the value of the stock, while subject to attachment, renders the sureties on the undertaking liable therefor and whether an attachment bond should be increased, merely because the price of the stock may go down.[2] Where a sale of stock is decreed and an appeal taken and a bond given on appeal, and the stock depreciates during the appeal and the decree is affirmed, the liability on the bond is the amount of depreciation.[3]

§ 485. *Can stock or certificates of stock be attached elsewhere than in the state creating the corporation?*—Shares of stock in a corporation are personal property, whose location is in the state where the corporation is created.[4] It is true that, for purposes of taxation and some other similar purposes, stock follows the domicile of its owner, but, considered as property separated from its owner, stock is in existence only in the state of the corporation.[5] All attachment statutes provide for the attachment of a non-resident debtor's property in the state, and generally, under such statutes, the stock owned by a non-resident in a corporation created by the state wherein the suit is brought may be attached and jurisdiction be

1 Fourth Nat. Bank, etc. *v.* Crescent, etc. Co., 52 S. W. Rep. 1021 (Tenn. 1897). See also § 330, *supra*.

2 In Miller *v.* Ferry, 50 Hun, 256 (1888), it was held that the sureties were not liable and that the bond should not be increased. If an attachment on stock is vacated the depreciation in its value between the time when it was levied and the time when it was vacated is collectible under the undertaking given in the attachment proceeding. McCarthy *v.* Boothe, 2 Cal. App. 170 (1905). See also § 364, *supra*.

3 Welch *v.* Welch, 60 S. W. Rep. 409 (Ky. 1901).

4 Quoted and approved in Armour, etc. Co. *v.* St. Louis Nat. Bank, 113 Mo. 12 (1892). Evans *v.* Monot, 4 Jones, Eq. (N. C.) 227 (1858). The fact that certificates of stock in foreign corporations are in New York state does not render them subject to taxation in that state. *Re* James, 144 N. Y. 6 (1894). The inheritance tax in New York state is not applicable to certificates of stock which happen to be in the state at the time of the death of the stockholder, where the stockholder is a non-resident and the corporation itself is a foreign corporation. See § 572*e*, *infra*. As to the validity of a transfer of stock made in one state, while the corporation issuing the stock is located in another state, the rule applies "that personal property has no locality, and that the law of the owner's domicile is to determine the validity of the transfer or alienation thereof, unless there is some positive or customary law of the country where it is found to the contrary." Black *v.* Zacharie, 3 How. 483, 514 (1844), an attachment case. A suit by the purchaser of a certificate of stock to compel delivery may be brought at the place where the certificate is, and absent defendants may be served by publication. Ryan *v.* Seaboard, etc. R. R. 83 Fed. Rep. 889 (1897). See also §§ 12, 13, 363, *supra*.

5 Quoted and approved in Fahrig *v.* Milwaukee & Chicago Breweries, 113 Ill. App. Rep. 525 (1904), and Armour, etc. Co. *v.* St. Louis Nat'l B'k, 113 Mo. 12 (1892).

thereby acquired to the extent of the value of the stock attached.[1] But a defendant's shares of stock cannot be reached by levy of attachment in an action commenced outside of the state wherein the corporation is incorporated, unless the certificates of stock are within the state where the suit is commenced, and are reached by the sheriff. For purposes of attachment, stock is located where the corporation is incorporated and nowhere else.[2] The shares owned by a non-resident defendant in the stock of a foreign corporation cannot be reached and levied upon by virture of an attachment, although officers of the corporation are within the state engaged in carrying on the corporate business.[3] It has even been held that such an

1 New London Nat. Bank *v.* Lake Shore, etc. Ry., 21 Ohio St. 221 (1871); Chesapeake, etc. R. R. *v.* Paine, 29 Gratt. (Va.) 502 (1877). An attachment and sale of stock made on a debt not justly due will be enjoined as regards registry on the corporate books, and the sale declared void. Seligman *v.* St. Louis, etc. R R., 22 Fed. Rep. 39 (1884).

2 Quoted and approved in Smith *v.* Downey, 8 Ind. App. 179 (1893), where it was held that a citizen of Indiana could not attach certificates of stock owned by a non-resident in a Colorado corporation, even though the certificates of stock were in the state of Indiana, and within the jurisdiction of the court. Ireland *v.* Globe, etc. Co., 19 R. I. 180 (1895); Armour, etc. Co. *v.* St. Louis Nat'l B'k, 113 Mo. 12 (1892); Winslow *v.* Fletcher, 53 Conn. 390 (1886), the court saying that "stock in a corporation, for the purposes of an attachment, has its situs where the corporation is located." Under the statutes of Tennessee, however, requiring a foreign corporation doing business in that state to file its articles of incorporation with the secretary of state, it was held that it became a domestic corporation sufficiently to authorize an attachment of stock in that state. Young *v.* South Tredegar Iron Co., 85 Tenn. 189 (1886). Bonds which are pledged by a non-resident cannot be attached by serving a notice on the pledgee. Tweedy *v.* Bogart, 56 Conn. 419 (1888). Certificates of stock represent the stock itself sufficiently to sustain a suit commenced by substituted service for the purpose of establishing a lien, even though the corporation is located in another state. Merritt *v.* American Steel Barge Co., 79 Fed. Rep. 228 (1897). An execution cannot be levied in the Indian Territory on stock owned by the defendant in a New Jersey corporation where the statutes of the Indian Territory provided for execution upon the stock of domestic corporations only, and the defendant is not a resident of that Territory. Caffery *v.* Choctaw, etc. Co., 95 Mo. App. 174 (1902). A statute authorizing the sale of stock on execution applies to stock in domestic corporations only, unless it clearly provides otherwise. Hence an alleged sale under levy of execution, in British Columbia, of stock in a Washington corporation is not good in Washington unless it is alleged and proved that such sale was authorized by the statutes of British Columbia. Daniel *v.* Gold Hill, etc. Co., 28 Wash. 411 (1902).

3 Quoted and approved in New Jersey, etc. Co. *v.* Traders', etc. Bank, 104 Ky. 90 (1898), where the court held that garnishee proceedings commenced in Kentucky against non-resident stockholders in a New Jersey corporation, the New Jersey corporation being so garnisheed, are not good

attachment cannot be levied, although the foreign corporation has a branch registry office in the state where the attachment is levied, and although the certificates of stock are also in such state.[1] The supreme court of Pennsylvania has said that stock cannot be attached by attaching the certificate, any more than lands situated in another state can be attached by an attachment in Pennsylvania levied on the title deeds to such land.[2] And it has been held that even

as regards stock held by the defendants in such New Jersey corporation. A suit in equity does not lie in the United States court in Nevada, at the instance of a resident of that state, to recover stock owned by non-residents in an Arizona corporation where service upon them is made only by publication. The stock is not within that district, within the meaning of the federal statute. McKane *v.* Burke, 132 Fed. Rep. 688 (1904). Stock owned by a citizen of New York in a railroad corporation of Michigan cannot be attached by process levied in Ohio. Such stock is not located in Ohio, and hence is not subject to attachment or garnishment there. Ashley *v.* Quintard, 90 Fed. Rep. 84 (1898); Plimpton *v.* Bigelow, 93 N. Y. 592 (1883), reversing 29 Hun, 362, the court saying: "We do not doubt that shares, for the purpose of attachment proceedings, may be deemed to be in the possession of the corporation which issued them, but only at the place where the corporation by intendment of law always remains, to wit, in the state or country of its creation. . . . Manifestly the *res* cannot be within the jurisdiction, as a mere consequence of a legislative declaration, when the actual locality is undeniably elsewhere." To same effect, Preston *v.* Pangburn, N. Y. L. J., March 7, 1892. See also Moore *v.* Gennett, 2 Tenn. Ch. 375 (1875). Garnishment proceedings will not apply. The defendant may move to have the attachment levy set aside. Martin *v.* Mobile, etc. R. R., 7 Bush (Ky.), 116 (1870), holding that a statute authorizing a foreign corporation to exercise certain powers does not make it a domestic corporation. Certificates of stock in a corporation of another state cannot be subjected to the payment of the stockholders' debts, either by attachment or a bill in equity. Morton *v.* Graffiin, 68 Md. 545 (1888).

1 Christmas *v.* Biddle, 13 Pa. St. 223 (1850), approved in Childs *v.* Digby, 24 Pa. St. 23 (1854). In this case the attachment was levied in Pennsylvania on certificates of stock in Pennsylvània, but belonging to a citizen of Mississippi, and the corporation was created by the laws of Mississippi. Certificates of stock in a corporation cannot be attached anywhere except in the state where the corporation is incorporated. Armour, etc. Co. *v.* St. Louis Nat. Bank, 113 Mo. 12 (1892).

2 Christmas *v.* Biddle, 13 Pa. St. 223 (1850). In Winslow *v.* Fletcher, 53 Conn. 390 (1886), the court well says: "While the certificates are in themselves valuable for some purposes, and to some extent may properly be regarded as property, yet they are distinct from the holder's interest in the capital stock of the corporation, and are not goods and effects within the meaning of the statute relating to foreign attachment. They are no more subject to an attachment or a trustee process than a promissory note. The debt is subject to attachment, but the note itself, which is simply evidence of the debt, is not. So with stock. That may be attached, but the certificates cannot be." Negotiable bonds, held outside of the jurisdiction of the court, cannot be attached by serving the attachment on the corporation which issued the bonds. Von Hesse

though certificates of stock in a West Virginia corporation are within the state of Massachusetts, yet a citizen of Massachusetts cannot attach the same in a suit in Massachusetts against a citizen of California, the owner of such certificates of stock.[1] The New York court of appeals, however, has recently held that where certificates of stock issued by a New Jersey corporation are within the state of New York, an attachment may be levied upon them and the interest of the owner or pledgor therein sold, such certificates being a property right within the state.[2] And it must be admitted that this decision, although apparently a wide departure from the common law, is a correct decision, in view of the fact that certificates of stock have gradually grown to be more than mere receipts or evidence of stock, and have come to be the stock itself, practically, in business transactions, especially in America, and, like a promissory note, a certificate of stock is property in itself and carries title, irrespective of the corporate books and of transfer on the corporate books. The decisions on this subject may perhaps be reconciled on the ground that where the words of the statute are broad enough to allow an attachment to be levied on *certificates* of stock, such a levy is effective, inasmuch as certificates of stock now represent value in themselves, in very much the same way as promissory notes. On the other hand, where the statute is not broad enough in its terms to include a *certificate* of stock, then an attachment levied upon a certificate of stock in a foreign corporation is ineffective.

§ 486. *Rights of an unregistered transferee of a certificate of stock as against an attachment or execution levied on that stock.*— The most difficult and unsettled question connected with an attachment or execution levied on stock is the question of how far a pur-

v. Mackaye, 55 Hun, 365 (1890); aff'd, 121 N. Y. 694. See also Tweedy *v.* Bogart, 56 Conn. 419 (1888). The mere fact that certificates of stock owned by a citizen of New York in a New York corporation happened to be in Missouri at the time of his death, does not authorize the public administrator in Missouri to administer such stock as property within the state. Richardson *v.* Busch, 198 Mo. 174 (1906).

1 Pinney *v.* Nevills, 86 Fed. Rep. 97 (1898).

2 Simpson *v.* Jersey City, etc. Co., 165 N. Y. 193 (1900), the court distinguishing the case of Plimpton *v.* Bigelow, 93 N. Y. 592 (1883), on the ground that the certificates of stock in that case were not within the state. The court said: "Certificates of stock are treated by business men as property for all practical purposes. They are sold in the market, and they are transferred as collateral security for loans, and they are used in various ways as property. They pass by delivery from hand to hand and they are the subject of larceny." On a writ of sequestration the sheriff may seize certificates of stock, and the court may aid him by an order to that effect. Ansley *v.* Stuart, 43 S. Rep. 892 (La. 1907).

chaser of the certificate of stock from the stockholder and debtor is protected in his ownership where such purchaser does not have his transfer registered on the corporate books before the attachment or execution is levied. The question is especially important, since it affects the rights of a *bona fide* purchaser of stock in the open market, and constitutes one of the greatest dangers incurred in the purchase of certificates of stock. It has been held that if a stockholder whose stock has been already attached or sold on execution sells his certificate of stock after the levy of such attachment or execution, the vendee or transferee buys subject to such levy, even though he had no knowledge of it. The stock, in contemplation of law, has already been seized by the levy, and the purchaser is bound to take notice of that fact.[1] The only means of avoiding this danger in the purchase of stock is by an inquiry at the office of the corporation at the time of making the purchase.[2]

A different question, however, presents itself when the stockholder against whose stock an attachment or execution is levied has already and before such levy sold and transferred his certificate of stock, but that transfer has not been registered on the corporate books. The courts of the different states are in irreconcilable conflict on this question of whether the unregistered transferee is protected in his purchase. The better rule, and the rule which ultimately will prevail, is that an unrecorded transfer of stock is in this respect like an unrecorded deed of land, and gives good title as against subsequent attachment or executions, even though the latter are levied in ignorance of the unrecorded transfer or deed. The remedy of the purchaser of a certificate of stock as against an execution sale is not an injunction unless the stock is of peculiar value or use to the purchaser.[3] In England it is the law that a court has no power to order the sale of stock on execution, inasmuch as it can only order a sale of the interest of the judgment debtor and not of the entire title, in the absence of proof that the judgment debtor owns the entire title.[4]

§ 487. *In Delaware, District of Columbia, Idaho, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Washington, and in the*

1 Young *v.* South Tredegar Iron Co., 85 Tenn. 189 (1886); Chesapeake, etc. R. R. *v.* Paine, 29 Gratt. (Va.) 502 (1877); Shenandoah Valley R. R. *v.* Griffith, 76 Va. 913 (1882); *Re* Braden's Estate, 165 Pa. St. 184 (1895). *Cf.* Dudley *v.* Gould, 6 Hun, 97 (1875).

2 Quoted and approved in Ball *v.* Towle Mfg. Co., 27 Ohio St. 306 (1902).

3 Boone *v.* Van Gorder, 164 Ind. 499 (1905).

4 Kolchmann *v.* Meurice, [1903] 1 K. B. 534.

federal courts passing upon the transfer of national bank stock, it is held that by the common law the unregistered transferee of a certificate of stock is protected as against all subsequent attachments or executions levied on that stock.—The decided weight of authority holds that he who purchases for a valuable consideration a certificate of stock is protected in his ownership of the stock, and is not affected by a subsequent attachment or execution levied on such stock for the debts of the registered stockholder, even though such purchaser has neglected to have his transfer registered on the corporate books, thereby allowing his transferrer to appear to be the owner of the stock upon which the attachment or execution is levied.[1] Such is the rule prevailing in the federal courts and in the courts of the above-named states.[2] Frequently this rule is justified and

1 Quoted and approved in Lipscomb's Adm'r *v.* Condon, 56 W. Va. 416 (1904).

2 For a careful statement of the rule in each state on this subject, see an article in 35 Am. Law. Rev. 238 (1901). For an able article by I. H. Hatfield in favor of the doctrine that the attaching creditor should be preferred to the unrecorded transferee, see 30 Am. Law Rev., p. 223. See also the detailed review of the cases on this subject in an article written by Chief Justice Corliss of North Dakota in 1 Am. & Eng. Corp. Cas. (N. S.), at the end of the volume. See also the table prepared by Lowell, Stimson, & Lowell for the Boston Clearing House Association.

Delaware: In Delaware the purchaser of a certificate of stock is protected as against attachments for debts of the transferrer, even though he does not have the stock transferred on the corporate books, and he may have an injunction against such attaching creditor selling the stock on execution. Allen *v.* Stewart, 7 Del. Ch. 287 (1895). In Trimble *v.* Vandegrift, 7 Houst. 451 (1887), the court ordered stock to be sold on an execution, although the corporation stated at the time of the attachment that it had received notice that the stock had already been sold. It appeared, however, that the statement made by the corporation did not tell to whom the sale had been made, and did not state that a transfer had been made on the corporate books, and it appeared also that the attaching creditor had no way of testing his right to priority, unless the sale was allowed to take place; and that the sale would not necessarily cut off the right of the holder of the certificate of stock to litigate the priority of his title. In Wilmington, etc. Turnp. Co. *v.* Bush, 1 Harr. 44 (1832), the court held that the company could not defend against a suit for dividends on the ground that attachment had been levied against the stock as the property of a former registered owner of the stock, it appearing that the corporation had issued new certificates of stock without a transfer on the books being made by the former owner of the stock. The statute is as follows: "The shares of stock in every corporation shall be deemed personal property and transferable on the books of the corporation in such manner and under such regulations as the by-laws provide. . . . Whenever any transfer of shares shall be made for collateral security, and not absolutely, it shall be so expressed in the entry of the transfer." (L. 1903) Ch. 394, § 16.

District of Columbia: The statute is as follows: Stock "shall be transferable in such manner as shall be

explained on the ground that registry and by-laws or charter provisions requiring registry of transfers on the corporate books are

prescribed by the by-laws of the company." Code of March 3, 1901, § 614. "A person in whose name shares of stock stand on the books of a company shall be deemed the owner thereof as regards the company, but if any such person shall in good faith sell, pledge, or otherwise dispose of any of his shares of stock to another and deliver to him the certificate for such shares, with written authority for the transfer of the same on the books, the title of the former shall vest in the latter so far as may be necessary to effect the purpose of the sale, pledge, or other disposition, not only as between the parties themselves, but also as against the creditors of and subsequent purchasers from the former." *Id.* § 629.

Idaho: An unrecorded sale or pledge of stock has preference over a subsequent attachment by a creditor of the vendor or pledgor, and a provision in the statutes that a transfer shall not be valid until recorded is for the benefit of the corporation, and not for the creditors of the transferrer. Such attachment, however, is good as against the equity of redemption of the pledgor. Mapleton Bank *v.* Standrod, 8 Idaho 740 (1902). The Idaho statute is that a "transfer is not valid except between the parties thereto, until the same is so entered upon the books of the corporation." Civil Code (1901), § 2122.

Kentucky: See the emphatic dictum in Thurber *v.* Crump, 86 Ky. 408 (1887); also the decision in Kentucky Nat. Bk. *v.* Avery 30 Am. L. Rev. 234 (1896). The corporation cannot claim a lien for a debt incurred after it had notice of a sale of the certificates. Bank of America *v.* McNeil, 10 Bush. 54 (1873). The Kentucky statute is as follows: "The shares of stock shall be transferred on the books of the corporation in such manner as the by-laws thereof may direct." Ky. Stat. (1903) § 545.

Louisiana: Pitot *v.* Johnson, 33 La. Ann. 1286 (1881); Smith *v.* Crescent City, etc. Co., 30 La. Ann. 1378 (1878); Crescent City, etc. Co. *v.* Deblieux, 40 La. Ann. 155 (1888). The attaching creditor of one who appears on the books of a corporation as registered owner of shares of its stock cannot hold the stock against the true equitable owner, who holds the certificate of stock duly indorsed by the debtor. Kern *v.* Day, 45 La. Ann. 71 (1893). *Cf.* Bidstrup *v.* Thompson, 45 Fed. Rep. 452 (1891), where the pledge had not been completed. See also Friedlander *v.* Slaughter House Co., 31 La. Ann. 523 (1879), holding that a company is not liable to the purchaser of the certificate where such purchaser did not make any claim or give notice of his rights until after the execution sale and until after the court had ordered the corporation to make a transfer to the purchaser at the execution sale. Where a creditor knows that stock standing in the name of his debtor on the books of a corporation has already been sold and transferred by such debtor he cannot by attachment obtain a prior lien thereon, even in Louisiana. Black *v.* Zacharie, 3 How. 483 (1844). The Louisiana statute is as follows: "When a debtor wishes to pawn . . . stocks . . . he shall deliver to the creditors the . . . certificates of stock or other evidences of the claims or rights so pawned; and such pawn so made, without further formalities shall be valid as well against third persons as against the pledgers thereof, if made in good faith." Civil Code (1900) Art. 3158. In 1904, in order to remove any doubt on this subject, the Legislature enacted the following statute: "The delivery of a stock

not for the purpose of notifying the creditors of the old registered stockholder that he no longer owns the stock, nor for any similar

certificate of a corporation to a *bona fide* purchaser or pledgee, for value, together with a written transfer of the same, or a written power of attorney to sell, assign, and transfer the same, signed by the owner of the certificate, shall be a sufficient delivery to transfer the title as against all parties; but no such transfer shall affect the right of the corporation to pay any dividend due upon the stock, or to treat the holder of record as the holder in fact, until such transfer is recorded upon the books of the corporation, or a new certificate is issued to the person to whom it has been so transferred." Acts of 1904, p. 370, No. 180.

Michigan: May *v.* Cleland, 117 Mich. 45 (1898). Newberry *v.* Detroit, etc. Co., 17 Mich. 141 (1868). The Michigan statute is as follows: "Shares may be transferred by indorsement and delivery of the certificates thereof, . . . but such transfer shall not be valid, except between the parties thereto, until the same shall have been so entered on the books of the corporation." Comp. Laws (1897), p. 2627, Ch. 230, § 8533. Stock may be attached. *Id.* pp. 3131, 3132, §§ 10335–10339, as am'd by Laws of 1903, p. 347, No. 219.

Minnesota: A sale and transfer of corporate stock, although not entered on the books of the corporation, takes precedence of a subsequent attachment in behalf of a creditor of the vendor. Lund *v.* Wheaton, etc. Co., 50 Minn. 36 (1892). The court so held although the statute prescribed that no transfer should be valid except as between the parties until such transfer was registered on the corporate books. Under the Minnesota practice, where a corporation is sued for refusal to transfer stock which is claimed on one hand by a purchaser of the certificate and on the other by a purchaser at an execution sale, the claimant intervenes. Haslam *v.* First Nat. Bank, etc., 79 Minn. 1 (1900). The Minnesota statute is as follows: "The transfer of shares is not valid, except as between the parties thereto, until it is regularly entered on the books of the company." Rev. Laws (1905), § 2864. Stock shall "be transferable only on the books of such corporation, in such form as the directors prescribe." *Id.* § 2799.

Mississippi: Goyer, etc. Co. *v.* Wildberger, 71 Miss. 438 (1894); Clark *v.* German Security Bank, 61 Miss. 611 (1884), the court holding that the holder of the certificate was protected, although the statute prescribed that stock should be transferable "only" on the books of the company. The Mississippi statute is as follows: "The stock in all corporations shall be transferable by the indorsement and delivery of the stock certificate and the registry of such transfer in the books of the corporation." Code of 1906, § 909.

Missouri: McClintock *v.* Central Bank, 120 Mo. 127 (1894). In this case it was held that an attaching creditor cannot complain that the pledgee, who has prior rights, settled with the pledgor after the attachment and then sold the stock. The creditor must offer to redeem or have a sale subject to the pledge. The pledgee of the certificates was the corporation itself. In Merchants' Nat. Bank *v.* Richards, 6 Mo. App. 454 (1879); aff'd, 74 Mo. 77, application had been made to the corporation for registry but had been refused. The purchaser of a certificate of stock in a Missouri corporation may maintain a bill in equity for injunction to prevent the corporation transferring such stock to one who purchased the same at execution sale on a judgment obtained against a registered holder of such

purpose, but are for the purpose of protecting the corporation in paying dividends and allowing the stock to be voted. Another

stock, it being shown that such purchaser at execution sale took with notice of the prior sale of the certificate. Seligman *v.* St. Louis, etc. R. R., 22 Fed. Rep. 39 (1884). Stock in a foreign corporation cannot be attached. Armour, etc. Co. *v.* St. Louis Nat. Bank, 113 Mo. 12 (1892). *Cf.* Smith *v.* Pilot Min. Co., 47 Mo. App. 409 (1891). A suit in equity by a purchaser of stock at execution sale against the corporation and the stockholder of record cannot be removed to the United States Court by the stockholder of record where the complainant and corporation are citizens of the same state, inasmuch as the corporation is an indespensable party and the main relief is against it. St. Louis, etc. Ry. Co. *v.* Wilson, 114 U. S. 60 (1885). "An unrecorded transfer is good against an execution creditor of a stockholder, who had no notice of the transfer where the execution was levied, but was notified thereof before he purchased the stock, at a sale under the execution." Wilson *v.* St. Louis, etc. Ry., 108 Mo. 588 (1891). The Missouri statute is as follows: Stock "shall be transferable in the manner prescribed by the by-laws of the company." Annotated Stat. (1906), §§ 965, 3183.

Nebraska: In Nebraska a person who has purchased or taken in pledge a certificate of stock before garnishee process has been levied thereon, in accordance with the statute, takes precedence. Farmers', etc. Bank, *v.* Mosher, 100 N. W. Rep. 133 (Neb. 1904). A transfer of the certificates takes precedence over an attachment or garnishee process. Farmers', etc. Bank *v.* Mosher, 63 Neb. 130 (1901). The Nebraska statute is as follows: Stock "owned by the judgment debtor, or the defendant in attachment proceedings, may be levied upon under executions or writs of attachment." Comp. Stat. (1907), § 7052.

New Jersey: Broadway Bank *v.* McElrath, 13 N. J. Eq. 24 (1860); aff'd, *sub nom.* Hunterdon County Bank *v.* Nassau Bank, 17 N. J. Eq. 496 (1864); Rogers *v.* New Jersey Ins. Co., 8 N. J. Eq. 167 (1849). In this last case the purchaser at the execution sale knew that the certificates had been sold. Even though a transfer may have been fraudulent, yet mandamus following an execution sale is not the proper way to test that question. State *v.* Warren Foundry, etc. Co., 32 N. J. L. 439 (1868). The New Jersey statute is as follows: "The shares of stock in every corporation shall be personal property and shall be transferable on the books of the corporation in such manner and under such regulations as the by-laws provide; and whenever any transfer of shares shall be made for collateral security, and not absolutely, it shall be so expressed in the entry of the transfer." Laws 1896, Ch. 185, § 20.

New York: The case of Smith *v.* American Coal Co., 7 Lans. 317 (1873), fully discusses and sustains this rule. See also De Comeau *v.* Guild Farm Oil Co., 3 Daly, 218 (1870), where the court says that the sheriff, "by the levy of such an attachment, could not acquire any better or greater title to the stock than a person would have done who had purchased this stock of the person in whose name it stood on the day of the levy of the attachment. And the principle is well settled in this state that such a purchaser would not acquire any interest whatever as against a prior purchaser for value." Where the corporation causes an attachment to be levied on the stock of a stockholder of record who has sold his certificates to another person and causes a sale to be made to deprive the latter of his stock, he may hold the corporation liable. Robinson *v.* New Berne Nat.

and stronger reason is that the law favors the transfer of stock certificates, and discountenances, so far as possible, all secret dangers

Bank, 95 N. Y. 637 (1884); Sims *v.* Bonner, 16 N. Y. Supp. 801 (1891). See also, in general, Dunn *v.* Star F. Ins. Co., 19 N. Y. Week. Dig. 531 (1884). An assignment of the certificates to a receiver in another state takes precedence of an attachment against the stock at the home of the corporation. The court will direct the corporation to register the transfer. Weller *v.* Pace Tobacco Co., 5 Ry. & Corp. L. J. 5 (N. Y. Sup. Ct., 1888). A New York trust company that holds, as a depositary, the certificates of stock of four railroad corporations which are about to be consolidated, one of which is incorporated in another state, is not liable for its omitting to have such stock in such corporation transferred into its name, even though thereby an attachment takes precedence over such deposit. The trust company is not bound to know the law of such other state. New Jersey Con. Co. *v.* Farmers' L. & T. Co., 39 N. Y. Misc. Rep. 672 (1903). The statute in New York is as follows: "No transfer of stock shall be valid as against the corporation, its stockholders and creditors for any purpose except to render the transferee liable for the debts of the corporation to the extent provided for in this chapter, until it shall have been entered in such book as required by this section, by an entry showing from and to whom transferred." Laws 1901, Ch. 354.

North Dakota: The statute is as follows: A "transfer is not valid except between the parties thereto, unless the same is so entered upon the books of the corporation." Code (1899), § 2876. In a controversy between a pledgee of corporate stock indorsed but not transferred on the books of the company and a subsequent judgment creditor of the pledgor who bought the stock in at an execution sale under his judgment, with knowledge of the pledgee, it was held that the transfer by indorsement passed equitable title to the pledgee, and that the judgment creditor took the stock subject to the lien of the pledgee. Van Cise *v.* Merchants' Nat. Bank, 4 Dak. 485 (1887). In *Re* Argus Printing Co., 1 N. Dak. 434, 444 (1891), there is a dictum giving priority to an attachment. In Doty *v.* First Nat. Bank, 3 N. Dak. 9 (1892), the court declined to pass upon the question, inasmuch as national-bank stock was involved, and the court followed the decisions of the federal courts on this subject.

Ohio: The statute is as follows: "Shares of stock in any company shall be personal property, and when fully paid up shall be subject to levy and sale upon execution against the owner." 2 Bates Annot. Stat. (1906), § 3255. An unrecorded pledge has precedence over a subsequent attachment. Norton *v.* Norton, 43 O. St. 509 (1885). An attachment has precedence over a subsequent sale of the certificates. Ball *v.* Towle Mfg. Co., 67 O. St. 306 (1902).

Oregon: The statute is as follows: The corporation in case of an execution sale "is required to make the necessary transfer to the purchaser upon the stock book; . . . all sales of stock, whether voluntary or otherwise, transfer to the purchaser all rights of the original holder or person for whom the same is purchased." Codes and statutes (1902), p. 1631, §§ 5064, 5065. Where the certificates of stock were sold before an attachment was levied, the purchaser at execution sale cannot by mandamus compel the corporation to issue a new certificate to him. Durham *v.* Monumental, etc. Co., 9 Oreg. 41 (1880).

Pennsylvania: Eby *v.* Guest, 94 Pa. St. 160 (1880); Finney's Appeal, 59

incurred in their purchase. By protecting the purchaser against subsequent attachments and executions, the law removes one of

Pa. St. 398 (1868); Commonwealth *v.* Watmough, 6 Whart. 117 (1840), holding also that the sheriff need not levy on stock which he knows has already been sold to an unregistered transferee. When the transferrer notifies the corporation of the transfer, a subsequent attachment of the stock as the property of the transferrer is not good, although the transfer was not recorded in the corporate book. Telford, etc. Co. *v.* Gerhab, 13 Atl. Rep. 90 (Pa. 1888); U. S. *v.* Vaughan, 3 Binn. 394 (1811), where the unregistered transferees resided in foreign lands. The statute in Pennsylvania is as follows: Stock "may be transferred on the books of the company in person or by attorney subject to such regulations as the by-laws may prescribe." Pepper & Lewis Dig. (1896), p. 954, § 38. Stock "shall be liable to execution like other goods or chattels." *Id.* p. 1918, § 8. "If any person shall claim to be the owner of such stock, he may, upon filing an affidavit that the stock is really his property, and entering into a recognizance, with two sufficient sureties, conditioned for the payment of such damages as the court may adjudge to the plaintiff, if such stock should really belong to the defendant, the court shall admit him to become a party upon the record, and take defense in like manner as if he were made garnishee in the writ." *Id.* p. 1938, § 53.

South Dakota: The statute is as follows: Stock "may be transferred by endorsement by the signature of the proprietor, or his attorney or legal representative, and delivery of the certificate; but such transfer is not valid except between the parties thereto, until the same is so entered upon the books of the corporation." Laws 1907, ch. 104. In a controversy between a pledgee of corporate stock indorsed but not transferred on the books of the company and a subsequent judgment creditor of the pledgor who bought the stock in at an execution sale under his judgment, with knowledge of the pledgee, it was held, that the transfer by indorsement passed equitable title to the pledgee, and that the judgment creditor took the stock subject to the lien of the pledgee. Van Cise *v.* Merchants' Nat. Bank, 4 Dak. 485 (1887).

Tennessee: A sale under execution of stock which has ben pledged conveys nothing. McQuade *v.* Williams, 101 Tenn. 334 (1898). Even though a pledgee who holds the certificates indorsed in blank sends them to the pledgor to be executed for new certificates in a consolidated company, and even though the pledgor takes out such new certificates in his own name, yet this is not a waiver of the pledge entitling attaching creditors of the pledgor to precedence over the pledgee. In a suit by an attaching creditor to determine the priority of his rights over an unregistered pledgee the court has no power to decree a sale of the pledge and the distribution of the assets. McClung *v.* Colwell, 107 Tenn. 592 (1901). See also on the main question, Cornick *v.* Richards, 3 Lea, 1 (1879). *Contra,* State Ins. Co. *v.* Sax, 2 Tenn. Ch. 507 (1875). A subscriber's subscription may be attached before a certificate of stock is issued and delivered, and such attachment has precedence over a mortgage even though the mortgage is recorded with the register of deeds, no notice, however, of such mortgage being given to the corporation itself. Cates *v.* Baxter, 97 Tenn. 443 (1896). An unrecorded assignment of the certificates takes precedence over an attachment where the corporation had notice of such assignment. State Ins. Co. *v.* Gennett, 2 Tenn. Ch. 100 (1874).

the chief risks incurred in holding certificates ot stock without a

The Tennessee statute is as follows: Stock is "subject to levy and sale as such, the company in such case being required to make the proper entries in its stock or transfer book." Code (1896), p. 538, § 2066.

Texas: Seeligson *v.* Brown, 61 Tex. 114 (1884). An unregistered pledgee has priority. Hamilton *v.* San Antonio, etc. Co., 51 S. W. Rep. 1104 (Tex. 1899). A pledgee of the certificates is protected against a subsequent attachment, although the transfer is not recorded. Tombler *v.* Palestine Ice Co., 17 Tex. Civ. App. 596 (1897). Garnishee process to reach stock owned by a judgment debtor is not good as against a prior purchaser of the certificate of stock. South Texas Nat. Bank *v.* Texas, 30 Tex. Civ. App. 412 (1902). The Texas statute is as follows: "The stock of any corporation created under this title shall be deemed personal estate; and shall be transferable only on the books of the corporation in such manner as the by-laws may prescribe." Sayles Statute (1897), Vol. I, p. 274, Art. 666.

Utah: The statute is as follows: "The delivery of a stock certificate of a corporation to a *bona fide* purchaser or pledgee for value, together with a written transfer of the same signed by the owner of this certificate, shall be a sufficient delivery to transfer the title, as against any creditors of the owner so transferring the certificates, and all other parties whatsoever." Laws of Utah, 1896, p. 304, § 2280, s. 14. A judgment creditor who purchases stock at execution sale, with notice that the certificates have been pledged, does not obtain priority. Barse, etc. Co. *v.* Range, etc. Co., 16 Utah 59 (1897).

Washington: Port Townsend Nat. Bank *v.* Port Townsend, etc. Co., 6 Wash. 597 (1893), the court so holding although the statute prescribed that the transfer should not be good except as between the parties until the same was registered on the corporate books. The Washington statute is as follows: Stock "shall be transferable in such manner as shall be prescribed by the by-laws of the company; but no transfer shall be valid except between the parties thereto, until the same shall have been entered upon the books of the company." Ballingers Code (1897), p. 1110, § 4261.

Federal Courts: In regard to stock in national banks, the federal courts have firmly established the rule that the unregistered transferee is protected against a subsequent attachment or execution. Continental Nat. Bank *v.* Eliot Nat. Bank, 7 Fed. Rep. 369 (1881), with a full review of the authorities by Judge Lowell; Hazard *v.* National Exch. Bank, 26 Fed. Rep. 94 (1886); Scott *v.* Pequonnock Nat. Bank, 15 Fed. Rep. 494 (1883), where the rule was applied, although the national bank was in Connecticut, a state which strongly favors the opposite rule. The court said: "The tendency of modern decisions is to regard certificates of stock attached to an executed blank assignment and power to transfer as approximating to negotiable securities, though neither in form or character negotiable." The statutes of the state wherein the national bank is located cannot change or interfere with this rule in regard to certificates of stock in national banks. Doty *v.* First Nat. Bank, 3 N. Dak. 9 (1892), where the court refused to give precedence to an attachment as against a prior unregistered transfer of a certificate of stock in a national bank. A pledgee of national bank stock is entitled to precedence over a subsequent attachment levied on such stock. Where the purchaser at the execution sale is the corporation itself, the remedy of the pledgee is at law, and he is entitled to recover only to the extent of his debt in case

registry, and thereby increases the safety and desirability of such investments.

§ 488. *In Illinois, Maine, Maryland, Massachusetts, Montana, New Hampshire, Rhode Island, Virginia, West Virginia, Wisconsin, and Wyoming, the statutes have prescribed that an unregistered purchaser or pledgee of certificates of stock shall be protected as against subsequent attachments or executions levied upon that stock.*[1]—

such debt is less than the actual value of the stock. Second Nat. Bank *v.* First Nat. Bank, 8 N. Dak. 50 (1898). Even in Massachusetts, where the courts upheld at common law an opposite rule, the state courts will follow the above rule when the stock of a national bank is in question. Sibley *v.* Quinsigamond Nat. Bank, 133 Mass. 515 (1882). The decision in State *v.* Jeffersonville Nat. Bank, 89 Ind. 302 (1883), is erroneous in various ways. See *Indiana*, § 490, *infra*, p. 1293. Williams *v.* Mechanics' Bank, 5 Blatchf. 59 (1862); s. c., 29 Fed. Cas. 1376, is not in accord with the other federal decisions. Where an attachment is levied on stock which has already been pledged, the attachment reaches only the equitable title of the debtor pledgor. Black *v.* Zacharie, 3 How. 483, 511 (1844). A decision of a state court that a *donatio causa mortis* of bank stock was effective, although the donor merely delivered the certificates of stock without transferring the same on the back thereof, does not raise a federal question, even though the stock was national-bank stock. Leyson *v.* Davis, 170 U. S. 36 (1898).

In England the creditor of a registered stockholder cannot subject the stock to his debt as against the owner of the certificates, who has allowed the stock to remain in the name of the debtor in order to qualify the latter as a director. Cooper *v.* Griffin, [1892] 1 Q. B. 740.

In Canada the unregistered transferee is protected. Morton *v.* Cowan 25 Ont. Rep. (Can.) 529 (1894). An execution has priority over an unrecorded transfer. Brock *v.* Ruttan, 1 C. P. (Can.) 218 (1851). An execution levied on stock after a transfer has been entered on the stock ledger is not good, even though the transferee has not yet accepted the stock. Woodruff *v.* Harris, 11 U. C. (Q. B.) 490 (1854).

1 *Illinois:* The case of People's Bank *v.* Gridley, 91 Ill. 457 (1879), had previously held that at common low an attachment or execution sale took precedence over a prior unregistered sale of pledge or certificates of stock. The statute was passed in 1883 to change this rule. Rice *v.* Gilbert, 173 Ill. 348 (1898). The Illinois statute is as follows: The share or interest of a stockholder may be sold on execution, "but in all cases, where such share or interest has been sold or pledged in good faith for a valuable consideration, and the certificate thereof has been delivered upon such sale or pledge, such shares or interest shall not be liable to be taken on execution against the vendor, or pledgor, except for the excess of the value thereof over and above the sum for which the same may have been pledged and the certificate thereof delivered." Rev. Stat. (1906), p. 1259, § 52.

Maine: In this state the statute formerly prescribed that no title should pass by sale of the certificates except as between the parties until registry had been had on the corporate books. This statute was held to give precedence to an attachment or execution sale. Skowhegan Bank *v.* Cutler, 49 Me. 315 (1860); Fiske *v.* Carr, 20 Me. 301 (1841). The Maine

The courts of Massachusetts were among the first to lay down the rule which places an attachment or execution levy ahead of an un-

statute is as follows: "The delivery of a certificate of stock of a corporation to a *bona fide* purchaser or pledgee for value, together with a written transfer of the same or a written power of attorney to sell, assign and transfer the same, signed by the owner of the certificate, shall be a sufficient delivery to transfer the title against all parties." R. S. (1903), Ch. 47, § 34, p. 440.

Maryland: In Maryland, by chapter 287, Laws of 1886, a pledgee or purchaser of certificates of stock is protected without a transfer on the books of the corporation as against subsequent attachments or executions. Morton *v.* Graffiin, 68 Md. 545 (1888), holding also that the attaching creditor cannot reach the equity by a bill in equity to obtain a receiver and to compel the pledgee to resort to other security first. In a transaction arising prior to the above statute, the pledgee made no effort to protect himself, and gave no notice of the pledge until seven years after the stock had been sold out on execution. It was held that the corporation was not liable to him. Noble *v.* Turner, 69 Md. 519 (1888). The Maryland statute is as follows: "All executions or attachments levied or laid upon the shares or interest of any defendant in the capital, joint stock or debts of a corporation standing on its books in his name shall only effect the interest which said defendants had in such capital, joint stock or debts at the time of levying such execution or attachment, and shall not in any way effect the right, title or interest acquired by any *bona fide* purchaser or pledgee for value to or in the capital, joint stock or debts of such corporation standing on its books in the name of such defendant by a sale or pledge thereof by such defendant by a delivery of the certificate representing such capital, joint stock or debts, with a power of attorney to transfer the same made prior to the levying of such execution or attachment, and that nothing contained in the succeeding sections of this article shall be construed to apply to any such capital, joint stock or debts so sold or pledged, or to prohibit or prevent any such corporation or purchaser or pledgee from transferring the said capital, joint stock or debts represented by such certificate upon the books of the corporation in the same manner and to the same effect as if no such execution or attachment had been levied." Pub. Gen. L. (1903), Vol. I, Art. XXIII, § 392, p. 496.

Massachusetts: It has been held under the Massachusetts statute that where a father delivers stock to his son in order to qualify the latter as director, and the son transfers the certificate back to his father, a creditor of the son cannot attach the stock as against the father, although the stock stands on the corporate books in the name of the son. Andrews *v.* Worcester, etc. R. R., 159 Mass. 64 (1893). Where a stockholder indorses a certificate of stock in blank and delivers it to an agent and the agent pledges it for his own purposes, the pledgee, if he took without notice of the breach of trust, is protected. The court held also that the statute of 1884 applied to such a case. Russell *v.* American, etc. Co., 180 Mass. 467 (1902). The Massachusetts statute protects purchasers of a certificate of stock, even though it is merely endorsed in blank. Clews *v.* Friedman, 182 Mass. 555 (1903). By written agreement, even in Massachusetts, the title may remain in the purchaser, the broker being merely a pledgee, and the statute of Massachusetts passing title by a transfer and delivery of the certificate has no application.

registered purchaser of the certificate of stock. The evil consequences of the rule, however, seem to have become apparent to her

Chase *v.* City of Boston, 193 Mass. 522 (1907). Even though the form of the old statutes in Massachusetts authorizing attachments of shares of stock were "to be considered as in the nature of a registry act, regulating the transfer of the stock as to third persons, and therefore preventing an unrecorded transfer from taking effect against a creditor afterwards attaching the shares without notice of the transfer," yet an unrecorded transfer of shares is valid as against a subsequent attachment by a creditor who has notice or knowledge of the transfer. Bridgewater Iron Co. *v.* Lissberger, 116 U. S. 8 (1885). The Massachusetts statute is as follows: "The delivery of a certificate of stock by the person named as a stockholder in such certificate or by a person entrusted by him with its possession for any purpose to a *bona fide* purchaser or pledgee for value, with a written transfer thereof or with a written power of attorney to sell, assign or transfer the same, signed by the person named as the stockholder in such certificate, shall be a sufficient delivery to transfer title as against all persons, but no such transfer shall effect the right of the corporation to pay any dividend due upon the stock, or to treat the holder of record as the holder in fact until it has been recorded on the books of the corporation, or until a new certificate has been issued to the person to whom it has been so transferred." . . . A pledgee of stock transferred as collateral security shall be entitled to a new certificate if the instrument of transfer substantially describes the debt or duty which is intended to be thereby secured. Such new certificate shall express on its face that it is held as collateral security, and the name of the pledgor shall be stated thereon, who alone shall be liable as a stockholder, and entitled to vote thereon." Laws 1903, Ch. 423, p. 403, § 1.

Montana: Laws 1907, p. 371, Ch. 143. "The delivery of a stock certificate of a corporation to a *bona fide* purchaser or pledgee for value, together with a written transfer of the same, or a written power of attorney to sell, assign and transfer the same, signed by the owner of the certificate, shall be a sufficient delivery to transfer the title as against the creditors of the transferrer and subsequent purchasers; but no such transfer shall affect the right of the corporation to pay any dividend due upon the stock, or to treat the holder of record as the holder in fact, until such transfer is recorded upon the books of the corporation, or a new certificate is issued to the person to whom it has been so transferred."

New Hampshire: Chapter 16, Laws 1887. The case of Pinkerton *v.* Manchester, etc. R. R., 42 N. H. 424 (1861), held that an attachment took precedence over a prior unregistered transfer of stock, except that the purchaser of the certificate of stock was to have a reasonable time to apply for registry. The case of Buttrick *v.* Nashua, etc. R. R., 62 N. H. 413 (1882), held that the company itself might attach, even though one of its directors knew of a prior unregistered sale of the certificates of stock; such director, however, having taken no part in levying the attachment. The case of Scripture *v.* Francestown Soapstone Co., 50 N. H. 571 (1871), held that the attachment was not good as against a prior purchaser of the certificate of stock from the president himself, inasmuch as the president's knowledge of the sale was sufficient notice to the corporation itself. See also Stowe *v.* Meserve, 13 N. H. 46 (1842). The New Hampshire statute is as follows:

courts, and it was held that, although the unregistered purchaser was not protected where the charter of the corporation required regis-

"The delivery of a stock certificate to a *bona fide* purchaser or pledgee for value, together with a written transfer or a deed of the same, or a power of attorney to sell, assign, and transfer the same, signed by the owner of the certificate, shall be a sufficient delivery to transfer the title as against all parties except the corporation; but no such transfer shall affect the right of the corporation to treat the stockholder of record as the stockholder in fact, until the old certificate is surrendered and a new certificate is issued to the person entitled thereto." Pub. Stat. (1901), Ch. 149, § 14.

Rhode Island: Chapter 690, Laws 1888. The statute is as follows: Stock "shall be transferable in such manner as shall be prescribed by the by-laws of the corporation." . . . "The delivery of a certificate of stock of a corporation, transferable only on the books of the corporation on surrender of the certificate, to a *bona fide* purchaser or pledgee for value, together with a written transfer of the same or a written power of attorney to sell, assign, and transfer the same, signed by the owner of the certificate, shall be a sufficient delivery to transfer the title against all parties; but no such transfer shall affect the right of the corporation to pay any dividend due upon the stock, or to treat the holder of record as the holder in fact, until such transfer is recorded or presented for record, upon the books of the corporation, or a new certificate is issued to the person to whom it has been so transferred." Rev. Stat. (1896), p. 535, Ch. 177, §§ 2 and 20. As to the mode of attachment and sale see Laws 1902, p. 51, Ch. 978; Lippitt *v.* American Wood Paper Co., 14 R. I. 301 (1883); Quaere in Beckwith *v.* Burrough, 13 R. I. 294 (1881), as to whether unrecorded transferee has precedence over a subsequent attachment.

Virginia: Code of 1887, § 1133. The statute is as follows: "If any person shall, for a valuable consideration, sell, pledge, or otherwise dispose of any of his shares of stock to another, and deliver to him the certificate for such shares with a power of attorney authorizing the transfer of the same on the books of the corporation, the title of the former (both at law and in equity) shall vest in the latter so far as may be necessary, to effect the purpose of the sale, pledge or other disposition, not only as between the parties themselves, but also as against the creditors of, and subsequent purchasers from, the former." Laws 1902–1903, p. 482, Ch. 5, § 59.

West Virginia: Section 37, chapter 53, Code 1906. In West Virginia an assignment of the certificates cuts off subsequent attachments obtained by creditors of the transferrer. Donnally *v.* Hearndon, 41 W. Va. 519 (1895). Where no certificates of stock have been issued a stockholder may sell his stock by a written instrument, and such written instrument takes precedence over a subsequent attachment or execution. Lipscomb's Adm'r *v.* Condon, 56 W. Va. 416 (1904). The West Virginia statute is as follows: "If any person, for valuable consideration, sell, pledge, or otherwise dispose of any shares belonging to him to another, and deliver to him the certificate for such shares with a power of attorney authorizing the transfer of the same on the books of the corporation, the title of the former shall vest in the latter so far as may be necessary to effect the sale, pledge or other disposal of the said shares, not only as between the parties themselves, but also as against the creditors of, and subsequent pur-

try,[1] yet, where only the by-laws or the certificate itself created such a requirement, the unregistered purchaser was protected and took precedence over the attachment or execution.[2] The legislature of Massachusetts seems to have had a still clearer perception of the demands of trade and of the interests of those who invest in certificates of stock, and in 1884 enacted a statute which made an attachment or execution levied on stock no more effective than in New York state.[3] Similar statutory changes have been made in the other states mentioned above. The boards of commissioners for promoting uniformity of legislation have recommended the enactment of a statute as follows: "The delivery of a stock certificate of a corporation to a *bona fide* purchaser or pledgee, for value, to-

chaser from, the former." Code (1899), p. 549 § 37.

Wisconsin: Annotated Statutes, chapter 85, section 1751, thereby changing the law as laid down in *Re* Murphy, 51 Wis. 519 (1881, the statute being as follows: "The delivery of a stock certificate of a corporation to a *bona fide* purchaser or pledgee for value, together with a written transfer of the same, signed by the owner of the certificate, his attorney or legal representative, shall be a sufficient delivery to transfer the title as against all persons." Annot. Stat. 1898, Ch. 85, § 1751.

Wyoming: The statute is as follows: Stock "shall be transferable in such manner as shall be prescribed by the by-laws of the company." Rev. Stat. of 1899, § 3040. "In all cases where the share or shares of the capital stock of any corporation shall have been pledged in good faith, or hypothecated as collateral security, to any loan or debt, and the certificate thereof shall have been delivered upon such pledge or debt, such share or shares shall not be liable to be taken on execution against the pledgor, except for the excess of value thereof over and above the sum for which the same may have been pledged, and the certificate thereof delivered." *Id.* § 3900. Levy of execution on stock belonging to the judgment debtor, but standing in the name of another, must be made in strict accordance with the statute. Wyoming, etc. Assoc. *v.* Talbott, 3 Wyo. 244 (1889).

1 Fisher *v.* Essex Bank, 71 Mass. 373 (1855); Newell *v.* Williston, 138 Mass. 240 (1885); Central Nat. Bank *v.* Williston, 138 Mass. 244 (1885); Boyd *v.* Rockport, etc. Mills, 73 Mass. 406 (1856); Blanchard *v.* Dedham Gas Light Co., 78 Mass. 213 (1858).

2 Sargent *v.* Essex, etc. Ry., 26 Mass. 202 (1829); Boston, etc. Assoc. *v.* Cory, 129 Mass. 435 (1880), holding that a delay of four years was not fatal to the unregistered purchaser's rights.

3 "The delivery of a stock certificate of a corporation to a *bona fide* purchaser or pledgee for value, together with a written transfer of the same, or a written power of attorney to sell, assign, and transfer the same, signed by the owner of the certificate, shall be a sufficient delivery to transfer the title as against all parties, but no such transfer shall affect the right of the corporation to pay any dividend due upon the stock, or to treat the holder of record as the holder in fact, until such transfer is recorded upon the books of the corporation, or a new certificate is issued to the person to whom it has been so transferred." Mass. Acts 1884, ch. 229. The enactment of a similar statute is respectfully recommended to the states mentioned in § 490, *infra*.

gether with a written transfer of the same, or a written power of attorney to sell, assign, and transfer the same, signed by the owner of the certificate, shall be sufficient delivery to transfer the title as against all parties; but no such transfer shall affect the right of the corporation to pay any dividend due upon the stock, or to treat the holder of record as the holder in fact, until such transfer is recorded upon the books of the corporation, or a new certificate is issued to the person to whom it has been so transferred."

§ 489. *Rights and duties of the corporation in such cases.*—The corporation has a dangerous duty to perform when stock has been attached or sold under levy of execution, and a registry is requested by the purchaser at such sale or by a purchaser of the outstanding certificate of stock.[1] If the purchaser of the certificate demands registry before registry has been allowed to the purchaser at the execution sale, and if the former claims to have purchased the certificate before the attachment or execution was levied, the right of the corporation is clear. It may refuse to allow the registry, and when sued therefor may interplead and compel the claimants to litigate the matter between themselves.[2] But where the corporation does not know whether the outstanding certificate is in the hands of a purchaser or not, and a registry is demanded by a purchaser at an execution sale, the rights and duties of the corporation are not so clear. It has two courses open to it: it may refuse to allow a registry until compelled to do so by a court, or it may allow registry without being so compelled. The former is the safer course, since the corporation will probably be thereby protected from all liability to a possible purchaser of the outstanding certificate.[3] The corporation should be protected in its obe-

1 Quoted and approved in Lipscomb's Adm'r *v.* Condon, 56 W. Va. 416 (1904).

2 See § 387, *supra.* The proper remedy for the purchaser from the judgment debtor to pursue under such circumstances is to enjoin the corporation and the purchaser at the execution sale from registering the latter as a stockholder. Smith *v.* Crescent City, etc. Co., 30 La. Ann. 1378 (1878). See also cases *supra.* If an attachment has been levied he should enjoin that. Cheever *v.* Meyer, 52 Vt. 66 (1879).

3 "Where a judicial tribunal of competent jurisdiction of last resort, after a fair contest in good faith by the corporation, orders the stock to be transferred to the purchaser under such seizure and sale, the corporation cannot be liable to the holder of the certificate who took no steps to protect himself." Friedlander *v.* Slaughter House Co., 31 La. Ann. 523 (1879). Where, also, the unregistered transferee contested in the courts the right of the purchaser at the execution sale, and was defeated in the lower court, and appealed without staying the decree below, the corporation is not liable for obeying the decree of the lower court, although the appeal is successful. Chapman *v.* New Orleans,

dience to the decree of a court.[1] It is quite probable, also, that no court in any of the above-named states would require the corporation to issue new certificates of stock to a purchaser of stock at an execution sale, unless such purchaser give to the corporation a bond of indemnity, whereby an unknown purchaser of the outstanding certificate may be protected.[2] The other course open to the corporation, that of allowing a registry by the purchaser at the execution sale without being compelled to do so by a court, is pursued by the corporation at its peril. If it afterwards transpires that the outstanding certificate had been purchased before the attachment or execution was levied, the corporation is liable in damages to such purchaser for allowing the registry,[3] but not unless such purchaser gave a valuable consideration for the certificate and alleges that fact in his pleading.[4] Until such purchaser demands a registry from the corporation, it may safely pay dividends to the execution purchaser.[5] *Mandamus* lies to compel a corporation to transfer stock sold under levy of execution. It can be granted as a common-law remedy or as a remedy ancillary to the suit.[6] This rule, however, would work harshly in states where the purchaser of the outstanding certificate may have

etc. Co., 4 La. Ann. 153 (1849). See Robinson *v.* New Berne Nat. Bank, 95 N. Y. 637 (1884).

1 See §§ 361, 388, *supra*. *Cf.* § 330, *supra*.

2 The supreme court of Ohio, in New London Nat. Bank *v.* Lake Shore, etc. Ry., 21 Ohio St. 221 (1871), very properly and very distinctly refused to compel a registry, although conceding that the execution purchaser is entitled to dividends. The court said: "Can it be that, because the defendant refused to assume the peril of deciding between the contending claimants by issuing other certificates for the same stock to the plaintiff upon demand, that it thereby became a wrong-doer and converted the plaintiff's stock to its own use, and rendered itself liable to respond in the full value of the stock to the claimant who could establish his right in a court of law? The mere statement of the proposition refutes it." As to the mode of pleading that the defendant company has been compelled to transfer the stock to a purchaser at an execution sale, see Wyoming Fair Assoc. *v.* Talbott, 3 Wyo. 244 (1889).

3 Smith *v.* American Coal Co., 7 Lans. 317 (1873). If the purchaser at the execution sale still has the certificates, the purchaser of the old certificate may bring suit against him and the corporation to compel a retransfer. Rogers *v.* New Jersey Ins. Co., 8 N. J. Eq. 167 (1849). In a suit by a purchaser at an execution sale to cut off the rights of a judgment debtor the corporation is an indispensable party, since it alone can allow a transfer on the books. St. Louis, etc. Ry. *v.* Wilson, 114 U. S. 60 (1885). See also the case of Hazard *v.* National Exch. Bank, 26 Fed. Rep. 94 (1886), holding the corporation liable in damages to the purchaser of the outstanding certificate.

4 Littell *v.* Scranton, etc. Co., 42 Pa. St. 500 (1862).

5 Smith *v.* American Coal Co., 7 Lans. 317 (1873).

6 Hair *v.* Burnell, 106 Fed. Rep. 280 (1900). *Cf.* § 390, *supra*.

some rights. Where such a possibility exists the *mandamus* should be denied.[1] A judgment creditor's execution lien on bank stock is subject to the lien of the corporation itself by statute on the stock for debts due to it from the judgment debtor, and a further statutory provision that the enforcement of the corporation's lien shall not affect attachment or execution liens goes merely to the remedy and does not affect the priority.[2] After a corporation has issued a certificate, by order of a court, it cannot refuse to recognize the holder as a stockholder.[3]

Where the transferee of certificates of stock in a bank presents them to the cashier of the bank for transfer, and the cashier and a director delay transfer until a debt of the transferrer to the bank becomes due and then in behalf of the bank levy an attachment on the stock for such debt, the transferee may hold the bank and the cashier and such director liable in trover for conversion of the stock, and it is no defense that the transfer of the certificate was made to defraud creditors.[4] If the statute prescribes that the corporation shall register as a stockholder the purchaser at the execution sale, the writ of *mandamus* will lie to compel the corporation to make such registry;[5] but the relator must allege that he presented to the corporation the required papers, and was refused such registry.[6] A court of equity will not compel a corporation to allow a transfer of stock by a purchaser at an execution sale where the price paid at such sale is so small as to shock the conscience of the court.[7]

1 State *v.* First Nat. Bank, 89 Ind. 302 (1883); Bailey *v.* Strohecker, 38 Ga. 259 (1868); Durham *v.* Monumental, etc. Co., 9 Oreg. 41 (1880).

2 Springfield, etc. Co. *v.* Bank of Batesville, 68 Ark. 234 (1900).

3 A person holding a certificate of stock issued by order of the court after an execution sale, is entitled to attend meetings, and his transferee who has presented the stock for transfer, and who also has a proxy from the transferrer, is entitled to attend the meetings and may recover damages for assault if he is ejected from the meeting. The company cannot defend on the ground that the execution sale was invalid, and that the stock had been canceled. Noller *v.* Wright, 138 Mich. 416 (1904).

4 Hine *v.* Commercial Bank, etc., 119 Mich. 448 (1899).

5 Bailey *v.* Strohecker, 38 Ga. 259 (1868). Where the attachment is on stock that the plaintiff alleges was transferred in fraud of creditors, *mandamus* will not lie to compel the corporation to allow a registry under the execution sale. State *v.* Warren Foundry, etc. Co., 32 N. J. L. 439 (1868). See also § 390, *supra*.

6 Lippitt *v.* American Wood Paper Co., 14 R. I. 301 (1883); s. c., 15 R. I. 141.

7 Mississippi, etc. R. R. *v.* Cromwell, 91 U. S. 643 (1875); Randolph *v.* Quidnick Co., 135 U. S. 457 (1890). See also § 850, *infra*. Inadequacy of price is not sufficient cause for setting aside an execution sale of stock. Conway *v.* John, 14 Colo. 30 (1890). Where the court orders stock to be sold *in solido* or in blocks to suit the purchaser, and $200,000 worth of stock

§ 490. *In Alabama, Arkansas, California, Colorado, Connecticut, Indiana, Iowa, New Mexico, and Vermont, the usual statutes requiring transfers of stock to be registered on the corporate books are so construed as to give an attachment or execution precedence over a prior unregistered sale or pledge of the certificates of stock*[1]*—Notice of transfer without registry—In Arizona, Florida, Georgia, Hawaii, Kansas, Nevada, North Carolina, Oklahoma, and South Carolina, the statutes have not yet been clearly construed.*—The courts

is sold in one block for $1,000, and it is shown that the creditor and the debtor had united, in order to deprive a transferee of his rights, the court held that the sale was fraudulent and would be set aside at the instance of the unregistered transferee. Fahrney *v.* Kelly, 102 Fed. Rep. 403 (1900). See also § 482, *supra.*

1 *Alabama:* By statute the attachment takes precedence over a prior transfer of the certificates, where such transfer is not recorded on the corporate books within fifteen days. Berney Nat. Bank *v.* Pinckard, 87 Ala. 577 (1888); Dittey *v.* First Nat. Bank, 112 Ala. 391 (1896). Under this statute the unregistered pledgee is not protected against attachments, but notice to the corporate officer of the attachment may be oral. Abels *v.* Planters', etc. Co., 92 Ala. 382 (1890). In Fisher *v.* Jones, 82 Ala. 117 (1886), the court held that the unregistered pledgee was protected where there was an entry made on the stub of the certificate book of the stock being held in pledge. Under this statute the attaching creditor takes title in preference to an unregistered transferee, and the same rule prevails where the registered holder is a mere "dummy" for another. White *v.* Rankin, 90 Ala. 541 (1890). The statute in Alabama prescribes that, unless a transfer is made on the corporate books within fifteen days after the transfer, it "shall be void as to *bona fide* creditors or subsequent purchasers without notice." In a suit by the purchaser at execution sale to compel the corporation to transfer the stock it need not be alleged that the purchase was made without notice of the claims of other persons. Wetumpka, etc. Co. *v.* Kidd, 124 Ala. 242 (1900). A purchaser of stock at an execution sale may file a bill against an alleged transferee of the stock and the corporation to have the conflicting rights adjudicated. Howard *v.* Corey, 126 Ala. 283 (1900). A judgment creditor who knows that stock has been hypothecated and yet causes it to be sold on execution and buys it in has no precedence over the pledge. Selma Bridge Co. *v.* Harris, 132 Ala. 179 (1902). Where the corporation knows that one of its stockholders has pledged his stock, the corporation cannot claim a prior lien by statute on a debt subsequently incurred. Birmingham, etc. Co. *v.* Louisiana, etc. Bank, 99 Ala. 379 (1892). Even though the purchaser at the execution sale knew of an unregistered sale of the certificates, yet if the judgment debtor did not know it, the purchaser is protected. Jones *v.* Latham, 70 Ala. 164 (1881). The Alabama statute is as follows: "Transfers of stock must be made or registered on the book of the corporation, and persons holding stock not so transferred or registered, or holding any stock under hypothecation, mortgages or other lien must have a transfer, hypothecation, mortgage or other lien made or registered as aforesaid, or upon failing to do so within fifteen days of such transfers, hypothecations, mortgages, or other liens shall be void as to judgment

of these states all hold that, where a statute exists requiring a transfer of stock to be registered on the corporate books in order to be

creditors or subsequent purchasers without notice." Code of Ala. 1907, Vol. 2, §§ 3470, 3471.

Arkansas: The statute is as to manufacturing and other business corporations as follows: "Whenever any stockholder shall transfer his stock in any such corporation, a certificate of such transfer shall forthwith be deposited with the county clerk aforesaid, who shall note the time of said deposit and record it at full length in a book to be kept for that purpose; and no transfer of stock shall be valid as against any creditor of such stockholder until such certificate shall have been so deposited." Dig. 1904, p. 352, §§ 849, 1338. Stock "shall be deemed personal property, and be transferred only on the books of such corporation in such form as the directors shall prescribe." *Id.* Sec. 1342. Under the Arkansas statute an attaching creditor has preference over a transfer not recorded with the county clerk as required by statute, even though such creditor knew that the certificate of stock had been sold. Scott *v.* Houpt, 73 Ark. 78 (1904). Under the Arkansas statute it is immaterial that the purchaser at the execution sale had actual knowledge that the debtor had transferred the stock, and it is immaterial that the attachment was due to an arrangement between the corporation, a creditor, and a debtor. Fahrney *v.* Kelly, 102 Fed. Rep. 403 (1900). The Arkansas statute requiring transfers of stock to be recorded with the county clerk does not apply to a pledge of stock. Batesville, etc. Co. *v.* Myer, etc. Co., 68 Ark. 115 (1900). In the case of Masury *v.* Arkansas Nat. Bank, 93 Fed. Rep. 603 (1899), the court in a carefully reasoned opinion decided that the Arkansas statute requiring a transfer on the corporate books as against creditors of the vendor of stock did not apply to a pledge of stock, even though such pledge was made by transferring and delivering the certificate of stock without any record whatsoever on the corporate books. The court stated that it was unnecessary for it to pass on the question of whether public notice of the pledge given at the execution sale had any bearing upon the rights of the purchaser. The court said: "It is a well known fact that stock certificates frequently circulate in places far remote from the home of the corporation by which they were issued, that in all commercial centers they are commonly transferred from hand to hand like negotiable paper, and that they are hypothecated for temporary loans by a simple indorsement and delivery thereof, the latter being perhaps the most common use to which such securities are put. In the great majority of cases, when stock is merely pledged for a loan, no record of the transfer is made on the books of the corporation, and in the judgment of laymen the making of such a record seems to be a needless formality. The trend of modern decisions has been to encourage the free circulation of stock certificates in the mode last indicated, on the theory that they are a valuable aid to commercial transactions, and that the public interest is best subserved by removing all restrictions against their circulation, and by placing them as nearly as possible on the plane of commercial paper."

California: The statute is as follows: A "transfer is not valid except as to the parties thereto, until the same is so entered upon the books of the corporation as to show the names of the parties by whom and to whom transferred, the number of the certificate, the number or designation of the shares, and the date of trans-

effectual, an attachment or execution levied on stock standing in the defendant debtor's name will cut off the rights of a previous pur-

fer." Civil Code (1906), § 324. A purchaser at execution sale, who knows the debtor has sold the stock, takes nothing. Blakeman *v.* Puget Sound Iron Co., 72 Cal. 321 (1887). Under this statute an attachment takes precedence over an unrecorded prior transfer of a certificate of stock. See Weston *v.* Bear River, etc. Co., 5 Cal. 186 (1855); Farmers', etc. Bank *v.* Wilson, 58 Cal. 600 (1881); Naglee *v.* Pacific Wharf Co., 20 Cal. 529 (1862). The case of Weston *v.* Bear River, etc. Co., 6 Cal. 425 (1856), holds that one who purchases stock at an execution sale, knowing that a certificate of stock had already been sold or pledged by the execution debtor, cannot claim a precedence over a sale of the certificates. To same effect, People *v.* Elmore, 35 Cal. 653 (1868). If the unregistered purchaser buys the judgment obtained under the attachment, the later is merged. Strout *v.* Natoma Water, etc. Co., 9 Cal. 78 (1858). A sale of stock after an attachment suit has failed, and before that decision is reversed, gives the purchaser good title. Loveland *v.* Alvord, etc. Co., 76 Cal. 562 (1888). A transaction whereby a debtor delivers certificates of stock to its creditor in pledge, and the creditor immediately returns them to the debtor, is not a valid pledge, even though the debtor told the corporate officers of the pledge, but said he did not want the transaction to appear on the books, and even though the secretary makes a note of the fact on the stubs of the certificate-of-stock book. An execution subsequently levied upon the stock as the property of the debtor takes precedence over the alleged pledge. McFall *v.* Buckeye, etc. Assoc., 122 Cal. 468 (1898). In California the purchaser at execution sale, without notice of a prior sale of the certificates, is entitled to the stock and to have new certificates issued to him, even though the old certificates are outstanding. West Coast, etc. Co. *v.* Wulff, 133 Cal. 315 (1901).

Colorado: The statute is as follows: Except in railroad and telegraph corporations and corporations having a paid up capital of over $20,000,000 and a stock transfer agency in New York City "no transfer of stock shall be valid for any purpose whatever . . . unless it shall have been entered . . . within 60 days from the date of such transfer by an entry showing to and from whom transferred; or in case of the pledge of any such stock a memorandum be made upon the books of said company showing to whom and for what amount the stock has been pledged." Ann'd Stat. (1905), p. 243, § 508. Even though the pledgor by a separate instrument assigns to a third party his interest in the stock, and the purchaser files such assignment with the corporation and asks for a transfer, yet a subsequent attachment has precedence, under the Colorado statute, where the debt of the pledgee was paid prior to the service of the execution and the purchaser of the equity of redemption did not obtain or present the certificate of stock for transfer. Isbell *v.* Graybill, 19 Col. App. 508 (1904). See Conway *v.* John, 14 Colo. 30 (1890), giving a preference to the attachment. *Cf.* Weber *v.* Bullock 19 Colo. 214 (1893), holding that the pledgee was protected where he had requested transfer and been wrongfully refused by the corporation. See also Supply Ditch Co. *v.* Elliott, 10 Colo. 327 (1887). Where a statute requires a transfer on the books within sixty days, and the transfer is not made within those sixty days, an attaching creditor of the transferrer takes title, even though he knew of the unregistered transfer. First Nat. Bank, etc.

ıaser of the certificate who has not completed his transfer by regis-y. Even in these states, however, it has been held that, if the per-

Hastings, 7 Colo. App. 129 (1895). here the purchaser of a certificate stock files a bill in equity to enjoin ı attaching creditor of the trans-ree from selling the stock on execu-ɔn, and joins the corporation as a .rty defendant, and in the suit the urt decides that the stock was origi-.lly legally issued, this decision is nding, even though it was not ised by the pleadings. Newman *v.* ıllock, 23 Colo. 217 (1896).

Connecticut: The statute is as fol-ws: "Shares of stock in any cor-ıration organized under the laws of is state or of the United States, or easurer's receipts for payment on bscription to the stock of any cor-ıration organized under the laws of is state, may be pledged by deliver-g the certificate of such stock or .ch receipt to the pledgee, with a ıwer of attorney for its transfer; ıt no such pledge shall be effectual hold such stock against any person her than the pledgor, his executor, administrator, unless there shall an actual transfer of the same ıon the books of the corporation, or ıless a copy of such power of attor-ːy shall be filed with the corporation. . . . The stock of every corpora-ɔn, except when otherwise provided the charter of a specially chartered rporation, shall be personal prop-ty, and, with the treasurer's receipt r payments on stock subscriptions, ıall be transferable only on its ıoks in such form as the by-laws .all prescribe. Whenever any trans-r of stock shall be made for col-teral security, the entry of the ansfer on the books of the corpora-ɔn shall state that it is made for ıllateral security." Public Laws 1903, 150, Ch. 194, §§ 20, 21. A pledge ɔt perfected, as required by statute, subject to a statutory lien of the ırporation itself, even though the statute was enacted after the pledge was made. First National Bank *v.* Hartford, etc. Ins. Co., 45 Conn. 22 (1877). Where the treasurer of a corporation has notice that stock owned by one of its stockholders of record has been pledged to a bank, this prevents the corporation claiming a lien on the stock for a subsequent debt from the stockholder to the corporation, even though the pledgee has not obtained or filed an actual transfer with the corporation. Hotchkiss, etc. Co. *v.* Union Nat. Bank, 68 Fed. Rep. 76 (1895). See Northrup *v.* Curtis, 5 Conn. 246 (1824); Oxford Turnp. Co. *v.* Bunnel, 6 Conn. 552 (1827); Richmondville Mfg. Co. *v.* Prall, 9 Conn. 487 (1833); Dutton *v.* Connecticut Bank, 13 Conn. 493 (1840), where the recording of an assignment for the benefit of creditors in the probate office was held insufficient notice to the company as against attachments; Colt *v.* Ives, 31 Conn. 25 (1862), holding that, where a transfer is wrongfully refused by the clerk, a subsequent attachment does not take precedence. The United States court sitting in Connecticut held in the case of New York Com. Co. *v.* Francis, 83 Fed. Rep. 769 (1897), where stock in a Connecticut corporation stood on the books of the corporation in the name of a person who was really but a nominal holder for a copartnership, that an attachment levied on the stock as the property of such nominal holder was not good as against the real owner. The court distinguished such a case from a case where a purchaser allowed the stock to stand in the name of the vendor. The court sustained a bill in equity on the part of the real owner of the stock to enjoin its sale on execution.

Indiana: The statute is as follows: Stock may be levied upon and sold, "and the sheriff shall transfer the

son who levies the attachment or purchases at the execution sale has notice that the defendant debtor had transferred his certificate before

stock, subject to the rights of the corporation or company. . . . The shares of stock subject to be levied upon shall be bound by the execution from the time of the levy . . . and such levy shall constitue a lien upon the stock from the time of such levy." Ann'd Stat. (1901), § 723. The remedy of the purchaser of a certificate of stock as against an execution sale is not an injunction unless the stock is of peculiar value or use to the purchaser. Boone *v.* Van Gorder, 164 Ind. 499 (1905). A statute prescribing that stock should be transferable on the corporate books "and not otherwise" was held to give precedence to an attachment as against unregistered purchasers of certificates of stock. Coleman *v.* Spencer, 5 Blackf. 197 (1839). In State *v.* Jeffersonville Nat. Bank, 89 Ind. 302 (1883), the court fell into the error that there could be no pledge of stock unless there was a transfer to the pledgee on the books of the company. Such of course is not the law. See § 465, *supra*. Moreover, the court did not consider the federal decisions on this subject, although national-bank stock was involved. However, the court held that the pledgee should have appeared and set up his claim.

Iowa: The statute is as follows: "The transfer of shares is not valid, except as between the parties thereto, until regularly entered upon the books of the company. . . . When any shares of stock shall be transferred to any person, firm or corporation as collateral security, such person, firm or corporation may notify in writing the secretary of the corporation whose stock is transferred as aforesaid, and from the time of such notice, and until written notice that said stock shall have ceased to be held as collateral security, said stock so transferred and noticed as aforesaid shall be considered in law as transferred on the books of the corporation which issued said stock, without any actual transfer on the books of such corporation of such stock. In such cases it shall be the duty of the secretary or cashier of the corporation or of the person or firm to which such stock shall have been transferred as collateral security at once, upon its ceasing to be so held, to inform the secretary of the corporation issuing such stock of such fact. The secretary of the corporation whose stock is transferred as collateral shall keep a record showing such notice of transfer as collateral, and notice of discharge as collateral, subject to public inspection. No holder of stock as collateral security shall be liable for assessment on the same." Code (1897), § 1626. Mere entry by the corporation that the stock has been pledged is sufficient to protect the pledgee. Moore *v.* Marshalltown, etc. Co., 81 Iowa, 45 (1890). *Mandamus* lies against the corporation in behalf of the purchaser at execution sale, and by the Iowa decisions such purchaser is protected, even though he knew at the time of the sale that the certificates had been sold by the judgment debtor to a third person. Hair *v.* Burnell, 106 Fed. Rep. 280 (1900). The court holds that this statute give an attachment priority over a prior unregistered sale or pledge of the certificates of stock. Fort Madison Lumber Co. *v.* Batavian Bank, 71 Iowa, 270 (1887). This case came up again in 1899, when it appears that after the decision of the lower court in favor of the pledgee, and before reversal by the upper court, the lower court ordered a sale and the pledgee bought in the stock, and afterwards the stock became worthless. The court now holds (77 Iowa, 393) that the pledgee need restore only the

the attachment or execution was levied, the purchaser of the outstanding certificate is entitled to the stock.[1] If the attaching creditor

stock, although worthless. In Commercial Nat. Bank *v.* Farmers', etc. Bank, 82 Iowa, 102 (1891), the attaching creditor took no title because a statutory notice as to attachments was not given. In Iowa the attaching creditor has priority even though he knew at the time of his attachment that the certificates of stock had been sold by his debtor and that notice thereof had been given to the corporation. Ottumwa, etc. Co. *v.* Stodghill, 103 Iowa, 437 (1897). Under the Iowa statute a transfer of stock is not effective as against creditors, even though a request has been made to the corporation to transfer the stock, if such transfer has not been made, and even though the corporation attached to the stub of the certificate an acknowledgment of the assignment of the certificate, and even though the attaching creditor knew of such request. Where the Iowa corporation keeps its stock books in Boston, a transfer on such books in Boston is not effective as against subsequent attachments on the stock in Iowa, unless a book is kept in Iowa showing all transfers as required by the statutes of Iowa. Perkins *v.* Lyons, 111 Iowa, 192 (1900). Where the purchaser of stock at execution sale applies for a *mandamus* to compel the corporation to transfer the stock to him, and the owner of the stock intervenes and claims that the debt on which the stock was sold had been paid, and asks for a delivery of the certificates to the owner, the case may be tried in equity. Croft *v.* Colfax, etc. Co., 113 Iowa, 455 (1901), holding also that even though a pledgee brings suit on a debt and levies on the stock he does not thereby lose his rights as pledgee. Compare § 476, *supra.*

New Mexico: The statute is as follows: "Stock shall be transferable on the books of the corporation in such manner and under such regulations as the by-laws provide; and whenever any transfer of shares shall be made for collateral security, and not absolutely, it shall be so expressed in the entry of the transfer." Laws 1905, p. 150, Ch. 79, § 21. The statute in this state is substantially the same as in California, and the same decision is made by the courts. See Lyndonville Nat. Bank *v.* Folsom, 7 N. M. 611 (1894).

Vermont: The statute is as follows: "Stock may be transferred as provided by its by-laws." Stat. of 1894, p. 660, § 3687. A pledge of certificates of stock takes precedence over subsequent attachments, if notice of such pledge is given to the corporation and a memorandum made on the stock ledger. *Id.* § 3689. In Vermont where a pledge of stock may be made only by transfer on the books or notice to the corporation, a pledge without such transfer or notification or any assignment in writing is not good as against a trustee in bankruptcy. French *v.* White, 78 Vt. 89 (1905). The decisions in this state are to the effect that the attaching creditor takes precedence over an unregistered purchaser or pledgee of the certificates of stock. Sabin *v.* Bank of Woodstock, 21 Vt. 353, 362 (1849); Warren *v.* Brandon Mfg. Co. (1874), cited in 52 Vt. 75;

[1] The purchaser of a certificate of stock in a Missouri corporation may maintain a bill in equity for injunction to prevent the corporation transferring such stock to one who purchased the same at execution sale on a judgment obtained against the registered holder of such stock, it being shown that such purchaser at execution sale took with notice of the prior sale of the certificate. Seligman *v.* St. Louis, etc. R. R., 22 Fed. Rep. 39 (1884).

has notice before the attachment is levied, the purchaser may obtain a permanent injunction against the attachment.[1] Moreover, if the purchaser at the execution sale has notice, he may be prevented from obtaining registry and claiming the stock.[2]

Actual notice of an unrecorded pledge of the certificate is sufficient, even though the statute requires a transfer on the books or the

Cheever *v.* Meyer, 52 Vt. 66 (1879), the court holding, however, that the attachment in this case did not take precedence, inasmuch as the party knew about the prior sale of the certificates of stock.

For a rather emphatic invective against the decisions of California, Indiana, Colorado, and other states allowing attachments in those states to have priority against a prior transfer of stock, see 12 Ry. & Corp. L. J. 145.

1 Cheever *v.* Meyer, 52 Vt. 66 (1879); Scripture *v.* Francestown Soapstone Co., 50 N. H. 571 (1871); Black *v.* Zacharie, 3 How. 483 (1845). A purchaser at an execution sale takes no title as against a prior purchaser of the certificate where the former knew of the latter's purchase when the execution sale took place. Wilson *v.* St. Louis, etc. Ry., 108 Mo. 588 (1891). If the purchaser at the execution sale buys with knowledge that the judgment debtor does not own the stock at the time of the sale, he takes no title to the stock. Blakeman *v.* Puget Sound Iron Co., 72 Cal. 321 (1887). Where the judgment creditor at the time of levying the execution knows that the certificates of stock have been transferred as security for a debt its purchase of the stock at the sale does not give title prior to the right of a pledgee. Selma, etc. Co. *v.* Harris, 132 Ala. 179 (1902).

2 People *v.* Elmore, 35 Cal. 653 (1868); Weston *v.* Bear River, etc. Co., 6 Cal. 425 (1856); s. c., 5 Cal. 186; Van Cise *v.* Merchants' Nat. Bank, 4 Dak. 485 (1887); Farmers' Nat. Gold Bank *v.* Wilson, 58 Cal. 600 (1881), holding also that the execution sale will not be enjoined, since the claimant may attend and give notice of his claim; Newberry *v.* Detroit, etc. Mfg. Co., 17 Mich. 141, 158 (1868), per Cooley, J. The purchaser of a certificate of stock in a Missouri corporation may maintain a bill in equity for injunction to prevent the corporation transferring such stock to one who purchased the same at execution sale on a judgment obtained against the registered holder of such stock, it being shown that such purchaser at execution sale took with notice of the prior sale of the certificate. Seligman *v.* St. Louis, etc. R. R., 22 Fed. Rep. 39 (1884). Where the corporation bought for itself at the execution sale and had notice, it is liable in tort to the unregistered purchaser of the old certificates. Bridgewater Iron Co. *v.* Lissberger, 116 U. S. 8 (1885). Jones *v.* Latham, 70 Ala. 164 (1881), holds that, if the execution is levied without notice of an unrecorded transfer, a subsequent notice before the sale to the purchaser at the sale is ineffectual, and does not affect the latter. Where the creditor of the vendor knows of the pledge of the certificates at the time he sells the stock on execution, he, the creditor, is not protected in such sale. George, etc. Co. *v.* Range, etc. Co., 16 Utah, 59 (1897). Where a statute requires a transfer on the books within sixty days, and the transfer is not made within those sixty days, an attaching creditor of the transferrer takes title, even though he knew of the unregistered transfer. First Nat. Bank, etc. *v.* Hastings, 7 Colo. App. 129 (1895).

filing of a power of attorney. The company has actual notice if its treasurer learns of it at a bank.[1]

Where the unregistered transferee of the certificate of stock has notified the corporation thereof and demanded registry, which is not granted, any attachment or execution levied subsequently to the improper refusal by the corporation to register does not take precedence over such purchaser.[2] If the corporation improperly refuses to allow the transferee of stock to register his transfer, and the stock is afterwards attached by a creditor of the stockholder, the transferee may, if he chooses [illegible] the corporation liable in damages for its refusal to allow the registry.[3] Where the transferee of the certificate has repeatedly demanded a transfer of the company, but been refused, a subsequent attachment by a creditor of the transferrer does not take precedence, even though the statutes require a registry within sixty days.[4] It is proper and legal for a corporation to add to the name appearing on the stock certificate the words "as pledgee" or "as collateral security," or similar words.[5] Where the unregistered purchaser is cut off by an attachment, he cannot compel a purchaser from him to pay for the stock which is made valueless by the attachment.[6]

It may be added, in regard to this whole subject, that the decisions and statutes of the various states show clearly that public policy and the legitimate demands of trade have gradually caused the courts and legislatures of the various states to establish the rule that a sale or pledge of certificates of stock has precedence over a subsequent attachment levied on that stock for the debt of the vendor

1 Hotchkiss, etc. Co. *v.* Union Nat. Bank, 68 Fed. Rep. 76 (1895).

2 Merchants' Nat. Bank *v.* Richards, 6 Mo. App. 454 (1879; aff'd, 74 Mo. 77; Colt *v.* Ives, 31 Conn. 25 (1862); State Ins. Co. *v.* Gennett, 2 Tenn. Ch. 100 (1874); Plymouth Bank *v.* Bank of Norfolk, 27 Mass. 454 (1830); Sargent *v.* Franklin Ins. Co., 25 Mass. 90 (1829). *Contra*, Fiske *v.* Carr, 20 Me. 301 (1841). See also §§ 258, 382, 383, *supra;* and § 532, *infra.* But not if the transferee merely sends a letter to the corporation requesting a transfer, without sending the evidences of his title and the old certificate. Newell *v.* Williston, 138 Mass. 240 (1885). The corporation is liable in damages if it levies the attachment under such circumstances. Sargent *v.* Franklin Ins. Co., 25 Mass. 90 (1829). Where registry is allowed it cuts off a subsequent attachment, even though the transferee has not formally accepted the stock as required by statute. Woodruff *v.* Harris, 11 U. C. (Q. B.) 490 (1854). A memorandum on the stock book that the stock has been transferred as collateral security is sufficient to give the transfer precedence over an attachment. Moore *v.* Marshalltown, etc. Co., 81 Iowa, 45 (1890).

3 Robinson *v.* National Bank of New Berne, 95 N. Y. 637 (1884). See also Plymouth Bank *v.* Bank of Norfolk, 27 Mass. 454 (1830).

4 Weber *v.* Bullock, 19 Colo. 214 (1893).

5 See §§ 247, 466, *supra.*

6 Rock *v.* Nichols, 85 Mass. 342 (1862).

or pledgor, and that the failure of the pledgee or purchaser of the certificate to obtain a registry on the corporate books is not fatal to his interest in the stock. In the great commercial centers, where certificates of stock pass from hand to hand and are pledged to banks and financial institutions daily to secure great sums of money, the necessity of such a rule is imperative;[1] and the fact that so many states have, by legislative enactment, adopted the New York rule, while no state has changed from the New York rule to the New England rule, demonstrates in itself the justice and advisability of the rule which prevails in New York state. The statutes in Arizona, Florida, Georgia, Hawaii, Kansas, Montana, Nevada, North Carolina, Oklahoma, and South Carolina, bearing on this subject, are given in the notes below in alphabetical order.[2]

1 Quoted and approved in Mapleton Bank *v.* Standrod, 8 Idaho, 740 (1902).

2 *Arizona:* The statute is as follows: "Transfer of the stock shall not be valid except as between the parties hereto, until the same are regularly entered upon the books of the company." R. S. (1901), § 773. Even though by the statutes of a state (Arizona) a transfer of the stock is not good until recorded except as between the parties, yet where various stockholders have pooled their stock by turning in their certificates of stock to one person to hold, and one of the parties so pooling has sold his pool certificate, and the manager of the pool knowing that fact refuses to permit the stock itself to be corespondingly transferred on the books of the company, and later fraudulently obtains a judgment against the party who originally entered the pool, and sells out his stock under such judgment, he may be compelled by a court of equity to transfer the stock to the purchaser of the pool certificate, even though the stock has advanced in value and two years have intervened. Brissell *v.* Knapp, 155 Fed. Rep. 809 (1907).

Florida: The statute is as follows: "Stock shall be transferable in the manner prescribed by the by-laws." Gen. Stat. (1906), § 2656. State *v.* Suwanee Co., 21 Fla. 1 (1884), holds that a provision in a special charter that a "transfer shall not be binding unless entered on the books of the company" is for the protection of the company and does not affect a transfer as between holder and assignee.

Georgia: The statute is as follows: "Except as against the claims of the corporation, a transfer of stock does not require a transfer on the books of the company." Code (1895), § 1855. Bailey *v.* Strohecker, 38 Ga. 259 (1868), holds that *mandamus* lies at the instance of the purchaser at execution sale to compel the corporation to issue to him a new certificate. No conflicting claim seems to have arisen in that case. A lien created by by-law has precedence over a judgment against the stockholder, especially where notice of the lien was given at the execution sale. Owens *v.* Atlanta, etc. Co., 122 Ga. 521 (1905).

Hawaii: The statute is as follows: "Transfer of the shares may be made by indorsement and delivery of the certificate. . . . No such transfer shall be valid, except between the parties thereto, until . . . the transfer shall have been recorded on the books of the corporation." Rev. Laws (1905), § 2549. See Marx *v.* Parmelee, 13 Hawaii, 438 (1901).

Kansas: The statute is as follows: "Stock shall be transferable only on the books of the corporation, in such

§ 491. *Shares of stock cannot be subjected to the payment of the stockholder's debts by the process of garnishment unless the statutes so provide.*—The process of garnishment is proper only where a debt is due from a third person to the defendant debtor. It is not a proper remedy for reaching shares of stock owned by the debtor.[1]

manner as the by-laws may prescribe." Gen. Stat. (1905), § 1361.

Nevada: The statute is as follows: "Shares may be transferred by indorsement and delivery of the certificate thereof, such indorsement being by the signature of the proprietor, or his or her attorney, or legal representative; but such transfer shall not be valid except between the parties thereto, until the same shall have been so entered upon the books of the corporation." Comp. Laws (1900) § 874.

North Carolina: The statute is as follows: "The shares of stock in every corporation shall be personal property, and shall be transferable on the books of the corporation in such manner and under such regulations as the by-laws provide; and whenever any transfer of shares shall be made for collateral security, and not absolutely, it shall be so expressed in the entry of the transfer." Laws 1901, p. 19, Ch. 2, § 21. An execution levy shall be valid "upon all shares of stock in such company held by the defendant in execution, which have not at the time of the receipt of such notice by said clerk, cashier, or other officer, who has custody of the books of registry of the stocks thereof, been actually transferred by the defendant; and thereafter any transfer or sale of such shares by the defendant in execution shall be void as against the plaintiff in said execution, or any purchaser of such stock at any sale thereunder." *Id.* p. 32, § 71. In Morehead *v.* Western N. C. R. R., 96 N. C. 362 (1887), there is a dictum to the effect that the attachment has precedence. There was no proof that the sale of the certificate was prior to the attachment, and moreover the court said that the purchaser of the certificate might thereafter litigate his rights in another suit, inasmuch as he was not a party to the suit at bar.

Oklahoma: The statute is as follows: "Shares may be transferred by indorsement by the signature of the proprietor, or his attorney or legal representative, and delivery of the certificate; but such transfer is not valid except between the parties thereto, until the same is so entered upon the books of the corporation." Rev. Stat. (1903), Vol. I, p. 338, § 28.

South Carolina: The statute is as follows: "No transfers of stock shall be valid except as between the parties thereto until the same shall have been regularly entered upon the books of the corporation." Code 1902, p. 728, § 1894. Stock in corporations other than banks and banking institutions "shall be deemed personal estate, except in the case of manufacturing companies, the stock in which shall be deemed realty, as stated in § 1861, and the mode of issuing the evidence of stock, and the manner, terms and conditions of assigning and transferring shares, shall be prescribed by the by-laws of each corporation." Laws 1905, p. 843, Ch. 418 (D).

1 Planters', etc. Bank *v.* Leavens, 4 Ala. (N. S.) 753 (1843); Foster *v.* Potter, 37 Mo. 525 (1866); Ross *v.* Ross, 25 Ga. 297 (1858), where the court said: "Is stock in this railroad such a debt (indebtedness) of the railroad to the stockholder that a garnishing creditor of the stockholder can enter up judgment for it against the railroad. It is not; it is a debt which the railroad dares not pay, even

The corporation owes the stockholder no debt, and by no fiction of law can it be held to be a debtor of the defendant debtor. Consequently, where the sheriff levies an attachment, not according to procedure governing attachments, but according to the procedure of garnishment, the whole proceeding is void, and a subsequent transfer of the stock by the defendant debtor is valid.[1] Stock held has collateral is property subject to garnishment under the statutes of Texas.[2] In Michigan garnishee process lies against the pledgee of stock in behalf of a creditor of the pledgor, and enables the latter to reach the equity in the stock.[3] Garnishee process lies to reach a stockholder's interest, under the statutes of Nebraska, especially where the real interest of a registered stockholder is different from his apparent interest.[4] In Pennsylvania the equity of redemption which a pledgor has in stocks which he has pledged to a national bank may be reached by garnishment served on the bank after judgment against the debtor. The national bank act does not forbid such process.[5] While a pledgee waives the pledge if he levies an attachment on the stock, yet a garnishee process, general in its intent, does not have that effect.[6] Even though garnishee process has been served upon the pledgee of stock for a debt of the pledgor, yet the pledgor and pledgee may agree that the stock shall belong to the pledgee in cancellation of the debt. Such agreement is not illegal if the debt was the full value of the stock at the time; and even though subsequently the pledgee, upon selling the stock for more than the debt, pays the surplus to the pledgor, the creditor issuing the garnishee process cannot complain.[7] Garnishee proceedings against a stockholder's interest in stock which has been pooled and has also been pledged does not affect such pool or pledge, but is made subject to them if they are legal.[8] Certificates of stock held by one party and belonging to another cannot be reached by garnishee process in behalf of a creditor

to the stockholder himself. The road may pay him *dividends* on it, but that is all."

[1] Mooar *v.* Walker, 46 Iowa, 164 (1877). *Cf.* Chesapeake, etc. R. R. *v.* Paine, 29 Gratt. (Va.) 502 (1877). Garnishee process must conform to the statute relative to attachments, and if served on the holders of the certificates instead of on the corporation it is ineffectual. Younkin *v.* Collier, 47 Fed. Rep. 571 (1891).

[2] Smith *v.* Traders' Nat. Bank, 74 Tex. 457 (1889); Harrell *v.* Mexico Cattle Co., 73 Tex. 612 (1889).

[3] Old Second Nat. Bank *v.* Williams, 112 Mich. 564 (1897).

[4] Farmers', etc. Bank *v.* Mosher, 63 Neb. 130 (1901).

[5] Commonwealth *v.* Chestnut, etc. Bank, 189 Pa. St. 606 (1899).

[6] Hudson *v.* Bank of Pine Bluff, 75 Ark. 493 (1905).

[7] Steiner *v.* First, etc. Bank, 127 Ala. 595 (1900).

[8] Hardin *v.* White, etc. Co., 26 Wash. 583 (1901).

f the owner of the stock. The certificate is merely "like a title deed : a bill of sale, which is not the property itself, but simply the evi- ence of title to property."[1] Garnishee process may reach dividends eclared while the proceedings are pending.[2] Garnishee process by creditor of the corporation itself, to collect unpaid subscriptions, considered elsewhere.[3]

1 Packard, etc. Co. *v.* Laev, 100 Wis. :4 (1898).

2 Farmers', etc. Bank *v.* Mosher, 100 . W. Rep. 133 (Neb. 1904). Where .e pledgee is garnisheed and the com- ıny goes into liquidation, the gar- .shee process covers the dividend on the stock less his claim. Cooley *v.* Janes, 71 Kan. 297 (1905).

3 See § 201, *supra.* Under the Alabama statute relative to garnishment on subscriptions, no call by the directors is necessary. Enslen *v.* Nathan, 136 Ala. 412 (1903).

CHAPTER XXVIII.

CONSTITUTIONALITY OF AMENDMENTS TO CHARTERS—RIGHT OF A STOCKHOLDER TO OBJECT.

§ 492. *A corporate charter is a contract between three parties—the state, the corporation, and the stockholders.*—The charter of a corporation having a capital stock is a contract between three parties, and forms the basis of three distinct contracts.[1] The charter is a contract between the state and the corporation; second, it is a contract between the corporation and the stockholders; third, it is a contract between the stockholders and the state.[2]

§ 493. *The charter as a contract between the corporation and the stockholders—Amendment of charter by majority of stockholders as allowed by statute existing at time of incorporation.*—That the

[1] See State Bank *v.* Knoop, 16 How. 369 (1853); Port Edwards, etc. Ry. *v.* Arpin, 80 Wis. 214 (1891); Northern R. R. *v.* Miller, 10 Barb. 260 (1851); Cooley, Const. Lim. (5th ed.), p. 337, where the learned author says: "Those charters of incorporation, however, which are granted, not as a part of the machinery of the government, but for the private benefit or purposes of the corporators, stand upon a different footing, and are held to be contracts between the legislature and the corporators, having for their consideration the liabilities and duties which the corporators assume by accepting them; and the grant of the franchise can no more be resumed by the legislature, or its benefits diminished or impaired without the consent of the grantees, than any other grant of property or valuable thing, unless the right to do so is reserved in the charter itself."

[2] Quoted and approved in Garey *v.* St. Joe Mining Company, 91 Pac. Rep. 369 (Utah 1907).

charter is a contract between the corporation and the stockholders has within the last fifty years been firmly established, and is now unquestioned law. The cases of Natusch *v.* Irving[1] in England, and Livingston *v.* Lynch[2] in this country, followed by a long line of supporting decisions, distinctly hold that the charter is a contract prescribing to the corporation that it shall not attempt to materially change, extend, alter, or abandon the particular business which that charter authorizes the corporation to do. Any attempt of the corporation to make such a change, extension, alteration, or abandonment of that business is called an *ultra vires* act. It is an act which a single stockholder may prevent by injunction or set aside by a suit in equity. This subject, however, is fully treated in another part of this work.[3] Where the statutes in existence at the time of incorporation provide for the extension of corporate charters a stockholder cannot prevent the corporation from extending its existence in accordance with such statutes.[4] Under a statute authorizing the stockholders by an amended certificate to change the objects of the corporation, the certificate may be amended so as to give a corporation power to purchase stock in other corporations.[5] A holder of preferred stock may prevent a reduction of the preferred dividend by an amendment of the certificate of incorporation, even though the statutes of the state at the time of the organization of the company authorize the certificate of corporation to be amended by a certain vote. Such reduction may be enjoined.[6] The reserved right to alter, amend or repeal charters is effective whether it appear in the charter or in the general laws or in the constitution of the state.[7] Where a statute provides that any corporation accepting its benefits thereby waives its exemption from the power of the legislature to amend its charter, the acceptance of the benefits of such a statute thereby works that change without any formal action on the part of the board of directors or stockholders.[8]

§ 494. *Charter as a contract between the state and the corporation.*—As between the state and the corporation the corporate charter is a contract, protected by that provision of the United States constitution which prohibits a state from passing any law which will im-

1 This case, decided by Lord Eldon in 1824, is reported in Gow on Partnership, 398; also 2 Cooper's Ch. 358.

2 4 Johns. Ch. 573 (1820); Clearwater *v.* Meredith, 1 Wall. 25 (1863); Harding *v.* American, etc. Co., 182 Ill. 551 (1899).

3 See ch. XL, *infra.*

4 Smith *v.* Eastwood, etc. Co., 58 N. J. Eq. 331 (1899).

5 Meredith *v.* New Jersey, etc. Co., 59 N. J. Eq. 257 (1899); aff'd, 60 N. J. Eq. 445 (1899).

6 Pronik *v.* Spirits, etc. Co., 58 N. J. Eq. 97 (1899).

7 Polk *v.* Mutual Reserve Fund, 207 U. S. 310 (1907). See also § 501, *infra.*

8 Louisville & N. R. R. *v.* State, 45 S. Rep. 296 (Ala. 1907).

pair the obligation of the contract.[1] Hence it is beyond the power of the state to repeal or materially annul such a corporate charter, unless the power of amendment and repeal has been expressly reserved by the state, or unless all the parties to the contract consent to the change. All the franchises, privileges, and express and implied powers necessary and essential to carrying out the corporate purposes are protected by this contract.[2] This branch of the law is important to stockholders in cases where the corporation neglects or refuses to protect itself against legislative amendments or repeals violating the charter contract between the corporation and the state. In such cases the stockholder may enjoin or remedy the wrong by bringing an action in place of and on behalf of the corporation, making it a party defendant, together witih the parties who, under the authority of the state, have violated the contract.[3] A stockholder's action to prevent the payment of a tax levied upon the corporation in violation of a statutory exemption from taxation is an action of this character.[4] Corporate charters, however, are subject to constitutional provisions enacted subsequently to the granting of the charters, unless there is a clear contract to the contrary.[5] Although a special charter gives the right to a railroad corporation to consolidate with

1 This rule of law, first enunciated in the case of Dartmouth College *v.* Woodward, 4 Wheat. 518 (1819), by Marshall, C. J., has become thoroughly established. As early as 1806 a court said: "We are also satisfied that the rights legally vested in this or in any corporation cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation." Wales *v.* Stetson, 2 Mass. 143 (1806). In England the unwritten constitution is not superior to the powers of parliament, and consequently the rule is different. In that country, as is said by Lord Coke, "the power and jurisdiction of parliament is so transcendental and absolute that it cannot be controlled or confined, either for causes or purposes, within any bounds." Stevens *v.* Rutland, etc. R. R., 29 Vt. 545 (1851); Thorpe *v.* Rutland, etc. R. R., 27 Vt. 140 (1857); Dartmouth College *v.* Woodward, 4 Wheat. 518, 643 (1819). Consequently, the English authorities are of little use in this chapter.

2 State Bank *v.* Knoop, 16 How. 369 (1853); Thorpe *v.* Rutland, etc. R. R., 27 Vt. 140 (1857), per Redfield, C. J. The latter case discusses the nature of the privilege thus protected.

3 Greenwood *v.* Union Freight R. R., 105 U. S. 13 (1881). See also §§ 900, 901, *infra*, on this subject. The character of such an action, also the parties, pleadings, and rules of relief, are explained in Part IV, *infra*.

4 Dodge *v.* Woolsey, 18 How. 331 (1855); State Bank *v.* Knoop, 16 How. 369 (1853). See also Wilmington R. R. *v.* Reid, 13 Wall. 264 (1871); Delaware R. R. Tax, 18 Wall. 206 (1873). See also § 562, *infra*.

5 Pennsylvania R. R. *v.* Miller, 132 U. S. 75 (1889). Where by an amendment an insurance charter is changed into a banking charter, an exemption from taxation may be lost thereby by reason of a constitutional provision enacted after the original charter was granted but before the amendment

other roads, yet a subsequent general statute may take away this power except so far as the same has been already exercised.[1] Even though a waterworks company has been incorporated, yet if before it obtains any valid franchise or vested right to furnish water to consumers, the state passes a statute requiring consumers to purchase water from the city plant, such a statute is valid.[2] A general act prohibiting a municipality from granting a ferry right within a half mile of an existing ferry does not constitute a contract with any particular ferry, but on the contrary may be repealed.[3] A city ordinance passed under the authorization of a statute is a law, within the meaning of the constitution of the United States prohibiting any law that impairs the validity of the contract.[4] Where an exclusive grant for a bridge by the legislature is extended, the extension is not a contract, being without consideration.[5] An amendment exempting a corporation from taxation may be repealed, there being no consideration for the contract.[6] After a foreclosure sale the legislature cannot pass a law compelling the purchaser to pay certain of the old debts, even though the purchaser is a railroad corporation which was organized under a special charter for the purpose of making such purchase.[7] A statute cannot turn over the property of an educational institution to another educational institution.[8]

was granted. Memphis City Bank *v.* Tennessee, 161 U. S. 186 (1896).

1 Pearsall *v.* Great Northern Ry., 161 U. S. 646 (1896). Mr. Justice Brown's opinion in this case contains a clear exposition of the law on this subject, and on the various and far-reaching applications and restrictions of the Dartmouth College case. In this case the court spoke of the Dartmouth College case as follows (p. 660): "The doctrine of this case has been subjected to more or less criticism by the courts and the profession, but has been reaffirmed and applied so often as to have become firmly established as a canon of American jurisprudence." The statute authorizing a corporation to amend its articles without changing substantially its purposes does not authorize a gas and power company to change itself into a street railway company. State *v.* Taylor, 55 Ohio St. 61 (1896).

2 City of Rochester *v.* Rochester, etc. Co., 189 N. Y. 323 (1907).

3 Williams *v.* Wingo, 177 U. S. 601 (1900).

4 Pike's Peak, etc. Co. *v.* Colorado Springs, 105 Fed. Rep. 1 (1900).

5 Robinson *v.* Lamb, 126 N. C. 492 (1900).

6 Manistee, etc. Co. *v.* Commissioner of Railroads, 118 Mich. 349 (1898). An amendment which grants to a street railway company an exclusive right to certain streets may be amended or repealed, even though it was granted at the session of the legislature which granted the original charter. Philadelphia, etc. Ry.'s Appeal, 102 Pa. St. 123 (1883). See also Johnson *v.* Crow, 87 Pa. St. 184 (1878); Norwich Gas, etc. Co. *v.* Norwich, etc. Co., 25 Conn. 19 (1856).

7 Woodward *v.* Central, etc. Ry., 180 Mass. 599 (1902).

8 Ohio *v.* Neff, 52 Ohio St. 375 (1895). See also § 500, *infra.*

§§ 495, 496. *Charter as a contract between the state and the stockholders.*—As between the state and the stockholders, also, the corporate charter is a contract protected by the United States constitution.[1] In consequence thereof the state cannot materially amend the charter, except by the unanimous consent of the stockholders, unless the power of amendment is expressly reserved by the state at the time of granting the charter. It is this contract which constitutes the subject of the present chapter.

§ 497. *Charter amendments imposed upon the stockholders.*—The right of the legislature to amend a charter against the will of the stockholders has been the subject of much litigation. Such amendments are clearly divisible into two kinds. The first are those which, by their terms, are absolute and compulsory, and become a part of the charter irrespective of the action or willingness of the stockholders to accept them. Such amendments, excepting those which are made as police regulations,[2] are unconstitutional and void,[3] unless made under a reserved power to amend.[4] Of such a kind

1 "A charter of incorporation granted by a state creates a contract between the state and the corporators which the state cannot violate." This has been held so often by this court that it is a "work of supererogation" to repeat it. Wilmington R. R. *v.* Reid, 13 Wall. 264 (1871). It "has been the settled law of this court since the decision in the Dartmouth College case." Delaware R. R. Tax, 18 Wall. 206 (1873). To the same effect, see Zabriskie *v.* Hackensack, etc. R. R., 18 N. J. Eq. 178 (1867); Lothrop *v.* Stedman, 42 Conn. 583 (1875); Stevens *v.* Rutland, etc. R. R., 29 Vt. 545 (1851). "An act granting corporate privileges to a body of men is, when accepted, a contract between the state and the corporators. . . . It is sustained by everything that we are bound to regard as authority,"—by the courts, by the opinion of the legal profession, and by the acquiescence of the people. Erie, etc. R. R. *v.* Casey, 26 Pa. St. 287 (1856), per Jeremiah Black, J. See also Sinking Fund Cases, 99 U. S. 700 (1878). "That an act of incorporation is a contract between the state and the stockholders is held for settled law by the federal courts and by every state court in the Union. All the cases on the subject are saturated with this doctrine. It is sustained not by a current but by a torrent of authorities. No judge who has a decent respect for the principle of *stare decisis*—that great principle which is the sheet-anchor of our jurisprudence—can deny that it is immovably established." "If anything is settled it is this rule of construction that a corporation takes nothing by its charter except what it is plainly, expressly, and unequivocally granted." Per Black, J., Bank of Pennsylvania *v.* Commonwealth, 19 Pa. St. 144 (1852).

2 See § 900, *infra.*

3 Such as an amendment changing the route and terminus. Ames *v.* Lake Superior, etc. R. R., 21 Minn. 241 (1875). A corporate charter right to take a certain rate of interest is a contract and is protected against subsequent legislation. Hazen *v.* Union Bank, 1 Sneed (Tenn.), 115 (1853). See also dictum in Philadelphia, etc.

4 See § 501, *infra.*

are amendments repealing an exemption of stockholders from taxation.[1] The legislature cannot compel a turnpike company to build a bridge beyond the turnpike as a condition of continuing to exercise its franchise.[2] Where a foreign railroad company has extended its lines into a state under a statute, the legislature of the latter state cannot afterwards require it to become a domestic corporation. Such a statute impairs the obligation of the contract.[3] Stockholders sued under the Minnesota statute cannot question the amount of the assessment which has been levied by the court. A statute to that effect is not unconstitutional.[4] An amendment to a banking act whereby a lien is given to banks on stock of its stockholders for debts due the bank from them does not apply to stock already issued.[5] The New Jersey statute prohibiting suits at law to enforce the statutory liability of stockholders in foreign corporations, and prescribing that the remedy shall be in equity only, is unconstitutional so far as liabilities existing at the time of the passage of the statute are concerned.[6] Where, by statute, a statutory liability may be enforced by any creditor in a separate action at law against any stockholder, the statute cannot be changed so that the remedy is a suit in behalf of all creditors against all the stockholders, so far as existing creditors are concerned.[7] The legislature may authorize the statutory liability of stockholders to be enforced by a receiver, even in corporations which have passed into a receiver's hands prior to the enactment of the statute.[8] But where, by statute, every creditor has the right to bring suit to enforce the stockholders' liability, a statute taking away this

Ry.'s Appeal, 102 Pa. St. 123 (1883), that an amendment to a charter which enlarges it without imposing any new or additional burden upon it is a mere license and may be revoked, citing Johnson *v.* Crow, 87 Pa. St. 184 (1878); Christ Church *v.* Philadelphia County, 24 How. 300 (1860). The legislature may subsequently authorize the sale of the corporate franchises, etc., to pay debts. Louisville, etc. Co. *v.* Ballard, 2 Metc. (Ky.) 165 (1859).

1 Thus, a statute authorizing the taxation of stock which by the corporate charter is exempt is unconstitutional. Gordon *v.* Appeal Tax Court, 3 How. 133 (1845); Farrington *v.* Tennessee, 95 U. S. 679 (1877). An exemption from taxation which is a gift may be repealed. Philadelphia *v.* Pennsylvania Hospital, 134 Pa. St. 171 (1890). See § 568, *infra*.

2 State *v.* Lebanon, etc. Co., 61 S. W. Rep. 1096 (Tenn. 1900).

3 Commonwealth *v.* Mobile, etc. R. R., 64 S. W. Rep. 451 (Ky. 1901).

4 Straw, etc. Co. *v.* Kilbourne, etc. Co., 80 Minn. 125 (1900).

5 Southern, etc. Co. *v.* Fidelity, etc. Co., 105 Ga. 487 (1898).

6 Western, etc. Bank *v.* Reckless, 96 Fed. Rep. 70 (1899).

7 Myers *v.* Knickerbocker T. Co., 139 Fed. Rep. 111 (1905), involving a Maryland statute, the court refusing to follow Miners', etc. Bank *v.* Snyder, 100 Md. 57 (1904).

8 Persons *v.* Gardner, 42 N. Y. App. Div. 490 (1899).

right and giving it to a receiver is unconstitutional.[1] So, also, a statute passed subsequently to the granting of a charter, and increasing the liability of a stockholder on his stock for the debts already incurred, is unconstitutional and void unless the legislature has reserved the right to alter or amend the charter.[2] Under such a reservation the statute is legal and binding, although there are limits even to this reserved power, as will be shown hereafter.[3] Under the reserved power the legislature may consolidate several beneficial and scientific corporations especially where the corporation objecting practically controls the others. The statute to that effect need not be submitted to the stockholders for acceptance, but is mandatory.[4] A statute which authorizes an additional assessment upon existing paid-

1 Woodworth *v.* Bowles, 61 Kan. 569 (1900). See § 218, *supra.*

2 It certainly is as regards corporate debts already incurred. Commonwealth *v.* Cochituate Bank, 85 Mass. 42 (1861); Wheeler *v.* Frontier Bank, 23 Me. 308 (1843). And has been held to be so as regards future corporate debts. Ireland *v.* Palestine, etc. Co., 19 Ohio St. 369 (1869). *Contra,* Stanley *v.* Stanley, 26 Me. 191 (1846); Coffin *v.* Rich, 45 Me. 507 (1858); Shufeldt *v.* Carver, 8 Ill. App. 545 (1881); Fogg *v.* Sidwell, 8 Ill. App. 551 (1881); Child *v.* Coffin, 17 Mass. 64 (1820), dictum; Gray *v.* Coffin, 63 Mass. 192, 200 (1852); Hathorn *v.* Calef, 53 Me. 471 (1866). See Weidenger *v.* Spruance, 101 Ill. 278 (1881). And it is said that a stockholder may restrain by a proper proceeding the acceptance by the corporation of an unconditional amendment to the charter by which the liability of the stockholders is increased. Owen *v.* Purdy, 12 Ohio St. 73 (1861); Fry *v.* Lexington, etc. R. R., 2 Metc. (Ky.) 314 (1859). *Cf.* Bailey *v.* Hollister, 26 N. Y. 112 (1862); Thompson *v.* Guion, 5 Jones, Eq. (N. C.) 113 (1859); Mowrey *v.* Indianapolis, etc. R. R., 4 Biss. 78 (1866); s. c., 17 Fed. Cas. 930; Lauman *v.* Lebanon Valley R. R., 30 Pa. St. 42 (1858); Hamilton, etc. Ins. Co. *v.* Hobart, 68 Mass. 543 (1854); Gardner *v.* Hamilton Mut. Ins. Co., 33 N. Y. 421 (1865). Where the incident of individual liability was repealed by an amendment to the state (Missouri) constitution after the debt accrued, but before the increase of stock was issued, the holders of the new stock were held not liable under the former constitution. Ochiltree *v.* Railroad Co., 21 Wall. 249 (1874). A statute imposing a double liability on stockholders in banks will be construed as applying only to debts thereafter incurred. Smathers *v.* Western, etc. Bank, 135 N. C. 410 (1904). A statute rendering directors liable may apply to rent becoming due thereafter on a lease made before the passage of such statute. Steiffel *v.* Tolhurst, 67 N. Y. App. Div. 521 (1902).

3 See § 501, *infra.*

4 McKee *v.* Chautauqua Assembly, 130 Fed. Rep. 536 (1904), the court saying: "That the reserved power authorizes the legislature to make any alteration or amendment of a charter which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the legislature may deem necessary to promote the original purpose contemplated by its charter or articles of association, or to protect the rights of the public." Under its reserved power to amend, the legislature may change the mode of electing the trustees of a non-stock corporation and may authorize a con-

up stock is unconstitutional.[1] A statutory liability may be applied to existing corporations if they continue to do business.[2] A statute authorizing corporations to sell all their property on a certain vote of the stockholders applies to corporations existing at the time of the enactment of the statute, the legislature having the reserved right to alter, amend or repeal charters.[3]

A statute releasing stockholders from paying one-half of the par value of the stock and declaring the stock paid up, although but fifty per cent. had been paid thereon, is unconstitutional as regards creditors existing at the time such statute was enacted.[4] A statute imposing additional liability upon the stockholders cannot be repealed so as to affect those who were corporate creditors previously to the repeal.[5] But, whenever the statute imposing the liability is penal in its

solidation with another corporation. McKee *v.* Chautauqua Assembly, 124 Fed. Rep. 808 (1903).

1 Enterprise, etc. Co. *v.* Moffitt, 58 Neb. 642 (1899).

2 Gamewell, etc. Co. *v.* Fire, etc. Co., 116 Ky. 759 (1903). A statute requiring corporations to file certificates stating the amount of capital stock paid in applies not only to subsequent corporations, but also to pre-existing corporations, as regards payments made after the statute was enacted. Bay State Gas Co. *v.* State, 4 Pen. (Del.) 497 (1904).

3 Germer *v.* Triple-State, etc. Co., 60 W. Va. 143 (1906). A statute requiring stock ledgers to be kept open for the examination of stockholders applies to pre-existing as well as subsequently organized corporations. Bay State Gas Co. *v.* State, 4 Pen. (Del.) 238 (1904).

4 Williams *v.* Watters, 97 Md. 113 (1903).

5 Hawthorne *v.* Calef, 2 Wall. 10 (1864); Conant *v.* Van Shaick, 24 Barb. 87 (1857); Norris *v.* Wrenschall, 34 Md. 492 (1871); Provident Sav. Inst. *v.* Jackson Place, etc. Co., 52 Mo. 552 (1873); St. Louis, etc. Co. *v.* Harbine, 2 Mo. App. 134 (1876); Central, etc. Assoc. *v.* Alabama, etc. Ins. Co., 70 Ala. 120 (1881); Woodruff *v.* Trapnall, 10 How. 190 (1850); McDonnell *v.* Alabama, etc. Ins. Co., 85 Ala. 401 (1888). See also Story *v.* Furman, 25 N. Y. 214 (1862); Rochester *v.* Barnes, 26 Barb. 657 (1858); Sinking Fund Cases, 99 U. S. 700 (1878). *Cf.* Jerman *v.* Benton, 79 Mo. 148 (1883); Woodhouse *v.* Commonwealth Ins. Co., 54 Pa. St. 307 (1867); *Re* State Ins. Co., 14 Fed. Rep. 28 (1882); Palfrey *v.* Paulding, 7 La. Ann. 363 (1852); *Re* Telegraph Constr. Co., L. R. 10 Eq. 384 (1870); Cooper *v.* Frederick, 9 Ala. (N. S.) 738 (1846); *Re* Credit Foncier, L. R. 11 Eq. 356 (1871); Coffin *v.* Rich, 45 Me. 507 (1858). A repeal of a statute imposing a statutory liability does not affect a liability already existing. Ramsden *v.* Knowles, 151 Fed. Rep. 718 (1906). A statute repealing a personal liability of stockholders is unconstitutional as to existing creditors to the extent only of such liability, and not as to increased capital stock after the repeal. Barton, etc. Bank *v.* Atkins, 72 Vt. 33 (1899). Registered transferees are liable the same as their transferrers, even though before the transfer the statutory liability was decreased by statute. The liability to old creditors follows the stock. National Com. Bank *v.* McDonnell, 92 Ala. 387 (1890). A statute giving the corporation a summary remedy against a stockholder for non-payment of calls may be repealed. *Ex parte* Northeast, etc. R. R., 37 Ala. 679 (1861).

nature, a repeal of it, even so as to affect existing debts, is constitutional at any time before the corporate creditor obtains judgment on his claim.[1] An important exception to the general rules stated above exists in regard to amendments under the police power of the state. The state may amend the charter of a railroad corporation by reducing its traffic charges, requiring it to build fences, and in various other ways for the protection of the public.[2] An amendment to a charter forbidding any consolidation with a competing line is a legitimate exercise of the police power of the state, and it is immaterial whether the power to amend was reserved or not.[3] It is constitutional for the legislature to require coal-mining companies to weigh coal before it is screened, especially where the legislature has reserved power to amend charters.[4] The action of a state railroad commission in ordering a railroad in the state to make a reasonable connection with another railroad by running an additional train, is not a denial of due process of law or a deprivation of the equal protection of the law, or a taking of property without compensation.[5] A statute, however, requiring corporations to pay their employees once a month, and giving the latter a lien prior to all liens excepting recorded mortgages, is unconstitutional as being a grant of special privileges and as denying the corporation the equal protection of the laws, and as depriving them of their property without due process of law, in that such statute interferes with the freedom to make contracts.[6]

1 Breitung *v.* Lindauer, 37 Mich. 217 (1877); Union Iron Co. *v.* Pierce, 4 Biss. 327 (1869); s. c., 24 Fed. Cas. 583; Gregory *v.* German Bank, 3 Colo. 332 (1877); Cooley, Const. Lim. (5th ed.), pp. 444, 474. See § 223, *supra.*

2 See §§ 900, 902, *infra.* The court in Pearsall *v.* Great Northern Ry., 161 U. S. 646, 666 (1896), in speaking of the police power, said: "So important is this power, and so necessary to the public safety and health, that it cannot be bargained away by the legislature; and hence it has been held that charters for purposes inconsistent with a due regard for the public health or public morals may be abrogated in the interests of a more enlightened public opinion." The decision of the Virginia courts forfeiting the charter of a club because it violated the liquor laws is valid, even though the liquor laws were passed after the charter had been granted to the club. Cosmopolitan Club *v.* Virginia, 208 U. S. 378 (1907).

3 Louisville, etc. R. R. *v.* Kentucky, 161 U. S. 677 (1896). To same effect, Pearsall *v.* Great Northern Ry., 161 U. S. 646 (1896).

4 A majority of the court, however, adopted the view that under the reserved right to amend charters the legislature must do so on terms that are just to the stockholders. Woodson *v.* State, 69 Ark. 521 (1900).

5 Atlantic, etc. R. R. *v.* North Carolina, etc., 206 U. S. 1 (1907).

6 Johnson *v.* Goodyear, etc. Co., 127 Cal. 4 (1899). To same effect, State *v.* Haun. 61 Kan. 146 (1899), rev'g s. c., 7 Kan. App. 509. A statute requiring corporations to pay their employees at least once a month is in violation of the United States Constitution. Toledo, etc. R. R. *v.* Long, 82 N. E. Rep. 757 (Ind. 1907). See also § 900, *infra,* and 208 U. S. 161.

§ 498. *Charter amendments offered to the stockholders.*—The second class of amendments to a charter—the amendments which occur most frequently and give rise to many difficulties—are those which allow the corporate directors or a majority of the stockholders in corporate meeting assembled to engage in a new or different or more extensive or more contracted business than that authorized by the original and unamended charter. This is the subject of the remainder of this chapter.

§ 499. *Auxiliary and incidental amendments are constitutional, though some of the stockholders dissent.*—An amendment made to a corporate charter is either a material and fundamental change from the original plan, or it is an auxiliary and incidental change, consistent with the carrying out of the original plan.[1] The latter class of amendments are constitutional and valid. The acceptance of an auxiliary amendment, however, should be by the stockholders in meeting assembled instead of by the board of directors.[2] But acceptance may arise from user;[3] and hence it generally happens that an incidental or auxiliary amendment to a charter is deemed to have been accepted by user and a vote of acceptance by the directors or by user alone.[4] An amendment may be said to be auxiliary and incidental when it merely grants new powers or authorizes new methods and new plans for the pupose of carrying out the original plan and effecting the real object of that plan. The individual motives and interests of a stockholder are disregarded. Whatever is for the benefit of the corporation is conclusively presumed to be for the benefit of each stockholder. A change not fundamental to the

1 The general principle of law governing this branch of the subject is well expressed in Woodfork *v.* Union Bank, 3 Coldw. (Tenn.) 488 (1866). "The contract or charter, after acceptance, is inviolable between the state and the corporation, as it is also between the corporation and stockholders. Neither the one nor the other can disregard its obligations or alter its essential franchises without the unanimous concurrence of the stockholders. . . . If the alterations proposed in the charter of a private corporation by legislative enactment are merely auxiliary and not fundamental, they may be accepted by a majority of the corporators; and when so assented to they are binding on the whole; but it is otherwise . . . when the alterations are fundamental, radical, and vital. The acceptance must then be unanimous."

2 Marlborough Mfg. Co. *v.* Smith, 2 Conn. 579 (1818); Brown *v.* Fairmount, etc. Co., 10 Phila. 32 (1873); Hope Ins. Co. *v.* Beckman, 47 Mo. 93 (1870).

3 See § 503, *infra*, and § 2*a*, *supra*.

4 Illinois, etc. R. R. *v.* Zimmer, 20 Ill. 658 (1858). See also Blatchford *v.* Ross, 54 Barb. 42 (1869); *Re* Excelsior F. Ins. Co., 16 Abb. Pr. 8, 14 (1862). In Venner *v.* Atchison, etc. R. R., 28 Fed. Rep. 581 (1886), it was held that the directors are the proper persons to accept an amendment under the circumstances of that case.

corporation is not fundamental to any stockholder.[1] A statute may authorize an existing mutual insurance corporation to change its organization so as to become a premium insurance corporation.[2] Under its reserved power to amend or repeal a charter, the legislature may authorize the corporation on a two-thirds vote of its stockholders to issue preferred stock.[3] The legislature may authorize a railroad corporation to consolidate with other companies, on a vote of a majority of its stock, provision being made for assessing and paying the value of dissenting stock. It is immaterial that the state had not reserved the power to amend the charter.[4]

1 Delaware R. R. *v.* Tharp, 1 Houst. (Del.) 149 (1855); Irvin *v.* Turnpike Co., 2 Pen. & W. (Pa.) 466 (1831); Illinois River R. R. *v.* Zimmer, 20 Ill. 654 (1858); Sprague *v.* Illinois, etc. R. R., 19 Ill. 174 (1857); Banet *v.* Alton, etc. R. R., 13 Ill. 504 (1851). *Cf.* Hester *v.* Memphis, etc. R. R., 32 Miss. 378 (1856); Witter *v.* Mississippi, etc. R. R., 20 Ark. 463 (1859); Fulton County *v.* Mississippi, etc. R. R., 21 Ill. 338 (1859). The cases of Zabriskie *v.* Hackensack, etc. R. R., 18 N. J. Eq. 178 (1867); Dayton, etc. R. R. *v.* Hatch, 1 Disney (Ohio), 84 (1855), and Central R. R. *v.* Collins, 40 Ga. 617 (1869), repudiate the distinction between the material and immaterial changes. All changes are held to be equally material.

2 Wright *v.* Minnesota, etc. Co., 193 U. S. 657 (1904).

3 Hinckley *v.* Schwarzschild, etc. Co., 107 N. Y. App. Div. 470 (1905). Even though the statute under which a corporation is organized authorizes the issue of preferred stock only on unanimous consent, yet such statute may be amended after the corporation has been formed authorizing such issue on a two-thirds vote of the stockholders. Hinckley *v.* Schwarzschild, etc. Co., 45 N. Y. Misc. Rep. 176 (1904). Everhart *v.* West Chester, etc. R. R., 28 Pa. St. 339 (1857); Rutland, etc. R. R. *v.* Thrall, 35 Vt. 536 (1863); Curry *v.* Scott, 54 Pa. St. 270 (1867). *Cf.* 70 Atl. Rep. 295.

4 Spencer *v.* Seaboard, etc. Co., 137 N. C. 107 (1904). A minority stockholder in a street railway cannot cause to be set aside a sale of its property to another company for stock of the latter, where such sale is authorized by statute, even though the statute was passed subsequently to the incorporation of the street railway, and even though the purchasing company had issued bonds and stocks to the amount of $90,000,000 in payment for street railways, the capital stock and bonded indebtedness of which was only $33,255,000, and even though in making the sale the majority stockholders voted that the stock was worth $170 a share, and that that price should be paid to minority stockholders, and the vendee company thereupon agred to pay the same. The remedy of the dissenting stockholder, if any, is at law for the market value of the stock or a proportionate share of the proceeds. Tanner *v.* Lindell Ry., 180 Mo. 1 (1904). Under its reserved power, the legislature may authorize a consolidation of railroads, especially where they are in a failing condition. A majority of the stockholders may accept such an amendment. Hinds County *v.* Natchez, etc. R. R., 85 Miss. 599 (1905). A corporation may amend its certificate of incorporation by inserting power to consolidate as granted by a statute passed after the original certificate of incorporation had been filed. A stockholder who became such after the charter has been amended, authorizing a consolidation, cannot complain. Colgate *v.*

Whether an amendment materially changes the corporate plans or not is a question of law for the court.[1] Accordingly each case is to be decided according to the peculiar circumstances of that case, and no general rules can be laid down which will apply to all cases. Many illustrations are given in the notes below.[2]

United States, etc. Co., 67 Atl. Rep. 657 (N. J. 1907).

1 Winter *v.* Muscogee R. R., 11 Ga. 438 (1852); Witter *v.* Mississippi, etc. R. R., 20 Ark. 463 (1859); Memphis Branch R. R. *v.* Sullivan, 57 Ga. 240 (1876). *Cf.* Southern, etc. R. R. *v.* Stevens, 87 Pa. St. 190 (1878).

2 Certain changes in the route of a railroad have been held to be immaterial, Wilson *v.* Wills Valley R. R., 33 Ga. 466 (1863); Johnson *v.* Pensacola, etc. R. R. 9 Fla. 299 (1860); Peoria, etc. R. R. *v.* Elting, 17 Ill. 429 (1856); Banet *v.* Alton, etc. R. R.; 13 Ill. 504 (1851); Chattanooga, etc. R. R. *v.* Warthen, 98 Ga. 599 (1896); building branch lines, Peoria, etc. R. R. *v.* Preston, 35 Iowa, 115 (1872); Greenville, etc. R. R. *v.* Coleman, 5 Rich. L. (S. C.) 118 (1851); issuing more common stock, Covington *v.* Covington, etc. Bridge Co., 10 Bush (Ky.), 69 (1873); Buffalo, etc. R. R. *v.* Dudley, 14 N. Y. 336 (1856). *Cf.* Hughes *v.* Antietam Mfg. Co., 34 Md. 316 (1870); extending the time for completing the road, Agricultural Branch R. R. *v.* Winchester, 95 Mass. 29 (1866); Poughkeepsie, etc. Co. *v.* Griffin, 24 N. Y. 150 (1861); Bailey *v.* Hollister, 26 N. Y. 112 (1862), power to amend being reserved; Taggart *v.* Western Md. R. R., 24 Md. 563 (1866); Union Hotel Co. *v.* Hersee, 79 N. Y. 454 (1880); Danbury, etc. R. R. *v.* Wilson, 22 Conn. 435 (1853); consolidations that take the place of part of the line as laid out, Sprague *v.* Illinois River R. R., 19 Ill. 174 (1857); Hanna *v.* Cincinnati, etc. R. R., 20 Ind. 30 (1863); change of corporate name, Bucksport, etc. R. R. *v.* Buck, 68 Me. 81 (1878); Clark *v.* Monongahela Nav. Co., 10 Watts (Pa.), 364 (1840); changing the terminus, Pacific R. R. *v.* Renshaw, 18 Mo. 210 (1852); Ross *v.* Chicago, etc. R. R., 77 Ill. 127, 134 (1875); reduction of capital stock and shortening of the road, Troy, etc. R. R. *v.* Kerr, 17 Barb. 581 (1854); Joslyn *v.* Pacific Mail S. S. Co., 12 Abb. Pr. (N. S.) 329 (1872). *Cf.* Oldtown, etc. R. R. *v.* Veazie, 39 Me. 571 (1855); increasing the number of directors, Mower *v.* Staples, 32 Minn. 284 (1884); or enlarging the capital stock and extending the road, such changes not appearing on the record to be detrimental, Peoria, etc. R. R. *v.* Elting, 17 Ill. 429 (1856); Rice *v.* Rock Island, etc. R. R., 21 Ill. 93 (1859); and minor changes in general, Union Agric. etc. Assoc. *v.* Mill, 31 Iowa, 95 (1870); also extensive changes, Illinois River R. R., *v.* Zimmer, 20 Ill. 654 (1858); such as extending the road, Cross *v.* Peach Bottom Ry., 90 Pa. St. 392 (1879); or purchasing another railroad, Venner *v.* Atchison, etc. R. R., 28 Fed. Rep. 581 (1886). An amendment increasing the capital stock and authorizing a branch road does not release subscribers. Schenectady, etc. Co. *v.* Thatcher, 11 N. Y. 102 (1854). See also Gray *v.* Coffin, 63 Mass. 192 (1852); Child *v.* Coffin, 17 Mass. 64 (1820); Longley *v.* Little, 26 Me. 162 (1846); Payson *v.* Withers, 5 Biss. 269 (1873); s. c., 19 Fed. Cas. 29; Joy *v.* Jackson, etc. Co., 11 Mich. 155 (1863); Lincoln, etc. Bank *v.* Richardson, 1 Me. 79 (1820); Greenville, etc. R. R. *v.* Johnson, 8 Baxt. (Tenn.) 332 (1874); Fall River Iron Works *v.* Old Colony R. R., 87 Mass. 221 (1862). An increase of the capital stock as allowed by the charter does not release subscribers. Port Edwards, etc. Ry. *v.* Arpin, 80 Wis. 214 (1891). An amendment may author-

§ 500. *Material amendments offered to the stockholders can be accepted only by a unanimous vote.*—On the other hand, a material and fundamental change in the charter by an amendment to that charter is an unconstitutional violation of the contract rights of any stockholder who does not assent to such an amendment. Considerable difficulty is experienced in determining what is a material and fundamental change. Each case is decided upon its own facts, and consequently the best light as to the spirit of what constitutes a material change is obtained by a study of the facts of cases which have been decided.[1]

ize the directors to change the location of toll gates. Bardstown, etc. Co. *v.* Rodman, 13 S. W. Rep. 917 (Ky. 1890). In Atchison, etc. R. R. *v.* Fletcher, 35 Kan. 236 (1886), an amendment authorizing a corporation to buy the stock of another railroad corporation and to guarantee its bonds was held to be valid. An amendment authorizing a dam company to raise the height of its dam is not a fundamental change. Gray *v.* Monongahela Nav. Co., 2 Watts & S. 156 (Pa. 1841). So also of an amendment shortening notices of calls from ninety to twenty days. Illinois River R. R. *v.* Beers, 27 Ill. 185 (1862); and an amendment making subscriptions payable five per cent. monthly instead of twenty-five per cent. annually. Burlington, etc. R. R. *v.* White, 5 Iowa, 409 (1857). The legislature may amend the charter in regard to the times when subscriptions become payable. West *v.* Topeka Sav. Bank, 66 Kan. 524 (1903). After six years a corporation cannot repudiate the action of its officers in amending its charter. Licking, etc. *v.* Commonwealth, 89 S. W. Rep. 682 (Ky. 1905). The legislature may authorize a seminary for girls to lease a part of the premises to school commissioners. Webster *v.* Cambridge Female Seminary, 78 Md. 193 (1893). An amendment to the charter may prescribe that unnecessary corporate real estate shall be divided among or partitioned between the stockholders. Merchant *v.* Western Land Assoc., 56 Minn. 327 (1894). The legislature may authorize a water-works company to sell its property to a municipality. Peabody *v.* Westerly Water-works, 20 R. I. 176 (1897). Where a statute provides that the charter may be amended in certain respects upon the directors or a majority of them making and signing a certificate, such making and signing need not be at a meeting of the directors. No meeting is required. Burden *v.* Burden, 159 N. Y. 287 (1899). Under a statute authorizing the stockholders by an amended certificate to change the object of the corporation, the certificate may be amended so as to give a corporation power to purchase stock in other corporations. Meredith *v.* New Jersey, etc. Co., 59 N. J. Eq. 257 (1899); aff'd, 60 N. J. Eq. 445 (1899). A member of an incorporated mutual life insurance association cannot prevent the association accepting an amendment to its charter changing the location of its principal place of business. Park *v.* Modern, etc. of America, 181 Ill. 214 (1899).

1 Under the circumstances of the cases it has been held a material change to shorten and vary the route, Winter *v.* Muscogee R. R., 11 Ga. 438 (1852); to vary the route, Middlesex Turnp. Corp. *v.* Locke, 8 Mass. 268 (1811); Middlesex Turnp. Corp. *v.* Swan, 10 Mass. 384 (1813); Hester *v.* Memphis, etc. R. R., 32 Miss. 378

§ 501. *Amendments under the reserved power of the state to alter, amend, or repeal the charter.*—The extent of the power of the legislature to amend a charter, where it has reserved that power, is not yet fully settled, and is full of difficulties. There is a strong

(1856); Witter *v.* Mississippi, etc. R. R., 20 Ark. 463 (1859); Champion *v.* Memphis, etc. R. R., 35 Miss. 692 (1858); Simpson *v.* Denison, 10 Hare, 54 (1852); changing a terminus, Manheim, etc. Co. *v.* Arndt, 31 Pa. St. 317 (1858); Marietta, etc. R. R. *v.* Elliott, 10 Ohio St. 57 (1859); Middlesex Turnp. Corp. *v.* Locke, 8 Mass. 268 (1811); Middlesex Turnp. Corp. *v.* Swan, 10 Mass. 384 (1813); Thompson *v.* Guion, 5 Jones, Eq. (N. C.) 113 (1859); permitting a railroad to go into water transportation business, Hartford, etc. R. R. *v.* Croswell, 5 Hill, 383 (1843), a leading case; Marietta, etc. R. R., *v.* Elliott, 10 Ohio St. 57 (1859); shortening the line, First Nat. Bank *v.* Charlotte, 85 N. C. 433 (1881); allowing business to be commenced before the full capital stock is subscribed, Memphis Branch R. R. *v.* Sullivan, 57 Ga. 240 (1876); dividing the line and forming two or more corporations, Indiana, etc. Turnp. Co. *v.* Phillips, 2 Pen. & W. (Pa.) 184 (1830); Fulton County *v.* Mississippi, etc. R. R., 21 Ill. 338 (1859); Carlisle *v.* Terre Haute, etc. R. R., 6 Ind. 316 (1855); transferring a railroad subscription from one railroad to another, Pittsburg, etc. R. R. *v.* Gazzam, 32 Pa. St. 340 (1858); making the charter perpetual and increasing power to hold property, Union Locks & Canals *v.* Towne, 1 N. H. 44 (1817); allowing a life insurance company to insure against fire and marine loss, Ashton *v.* Burbank, 2 Dill. 435 (1873); s. c., 2 Fed. Cas. 26; extending the line, Stevens *v.* Rutland, etc. R. R., 29 Vt. 545 (1851). See also Noesen *v.* Port Washington, 37 Wis. 168 (1875), where there was an amendment authorizing the purchase of a railroad running at right angles to the old, but a lease was upheld; increasing the par value of the stock, Mahan *v.* Wood, 44 Cal. 462 (1872); consolidating the corporation with another corporation, Illinois, etc. R. R. *v.* Cook, 29 Ill. 237 (1862); McCray *v.* Junction R. R., 9 Ind. 358 (1857); Shelbyville, etc. Turnp. Co. *v.* Barnes, 42 Ind. 498 (1873); Booe *v.* Junction R. R., 10 Ind. 93 (1857); New Orleans, etc. R. R. *v.* Harris, 27 Miss. 517 (1854); Clearwater *v.* Meredith, 1 Wall. 25 (1863); Knoxville *v.* Knoxville, etc. R. R., 22 Fed. Rep. 758 (1884); Kean *v.* Johnson, 9 N. J. Eq. 401 (1853); Black *v.* Delaware, etc. Canal Co., 24 N. J. Eq. 455 (1873). *Cf.* Lauman *v.* Lebanon Valley R. R., 30 Pa. St. 42 (1858), criticised in Mowrey *v.* Indianapolis, etc. R. R., 4 Biss. 78 (1866); s. c., 17 Fed. Cas. 930; Fry *v.* Lexington, etc. R. R., 2 Metc. (Ky.) 314 (1859). Until, however, the corporation accepts such amendment the stockholders cannot complain. Delaware, etc. R. R. *v.* Irick, 23 N. J. L. 321 (1852). Amendments which have not been acted upon do not release the subscriber. Taylor *v.* Supervisors, 86 Va. 506 (1889). See, in general, Pearce *v.* Madison, etc. R. R., 21 How. 441 (1858); Tuttle *v.* Michigan Air Line R. R., 35 Mich. 247 (1877); New Jersey Mid. Ry. *v.* Strait, 35 N. J. L. 322 (1872). In all these cases neither a mandatory statute, nor a vote of the directors, nor a majority of the stockholders can compel a dissenting stockholder to accept the change. It would be unconstitutional. The stockholder may say: "I have agreed to become interested in a railroad company, and have contracted in view of the profits to be expected, and the perils and losses incident to that description of business; but I have not agreed that those to be entrusted with the capital I contribute shall have power to use

tendency in the decisions, and a tendency which is deserving of the highest commendation, to limit the power of the legislature to amend a charter under this reserved power. It should be restricted to those amendments only in which the state has a public interest. Any at-

it in a business of a different character, and attended with hazards of a different description." Marietta, etc. R. R. *v.* Elliott, 10 Ohio St. 57 (1859). Even though the legislature, after a turnpike corporation is organized, authorizes it to issue stock in payment for another turnpike, yet a dissenting stockholder may prevent the purchase by showing that it decreases the value of his stock. Shaw *v.* Campbell, etc. Co., 15 S. W. Rep. 245 (Ky. 1891). Where the statutes under which the company is organized allow the objects of the company to be changed on a vote of the stockholders, a dissenting stockholder is not released from his subscription by such change. Mercantile Statement Co. *v.* Kneal, 51 Minn. 263 (1892). Acts relative to a corporation may be so radical as to constitute a new charter instead of amendments to the old one. Snook *v.* Georgia Imp. Co., 83 Ga. 61 (1889). Where a municipality has subscribed for stock and issued its bonds indorsed by a railroad company to raise the money to pay the subscription, the legislature cannot authorize the company to apply its assets to the payment of such bonds. A stockholder may enjoin it. Hill *v.* Glasgow R. R., 41 Fed. Rep. 610 (1888). The legislature cannot, in the amendment itself, authorize the majority to bind the minority herein. New Orleans, etc. R. R. *v.* Harris, 27 Miss. 517 (1854). Where a charter authorizes a lease, if assented to by the stockholders, an amendment authorizing such a lease by the directors would be unconstitutional, unless accepted by the stockholders. *Re* Opinion of the Judges, 120 N. C. 623 (1897). Where a state is a stockholder, and by statute is entitled to a certain vote at elections, a subsequent statute cannot give to the state a larger vote. Tucker *v.* Russell, 82 Fed. Rep. 263 (1897). An amendment cannot deprive the members of a corporation of the privilege of electing its directors. The legislature cannot arbitrarily name and appoint trustees of an educational corporation, the charter providing that vacancies shall be filled by the remaining trustees. Sheriff *v.* Lowndes, 16 Md. 357 (1860). It cannot give to the city of Louisville the power to elect the trustees of the University of Louisville, an educational corporation. Louisville *v.* University of Louisville, 15 B. Mon. (Ky.) 642 (1855). It cannot turn over the property of an educational institution to another educational institution. Ohio *v.* Neff, 52 Ohio St. 375 (1895). It cannot vest the government of an incorporated academy in a new board of trustees. Norris *v.* Abingdon Academy, 7 Gill & J. (Md.) 7 (1834). *Cf.* § 609*a*, *infra.* For a valuable argument against the power of a majority of the stockholders to accept an amendment of the charter so as to give the company the power to lease its railroad, see 8 Harvard L. Rev. 396. In Loewenthal *v.* Rubber, etc. Co., 52 N. J. Eq. 440 (1894), the court held that the original by-laws constituted a contract between the stockholders, and that a by-law providing for cumulative voting could not be repealed. On the right of a dissenting stockholder in general, see also Printing House *v.* Trustees, 104 U. S. 711 (1881); Hoey *v.* Henderson, 32 La. Ann. 1069 (1880); *Re* St. Mary's Church, 7 Serg. & R. (Pa.) 517 (1822). A majority of the stockholders of a railroad company have no power to amend the charter so as to accept the general railroad act of the state,

tempt to use this power of amendment for the purpose of authorizing a majority of the stockholders to force upon the minority a material change in the enterprise is contrary to law and the spirit of justice. Under such reserved power the legislature has only that right to amend the charter which it would have had in case the Dartmouth College case had decided that the federal constitution did not apply to corporate charters.[1] In fact the historical origin of this reservation of the right to amend was due to the effort of the various states of the Union to escape from the decision in the Dartmouth College case.[2] By this reserved right the restraint of the federal constitution is done away with. But the power to make a new contract for the stockholders is not thereby given to the legislature. The legislature may repeal the charter, but cannot force any stockholder into a contract against his will.[3]

which general act will give the company the right to indefinitely extend its railroad, build branch lines, lease its property, build and operate steamboats, or consolidate with any other railroad company. Such a wholesale amendment is illegal as against the dissent of a stockholder, even though a portion of such general act might have been accepted as being not a fundamental but merely an auxiliary amendment. Alexander *v.* Atlanta, etc. R. R. Co., 108 Ga. 151 (1899). Where an insurance fund has been collected by an exchange, in accordance with its charter, a by-law subsequently passed distributing the fund among the members is illegal as against the objection of any member who contributed to the fund. Parish *v.* New York, etc. Exchange, 169 N. Y. 34 (1901). A holder of preferred stock may prevent a reduction of the preferred dividend by an amendment of the certificate of incorporation, even though, the statutes of the state at the time of organization of the company authorized the certificate of incorporation to be amended by a certain vote. Such reduction may be enjoined. Pronik *v.* Spirits, etc. Co., 58 N. J. Eq. 97 (1899). An amendment authorizing a corporation to increase its capital stock is a fundamental, and hence is a special, act in violation of a constitutional prohibition against special acts. Marion T. Co. *v* Bennett, 82 N. E. Rep. 782 (Ind. 1907).

1 Quoted and approved in Garey *v.* St. Joe Mining Co., 91 Pac. Rep. 369 (Utah 1907). Sinking Fund Cases, 99 U. S. 700, 720 (1878); Miller *v.* State, 15 Wall. 478, 495 (1872); San Mateo County *v.* Southern Pacific R. R., 8 Sawyer, 238, 279 (1882); Detroit *v.* Detroit, etc. Co., 43 Mich. 140 (1880). The reserved right to amend or repeal a charter "leaves the state where any sovereignty would be if unrestrained by express constitutional limitations, and with the powers which it would then possess. It might therefore do what it would be admissible for any constitutional government to do when not thus restrained, but it could not do what would be inconsistent with constitutional principles. And it cannot be necessary at this day to enter upon a discussion in denial of the right of the government to take from either individuals or corporations any property which they may rightfully have acquired." Smith *v.* Lake Shore, etc. Co., 114 Mich. 460 (1897), reversed on another point in 173 U. S. 684 (1899).

2 See Spring Valley Water-works *v.* Schottler, 110 U. S. 347, 352 (1884).

3 Quoted and approved in Garey *v.*

The power to make amendments, and to repeal and alter charters, has been reserved in most of the states of the Union.[1] It is clearly established that the legislature cannot, under this reserved power, amend the charter so as to change the whole character of the enterprise and compel the corporation to proceed under the amended charter.[2] The restrictions of the state constitution still

St. Joe Mining Co., 91 Pac. Rep. 369 (Utah 1907).

1 See the notes below. The following special references are made to some of the constitutional provisions on this subject: Constitution of Alabama, XIII, 1; Arkansas, V, 48; California, IV, 31; 1879, XII, 1; Colorado, 1876, XV, 3; Delaware, II, 17; Iowa, VIII, 12; Kansas, XII, 1; Maine, Laws of 1831; Maryland, III, 48, par. 2; Massachusetts, St. 1830, ch. 81; R. S., ch. 44, § 23; Gen. St., ch. 68, § 41; Michigan, XV, 1, 8; Missouri, VIII, 14; Nebraska, 1875, XI; Nevada, VIII, 1; New Jersey, Amend. IV, 7, par. 11, cl. 11; New York, VIII, 1 R. S., pt. 1, ch. XVIII, title 3, § 8; North Carolina, VIII, 1; Ohio, XVIII, 2; Oregon, XI, 2; Pennsylvania, XVI, 10; South Carolina, XII, 1; Tennessee, XI, 8; Texas, 1875 XII, 5, 7; Wisconsin, XI, § 1; *Re* New York Elevated R. R., 70 N. Y. 327 (1877); Johnson *v.* Hudson River R. R., 49 N. Y. 455 (1872); Bank of Chenango *v.* Brown, 26 N. Y. 467 (1863); Ashuelot R. R. *v.* Elliot, 58 N. H. 451, 454 (1878).

2 In Pennsylvania it is held that the reserved power, when used so as to make an amendment compulsory on the corporation, "is in the nature of a police power, designed for the protection of the public welfare." Cross *v.* Peach Bottom Ry., 90 Pa. St. 392 (1879). Under its reserved power to amend, the state may give a remedy against a mill-dam corporation for injury by flood. Monongahela Nav. Co. *v.* Coon, 6 Pa. St. 379 (1847), holding also that, by accepting an amendment which is granted on condition that the reserved power to amend shall apply to the corporation, it is subject to such power; Kenosha, etc. R. R. *v.* Marsh, 17 Wis. 13 (1863); Troy, etc. R. R. *v.* Kerr, 17 Barb. 581 (1854). In Knoxville *v.* Knoxville, etc. R. R., 22 Fed. Rep. 758 (1884), the court said: "It was not competent for the legislature to do more in this respect than to waive the public rights. It could not divest or impair the rights of the shareholders as between themselves, as guaranteed by the company's charter, without their consent. It was upon the faith of the stipulations contained in said charter that the shareholders subscribed to the capital stock, and thereby made themselves members of the corporation." In Orr *v.* Bracken County, 81 Ky. 593 (1884), an amendment under the reserved power, changing the method of voting, was decided to be of no effect until the stockholders accepted it. The court said: "The right to amend the charter may be expressly reserved, but that right does not confer the power of taking from the corporators the control of the corporate property." See also § 609*a*, *infra*, as to amendments affecting the right to vote. Query, whether a mandatory consolidation would be legal. Mowrey *v.* Indianapolis, etc. R. R., 4 Biss. 78 (1866); s. c., 17 Fed. Cas. 930. When legal a mandatory change does not require acceptance by the stockholders. Zabriskie *v.* Hackensack, etc. R. R., 18 N. J. Eq. 178 (1867). But when the mandatory amendment goes beyond the legal limits, it must be accepted by the corporation as though it were made optional with the corporation. Kenosha, etc. R. R. *v.* Marsh, 17 Wis. 13 (1863), the court saying that the power of amendment was never reserved with reference to any question between the corporation and its stock subscribers, but solely

exist, and individuals cannot be forced by the state into new contracts.[1] Moreover the amendment must not be foreign to the purposes and objects of the original charter. The power of amendment has its limits. "It can repeal or suspend the charter; it can alter or modify it; it can take away the charter; but it cannot impose a new one and oblige the stockholders to accept it. . . . The power to alter and modify does not give power to make any substantial additions to the work."[2] The best view taken of this reserved power of the state is that under it a fundamental amendment to the charter does not authorize a majority of the stockholders to accept the amendment and proceed, but that unanimous consent of the stockholders is necessary.[3]

with reference to questions between the corporation and the state, where the latter desired to make compulsory amendments against the will of the former. The corporation cannot be compelled to proceed. All the state "can do is to grant it the power, and then it is for the corporation to accept it or not, as it pleases." See also § 497, *supra*.

1 Cooley, Const. Lim. (5th ed.), p. 454. As to repeals of charters under this reserved power, see ch. XXXVIII, *infra*.

2 Zabriskie *v.* Hackensack, etc. R. R., 18 N. J. Eq. 178 (1867). "The power of alteration and amendment is not without limit. The alterations must be reasonable; they must be made in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration." Shields *v.* Ohio, 95 U. S. 319 (1877); Spring Valley Waterworks *v.* San Francisco, 61 Cal. 3 (1881). The amendment must "not defeat or substantially impair the object of the grant, or any rights vested under it." Close *v.* Glenwood Cemetery, 107 U. S. 466 (1882). See also Miller *v.* State, 15 Wall. 478 (1872); Worcester *v.* Norwich, etc. R. R., 109 Mass. 103 (1871). The motives of the legislators cannot be inquired into. Northern R. R. *v.* Miller, 10 Barb. 260 (1851); *Re* N. Y. Elevated R. R., 70 N. Y. 327, 351 (1877). See Astor *v.* Arcade Ry., 113 N. Y. 93, 111 (1889).

3 Quoted and approved in Garey *v.* St. Joe Mining Co., 91 Pac. Rep. 369 (Utah 1907). Mills *v.* Central R. R., 41 N. J. Eq. 1, 4 (1886), where a statute subsequent to the charter authorized the consolidation of railroad companies. The court said: "The legislature did not intend to affect the rights of stockholders *inter sese*, and the act does not do so, either expressly or by implication. . . . After shareholders had entered into a contract among themselves, under legislative sanction, and expended their money in the execution of the plan mutually agreed upon, the plan could not, even by virtue of legislative enactment, be radically changed by the majority alone, and dissentient stockholders be compelled to engage in a new and totally different undertaking, because such action would impair the obligation of the dissenting stockholders' contract with their associates and the state." The court said also, that, under its reserved power to amend a charter, the state cannot give "a power to one part of the corporators as against the other which they did not have before." The case of Cross *v.* Peach Bottom Ry., 90 Pa. St. 392 (1879), holds that "the legislative reservation is in the nature of a police power designed for the protection of

Under this reserved power, however, the legislature, it is held, may impose a statutory liability upon stockholders after they have been incorporated and have gone into business under a charter which does not impose such liability. The exercise of this power by the legislature, in such a case, is held to be only a repeal of part of the corporate franchises.[1] So, also, it is said that under this reserved power the legislature may impose a statutory liability for the future debts and obligations of the corporation.[2] Even though the legislature has reserved the right to amend a charter, yet it cannot authorize the corporation to assess stock which was issued as being full-paid and non-assessable. A minority stockholder may enjoin the sale of the stock for non-payment of such an assessment.[3]

the public welfare; and where such protection becomes necessary, the law-making power may act without consulting either the interests or will of the company; and in such case it may well be that not only the company but its stockholders must submit. . . . The reservation . . . was only intended to enable the legislature to act without the consent and against the will of the corporation." On this subject see also § 497, *supra*, and the notes thereto.

1 Quoted and approved in Williams *v.* Nall, 108 Ky. 21 (1900), a case where the court held that the minority stockholders were not entitled to a dissolution of the corporation by reason of a statute imposing a statutory liability upon the stockholders. McGowan *v.* McDonald, 111 Cal. 57 (1896); Bissell *v.* Heath, 98 Mich. 472 (1894); South Bay, etc. Co. *v.* Gray, 30 Me. 547 (1849); Sleeper *v.* Goodwin, 67 Wis. 577 (1887). *Cf.* Close *v.* Glenwood Cemetery, 107 U. S. 466 (1882). See §§ 242, 280, 497, *supra*. Amendment under reserved right cannot affect rights of previous creditors against the corporation. Bank of Old Dominion *v.* McVeigh, 20 Gratt. 457 (1871).

2 Sherman *v.* Smith, 1 Black, 587 (1861), aff'g *Re* Oliver Lee's Bank, 21 N. Y. 9 (1860); U. S. Trust Co. *v.* U. S. F. Ins. Co., 18 N. Y. 199 (1858). *Cf.* Bailey *v.* Hollister, 26 N. Y. 112 (1862); Sinking Fund Cases, 99 U. S. 700 (1878); Oldtown, etc. R. R. *v.* Veazie, 39 Me. 571 (1855); Green *v.* Biddle, 8 Wheat. 1, 84 (1823); Gardner *v.* Hope Ins. Co., 9 R. I. 194 (1869). Such increased liability may be imposed by a new constitution of the state. *Re* Reciprocity Bank, 22 N. Y. 9 (1860); U. S. Trust Co. *v.* U. S. F. Ins. Co., 18 N. Y. 199 (1858); *Re* Oliver Lee's Bank, 21 N. Y. 9 (1860); aff'd *sub nom.* Sherman *v.* Smith, 1 Black, 587 (1861). In Consolidated Assoc. *v.* Lord, 35 La. Ann. 425 (1883), the court refused to uphold an amendment which imposed further liability on the stockholder. The statutory liability in California does not apply to stockholders in corporations existing at the time the statute was enacted. United States *v.* Stanford, 69 Fed. Rep. 25 (1895); aff'd, 161 U. S. 412 (1896). A legislature may by statute create a statutory liability of stockholders for existing debts of the corporation, although the original charter did not contain such liability. Lincoln *v.* Carroll, 73 N. W. Rep. 173 (Minn. 1897). Under the reserved right of the legislature to alter or repeal charters, the legislature may impose an additional liability on stockholders in a bank. Barnes *v.* Arnold, 45 N. Y. App. Div. 314 (1899); aff'd, 169 N. Y. 611. See also § 497, *supra*.

3 Garey *v.* St. Joe Mining Company, 91 Pac. Rep. 369 (Utah 1907).

The constitutionality of various amendments to charters in which the legislature reserved the right to amend or repeal is considered in the notes below.[1]

1 Under the reserved right to amend, alter, or repeal charters, the rights of stockholders among themselves cannot be impaired, except as required by public interest. While it is true that the charter constitutes a contract between the stockholders, yet under this reserved power the legislature may authorize existing corporations to purchase and retire preferred stock and issue in lieu thereof mortgage bonds, such amendment being construed to be in behalf of the public interest. Berger *v.* United States Steel Corp., 63 N. J. Eq. 809 (1902). Under the reserved right to amend charters, the legislature may authorize a corporation to reduce its capital stock and issue bonds in exchange for such part of the capital stock as is retired, especially where the original charter authorized the corporation to decrease its capital stock by purchasing its own stock. Venner Co. *v.* United States, etc. Corp., 116 Fed. Rep. 1012 (1902). Even under the right to amend or repeal charters a statute changing the amount which a member of a building association is entitled to upon withdrawal is unconstitutional. Intiso *v.* State, etc. Assoc., 68 N. J. L. 588 (1902). An exclusive grant by the legislature to a water-works company to supply the city with water may be repealed under the constitution of Alabama which prohibits the legislature from "making any irrevocable grants of special privileges or immunities," and another provision of the constitution that a repeal or amendment may be made, provided "no injustice shall be done to the incorporators," does not prevent such amendment. Bienville, etc. Co. *v.* Mobile, 186 U. S. 212 (1902). The case of Sinking-Fund Com'rs *v.* Green, etc. Co., 79 Ky. 73 (1880), holding that the right to take tolls cannot be abolished where the company has maintained and kept in repair the rivers, relying on the right to take toll, is referred to in Louisville Water Co. *v.* Clark, 143 U. S. 1 (1892). Concerning this subject, see § 902, *infra.* In Ohio, etc. Ry. *v.* People, 123 Ill. 467 (1888), the court referred to but did not decide the question whether a state could withdraw its consent to a consolidation after the consolidation had been made. The legislature cannot, under its reserved power, compel a dam company to erect new fish-ways after it has compelled them to pay damages to fish owners. Commonwealth *v.* Essex Co., 79 Mass. 239 (1859). Under its reserved right the legislature may amend the charter of a college which has private stockholders, but to which the state contributes funds, so that instead of the state having four directors out of eleven, the state shall have seven out of twelve. Jackson *v.* Walsh, 75 Md. 304 (1892); but see Sage *v.* Dillard, 15 B. Mon. (Ky.) 340, 357 (1854); State *v.* Adams, 44 Mo. 570 (1869); Allen *v.* McKean, 1 Sumn. 276 (1833); s. c., 1 Fed. Cas. 489. Under its reserved power to amend, the legislature may change the mode of electing the trustees of a non-stock corporation and may authorize a consolidation with another corporation. McKee *v.* Chautauqua Assembly, 124 Fed. Rep. 808 (1903). Under the reserved power the legislature may consolidate several beneficial and scientific corporations, especially where the corporation objecting practically controls the others. The statute to that effect need not be submitted to the stockholders for acceptance, but is mandatory. McKee *v.* Chautauqua Assembly, 130 Fed. Rep. 536 (1904), the court saying: "That the reserved power authorizes the legislature to

The supreme court of the United States has said that "a power reserved to the legislature to alter, amend, or repeal a charter authorizes it to make any alteration or amendment of a charter granted

make any alteration or amendment of a charter which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the legislature may deem necessary to promote the original purpose contemplated by its charter or articles of association, or to protect the rights of the public." While under the reserved power the legislature may authorize the board of directors of an insurance company to allow policy holders to elect a majority of the board, yet in the instance before the court it was held that the various acts of the legislature on that subject did not apply to the Equitable Life Assurance Society. Lord *v.* Equitable, etc. Soc., 109 N. Y. App. Div., 252 (1905). Under its reserved right to amend or repeal a charter, the legislature may authorize a change in the location of a college, even though the citizens of the place where it was first located donated largely to its funds. Bryan *v.* Board of Education, 151 U. S. 639 (1894).

Where a gas company has an exclusive right to supply gas to a city, subject to the right of the legislature to alter or revoke the same, the legislature may authorize the city to construct its own gas-works. A municipal ordinance is not such a contract as is protected by the constitution of the United States in regard to impairing the validity of contracts. It is a contract that is protected in the same way as contracts of individuals. Hamilton, etc. Co. *v.* Hamilton City, 146 U. S. 258 (1892). As to the latter point, see *contra*, City Ry. *v.* Citizens' Street R. R., 166 U. S. 557 (1897). Where an amendment exempts the company from taxation and provides that it shall furnish the city with water free of cost, a repeal of the exemption repeals the obligation as to water. Louisville Water Co. *v.* Clark, 143 U. S. 1 (1892). An exemption from taxation may be repealed under the reserved right to amend, etc. Commissioners, etc. Co. *v.* Bancroft, 203 U. S. 112 (1906); Pearsall *v.* Great Northern Ry., 161 U. S. 646, 663 (1896); Wagner Free Institute *v.* Philadelphia, 132 Pa. St. 612 (1890). As to such repeals see § 572*b*, *infra*. A state may levy a tax on stock in a domestic corporation whether owned by residents or non-residents and may compel the corporation itself to pay such tax, giving the corporation a right to recover against the stockholders and a lien on the stock. Notice of such a tax to the corporation in accordance with the statute may be sufficient. Such a tax may be levied under the reserved right to amend the charter. Corry *v.* Baltimore, 196 U. S. 466 (1905). Under the reserved power to amend or repeal a charter the legislature may compel the corporation to pay wages weekly to its employees. State *v.* Brown, etc. Mfg. Co., 18 R. I. 16 (1892). Under the reserved right to amend the charter the legislature may amend so as to confine the road to a particular route, and outstanding contracts of the company do not prevent such an amendment. Macon, etc. R. R. *v.* Gibson, 85 Ga. 1 (1890). Under its reserved power to amend, the legislature may require several railroads to acquire, build to, and use a union depot. Worcester *v.* Norwich, etc. R. R., 109 Mass. 103 (1871). Even though a provision in a special railroad charter provides that rates shall be fixed by its board of directors, yet, under a reserved right to amend, the legislature may authorize a state commission to regulate rates. Matthews *v.* Board of Corporation Com'rs, etc., 97 Fed. Rep. 400 (1899). The legislature cannot reduce the rates on a

subject to it which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right."[1] Under the reserved power to amend a charter the legislature may authorize the consolidation of railroads;[2] pass a statute

railroad where the original charter fixed the rates, and even a reserved right to amend the charter upon compensation being made does not sustain such reduction of rates, no compensation being provided for. Pingree *v.* Michigan, etc. Co., 118 Mich. 314 (1898). In regard to the question of the constitutionality of a radical amendment to a charter under the reserved right to amend, see Shields *v.* Ohio, 95 U. S. 319 (1877); Sinking Fund Cases, 99 U. S. 700 (1878); Pennsylvania College Cases, 13 Wall. 190 (1871); Miller *v.* State, 15 Wall. 478 (1872); Spring Valley Waterworks *v.* Schottler, 110 U. S. 347 (1884); Close *v.* Glenwood Cemetery, 107 U. S. 466 (1882). Authorizing one railroad to subscribe for stock in another railroad has been held legal. White *v.* Syracuse, etc. R. R., 14 Barb. 559 (1853). Also borrowing money and building branches. Northern R. R. *v.* Miller, 10 Barb. 260 (1851). Also reducing capital stock. Joslyn *v.* Pacific Mail S. S. Co., 12 Abb. Pr. (N. S.) 329 (1872). See also White Hall, etc. R. R. *v.* Myers, 16 Abb. Pr. (N. S.) 34 (1872); State *v.* Accommodation Bank, 26 La. Ann. 288 (1874). The extension of the line from six to seventeen miles was held to require a unanimous acceptance in Zabriskie *v.* Hackensack, etc. R. R., 18 N. J. Eq. 178 (1867). Under its reserved right to amend, the legislature may change the name of a corporation. Phinney *v.* Trustees, etc., 88 Md. 633 (1898).

1 New York & New England R. R. *v.* Bristol, 151 U. S. 556 (1894).

2 Market Street Ry. *v.* Hellman, 109 Cal. 571 (1895); Hale *v.* Cheshire R. R., 161 Mass. 443 (1894); Bishop *v.* Brainerd, 28 Conn. 289 (1859); Colby *v.* Equitable Trust Co., 124 N. Y. App. Div. 262 (1908) and 192 N. Y. —. *Contra*, Kenosha, etc. R. R. *v.* Marsh, 17 Wis. 13 (1863), a dictum; Mowrey *v.* Indianapolis, etc. R. R., 4 Biss. 78 (1866); s. c., 17 Fed. Cas. 930; Mills *v.* Central R. R., 41 N. J. Eq. 1, 4, (1886). See also § 896, *infra*. Under its reserved power, the legislature may authorize a consolidation of railroads, especially where they are in a failing condition. A majority of the stockholders may accept such an amendment. Hinds County *v.* Natchez, etc. R. R., 85 Miss. 599 (1905). The legislature may authorize a railroad corporation to consolidate with other companies, on a vote of a majority of its stock, provision being made for assessing and paying the value of dissenting stock. It is immaterial that the state had not reserved the power to amend the charter. Spencer *v.* Seaboard, etc. Co., 137 N. C. 107 (1904). A statute authorizing corporations to sell all their property on a certain vote of the stockholders applies to corporations existing at the time of the enactment of the statute, the legislature having the reserved right to alter, amend or repeal charters. Germer *v.* Triple-State, etc. Co., 54 S. E. Rep. 509 (W. Va. 1906). A subscription for stock is not released by a subsequent consolidation of the company with another, unless such consolidation is a fundamental alteration of the organization. Morrill *v.* Smith County, 89 Tex. 529 (1896). It has been held that, under its reserved power, the legislature may authorize a road to lease to another. Durfee *v.* Old Colony, etc. R. R., 87 Mass. 230 (1862). Under the reserved right to amend the charter, an amendment authorizing a lease is not valid except with the unanimous consent of

allowing stockholders to cumulate their votes in elections, thus enabling minority stockholders to elect a minority of the board of directors;[1] reduce water rates provided the reduction is reasonable and leaves six per cent. on the present value of the property used, even though the original cost was much greater;[2] require a street railway to do additional paving;[3] require a railroad corporation to allow other railroads to use a bridge and terminals on payment of reasonable compensation, if such use does not interfere with the business of the first corporation;[4] authorize a sale of all the corporate property on a vote of two-thirds in interest of the stockholders;[5] authorize a mutual insurance company to reincorporate as a regular insurance company and the policyholders cannot object;[6] revoke an

the stockholders. Dow *v.* Northern R. R., 67 N. H. 1 (1887), giving an exhaustive discussion of the question.

1 Looker *v.* Maynard, 179 U. S. 46 (1900). Where by statute the state retains power to amend charters subsequently granted, a subsequent constitutional provision for cumulative voting applies to all such corporations, whether organized by special charter or under the general act, and does not impair the validity of a contract. So also where a corporation amends its charter under an act providing for cumulative voting, such cumulative voting applies to it. Gregg *v.* Granby, etc. Co., 164 Mo. 616 (1901). Under the reserved right to amend, the legislature may change the charter of a library corporation so that each share shall have one vote instead of restricting the vote of those who held more than five shares. Rankin *v.* Newark, etc. Assoc., 64 N. J. L. 265 (1900). Under a reserved right to amend or repeal a charter the legislature may take from the stockholders of an insurance company the right to elect all the directors and give to the policy holders the exclusive right to vote for a majority of them. Lord *v.* Equitable, etc. Society, 57 N. Y. Misc. Rep. 417 (1908).

2 Stanislaus County *v.* San Joaquin, etc. Co., 192 U. S. 201 (1904).

3 Fair Haven R. R. *v.* New Haven, 203 U. S. 379 (1906). Under the reserved right to amend a charter the state may require street railway companies to pave a certain part of the street. Marshalltown, etc. Ry. *v.* City of Marshalltown, 127 Iowa 637 (1905).

4 Union Pac. R. R. *v.* Mason City, etc. R. R., 128 Fed. Rep. 230 (1904). Where in a charter granted by Congress to a railroad corporation for a bridge, the right is retained to Congress to alter, amend or repeal, and thereafter another act of Congress provides that such bridge shall be open for the use of other railroads on a reasonable compensation, and thereafter a mortgage given by the corporation is forclosed, the purchaser takes the bridge, subject to the obligation to allow other railroads to use the bridge, even though the mortgage was executed before the second statute was enacted. The court came to this conclusion without stopping to inquire whether the foreclosure and sale "was anything more than a reorganization under the form of a judicial proceeding," nor whether, if it were a *bona fide* sale to an independent third party, the sale took the property out of the jurisdiction of Congress. Union Pacific Co. *v.* Mason City Co., 199 U. S. 160 (1905).

5 Allen *v.* Ajax, etc. Co., 30 Mont. 490 (1904).

6 Such reserved power is effective whether it appears in the charter or in the general laws or in the consti-

exemption from taxation;[1] compel a building and loan association to limit the interest they pay or else cease doing business;[2] authorize the corporation on a two-thirds vote of its stockholders to issue preferred stock[3] or provide that it is no defense to an action for negligence that the injury was caused by the negligence of a co-employee.[4] Even though a railroad has made a survey and located its route, yet, if it has not condemned its right of way under the state statute, the state, under the reserved right to amend or repeal, may repeal the power to so condemn.[5] A general statute reserving the power to amend or repeal charters is a part of all special charters passed subsequently.[6] A general statute reserving to the legislature the right to repeal and amend charters applies to extensions of pre-existing charters as well as to subsequent grants of new charters.[7] Where a statute provides that any corporation accepting its benefits

tution of the state. Polk *v.* Mutual Reserve Fund, 207 U. S. 310 (1907).

1 People *ex rel.* Cooper Union *v.* Gass, 190 N. Y. 323 (1907).

2 St. John *v.* Iowa, etc. Ass'n, 113 N. W. Rep. 863 (Iowa 1907).

3 Hinckley *v.* Schwarzschild, etc. Co., 107 N. Y. App. Div. 470 (1905).

4 Lewis *v.* Northern Pac. Ry., 92 Pac. Rep. 469 (Mont. 1907).

5 Adirondack Ry. *v.* New York State, 176 U. S. 335 (1900).

6 A general statute reserving to the state the right to amend or repeal a charter is a part of all special charters thereafter passed, even though not expressly made a part thereof. Citizens' Sav. Bank, etc. *v.* Owensboro, 173 U. S. 636, 644 (1899). Polk *v.* Mutual Reserve Fund, 207 U. S. 310 (1907). Even though a charter for a street railway is granted before a constitutional provision is enacted reserving the right to amend, yet subsequent grants to the street railway are subject to such reserved right to amend. A foreclosure of the company and the taking over of the property by a new company after the constitutional provision is enacted makes the new company subject thereto. San Antonio, etc. Co. *v.* Altgelt, 200 U. S. 304 (1906). A general statute reserving the right to alter, amend, or repeal charters applies to all subsequent special charters not expressly excepted from its effect. Watson Seminary *v.* Pike Co. Court, 149 Mo. 57 (1899). See § 2, *supra*. A general antecedent statute reserving the right to amend does not apply to subsequent amendments to an old charter where it was not so intended. A new charter may be so drawn as to be free from such a general antecedent statute. New Jersey *v.* Yard, 95 U. S. 104 (1877), rev'g 37 N. J. L. 228. Where, subsequently to the incorporation of a company, a general act reserves to the legislature the right to amend or repeal any and all charters, the legislature may repeal any amendments to the charter, so far as such amendments are passed after the general act, where the amendments do not expressly waive the legislative right of amendment or repeal. But any amendment should be "saving, whenever that power was exerted, all rights previously vested." An exemption from taxation may be repealed under the reserved power. (Approving Tomlinson *v.* Jessup, 15 Wall. 454—1872, and Railroad Co. *v.* Maine, 96 U. S. 499—1877.) Creditors stand upon the same footing in this respect. Louisville Water Co. *v.* Clark, 143 U. S. 1 (1892).

7 Northern Bank, etc. *v.* Stone, 88 Fed. Rep. 413 (1898).

thereby waives its exemption from the power of the legislature to amend its charter, the acceptance of the benefits of such a statute thereby works that change without any formal action on the part of the board of directors or stockholders.[1] Where a city reserves the right in its grant to a telephone company to repeal it, such repeal is legal.[2] An exclusive right of a street railway company may be repealed under a reserved right by the legislature to revoke, and such repeal may be by implication.[3]

§ 502. *Dissenting stockholder's remedy against an illegal amendment.*—Where an unauthorized and illegal amendment has been accepted by a corporation and is about to be acted upon, a stockholder has two remedies. If he has not paid his subscription, he may consider himself released from his liability to pay the subscription, or he may begin suit in equity to obtain an injunction against or to set aside any action by the corporation under the amendment.[4] If the

1 Louisville & N. R. R. *v.* State, 45 S. Rep. 296 (Ala. 1907).

2 Southern, etc. Co. *v.* City of Richmond, 98 Fed. Rep. 671 (1899).

3 Wilmington City Ry. *v.* Wilmington, etc. Ry., 46 Atl. Rep. 12 (Del. 1900). Under the right reserved in the constitution of the state to revoke charters, the legislature may disregard an exclusive right granted to a street railway by its special charter and may grant rights to another company. Wilmington, etc. Ry. *v.* People's Ry., 47 Atl. Rep. 245 (Del. 1900). *Cf.* § 913, *infra.*

4 This rule is recognized and applied in most of the cases of this chapter. See also Clearwater *v.* Meredith, 1 Wall. 25 (1863), holding that the stockholder was released, and saying: "Clearwater could have prevented this consolidation had he chosen to do so;" Nugent *v.* Supervisors, 19 Wall. 241 (1873). An amendment to the charter materially changing the terminus releases a dissenting subscriber for stock from his subscription. Kenosha, etc. R. R. *v.* Marsh, 17 Wis. 13 (1863). A change of the termini under an amendment to the charter releases previous subscribers, there being no reserved right to make such amendment. Snook *v.* Georgia Imp. Co., 83 Ga. 61 (1889). A fundamental change in the corporation releases subscribers. Greenbrier Ind. Exposition *v.* Rodes, 37 W. Va. 738 (1893); Buffalo, etc. R. R. *v.* Pottle, 23 Barb. 21 (1856). A subscription to a corporation to be organized for dealing in a specified article cannot be enforced by a corporation subsequently organized for manufacturing and dealing in that article. Woods, etc. Co. *v.* Brady, 181 N. Y. 145 (1905). A change in the plan of organization so as to have a larger capital stock than was originally intended releases a subscriber. Norwich, etc. Co. *v.* Hockaday, 89 Va. 557 (1893). A change of route releases the subscriber. Champion *v.* Memphis, etc. R. R., 35 Miss. 692 (1858). A charter amendment enlarging the corporate objects from fire and accident to fire, marine, and inland insurance releases dissenting stockholders. Ashton *v.* Burbank, 2 Dill. 435 (1873); s. c., 2 Fed. Cas. 26. A legislative amendment not accepted by the company is no defense to a subscription. Chattanooga, etc. R. R. *v.* Warthen, 98 Ga. 599 (1896). In opposition to the above rule of law, there are some decisions holding that the subscribers' only remedy is an injunction. Were

stockholder has already paid his subscription, then his only remedy is an injunction or a suit to set aside.[1] In Pennsylvania it has been held that the stockholder may have an injunction herein, but only until the corporation shall have purchased his interest in the corporation.[2] This decision, however, has been doubted, and hardly seems consistent with well-established principles protecting persons in their right to retain their property except as taken from them under the power of eminent domain.[3]

§ 503. *Assent and acquiescence as a bar to the stockholder's remedy.*—A stockholder may be estopped from objecting to an amendment by his express or implied acquiescence therein. Any acts indicating an acceptance by him of the amendment bind him and bar his suit.[4] Acquiescence may sometimes grow out of his silence

it not that the great weight of authority holds otherwise, this view would be commended as the only logical result of the law. There is no reason why a stockholder who has not paid his subscription should be better off than he who has met that obligation. See § 187, *supra;* also Hays *v.* Ottawa, etc. R. R., 61 Ill. 422 (1871); Pacific R. R. *v.* Hughes, 22 Mo. 291 (1855); Martin *v.* Pensacola R. R., 8 Fla. 370, 389 (1859); Ware *v.* Grand Junction Water Works, 2 Russ. & M. 470 (1831); First Nat. Bank *v.* Charlotte, 85 N. C. 433 (1881). The plea of release must allege acceptance by the corporation, and injury to the defendant sued on his subscription. Hawkins *v.* Mississippi, etc. R. R., 35 Miss. 688 (1858). The subscribers' remedy, where the charter differs from the prospectus or contract of subscription, is considered elsewhere. See § 194, ch. X, *supra.*

1 This remedy also is supported by a large number of the cases in this chapter. See Stevens *v.* Rutland, etc. R. R., 29 Vt. 545 (1851); Black *v.* Delaware, etc. Canal Co., 24 N. J. Eq. 455 (1873); Mowrey *v.* Indianapolis, etc. R. R., 4 Biss. 78 (1866); s. c., 17 Fed. Cas. 930; Ware *v.* Grand Junction Water Works, 2 Russ. & M. 470 (1831). The stockholder cannot enjoin parties from applying to the legislature for the amendment. Story *v.* Jersey City, etc. Co., 16 N. J. Eq. 13 (1863), reviewing the cases; Stevens *v.* Rutland, etc. R. R., 29 Vt. 545 (1851).

2 Lauman *v.* Lebanon Valley R. R., 30 Pa. St. 42 (1858), approved in State *v.* Bailey, 16 Ind. 46 (1861). *Cf.* Ship. *v.* Crosskill, L. R. 10 Eq. 73 (1870); Stewart *v.* Austin, L. R. 3 Eq. 299 (1866), holding that the recovery back cannot be in a court of equity.

3 Mowrey *v.* Indianapolis, etc. R. R., 4 Biss. 78 (1866); s. c., 17 Fed. Cas. 930.

4 Bedford R. R. *v.* Bowser, 48 Pa. St. 29 (1864). Long delay may constitute a ratification herein, no formal acceptance of an amendment being necessary. Gifford *v.* New Jersey R. R., 10 N. J. Eq. 171 (1854); Bangor, etc. R. R. *v.* Smith, 47 Me. 34 (1859); State *v.* Sibley, 25 Minn. 387 (1879); Hope Mut. F. Ins. Co. *v.* Beckman, 47 Mo. 93 (1870); Covington *v.* Covington, etc. Co., 10 Bush (Ky.), 69 (1874); Kenton County Court *v.* Bank Lick Turnp. Co., 10 Bush (Ky.), 529 (1875); Sumrall *v.* Sun Mut. Ins. Co., 40 Mo. 27 (1867); Smead *v.* Indianapolis, etc. R. R., 11 Ind. 104 (1858). *Cf.* Pingry *v.* Washburn, 1 Aiken (Vt.) 264 (1826). See, in general, Memphis Branch R. R. *v.* Sullivan, 57 Ga. 240 (1876); Houston *v.* Jefferson College, 63 Pa. St. 428

or delay under circumstances that called on him to dissent if he so intended.[1] A court of equity will go far to aid a dissenting stockholder where he applies promptly and before large investments and many changes are made on the faith of the acts complained of. But laches will not be tolerated by the courts, especially where important

(1869); Danbury, etc. R. R. v. Wilson, 22 Conn. 435 (1853); Vermont, etc. R. R. v. Vermont Central R. R., 34 Vt. 1 (1861); Hayworth v. Junction R. R., 13 Ind. 348 (1859); Mills v. Central R. R., 41 N. J. Eq. 1 (1886); Zabriskie v. Hackensack, etc. R. R., 18 N. J. Eq. 178 (1867); *Ex parte* Booker, 18 Ark. 338 (1857); Upton v. Jackson, 1 Flip. C. C. 413 (1874); s. c., 28 Fed. Cas. 844; Goodin v. Evans, 18 Ohio St. 150 (1868); also § 640 and ch. XLIV, *infra*. If the stockholder subscribed after the amendment was made he cannot complain. Eppes v. Mississippi, etc. R. R., 35 Ala. 33, 54 (1859); McClure v. People's Freight Ry., 90 Pa. St. 269 (1879). If a stockholder does not object to an amendment, it is not for a person whose land is being taken under eminent-domain proceedings to object. Ames v. Lake Superior, etc. R. R., 21 Minn. 241, 291 (1875). Changes and amendments as to the route do not release the subscriber where he took part therein. Owenton, etc. Co. v. Smith, 13 S. W. Rep. 426 (Ky. 1890). Bonds issued under an amendment to a charter with the consent of all the stockholders will be enforced, even though the amendment was invalid. Johnson v. Mercantile, etc. Co., 94 Ga. 324 (1894). See 69 Atl. Rep. 765 and 1023.

1 Commonwealth v. Cullen, 13 Pa. St. 13 (1850); Martin v. Pensacola, etc. R. R., 8 Fla. 370 (1859); Owen v. Purdy, 12 Ohio St. 73 (1861). *Contra*, Hamilton Mut. Ins. Co. v. Hobart, 68 Mass. 543 (1854). Parties taking part in an extension of the road cannot object that the charter amendment authorizing it was unconstitutional. Jones v. Concord, etc. R. R., 67 N. H. 234 (1892). Although a radical change in the location of a railroad after a subscription has been made releases the subscription, yet the subscriber may by his acts be bound by such change. Lowell v. Washington Co. R. R., 90 Me. 80 (1897). Although a stockholder may enjoin a consolidation of his company with another under a statute passed after the incorporation, the object of the consolidation being different from that of the original corporation, yet where the stockholder delays applying to the court for nearly a year, and in the meantime the consolidated company has borrowed money and given mortgages, and such mortgages are about to be foreclosed, the complaining stockholder is guilty of laches and his remedy is barred. Rabe v. Dunlap, 51 N. J. Eq. 40 (1893). A consolidation of railroads under an amendment to the charter may be prevented by a single stockholder. But several years' delay in complaining is fatal. The stockholder then can only recover the value of his stock and past dividends. Deposit Bank v. Barrett, 13 S. W. Rep. 337 Ky. (1890). Where stockholders in a college exchange their stock for scholarships, a removal of the college to another location under an amendment to the charter, such amendment having been made twenty-five years prior to such removal, will not be enjoined. Bryan v. Board of Education, 90 Ky. 322 (1890); aff'd, 151 U. S. 639. Assent of a stockholder is not presumed, but must be proven. March v. Eastern R. R., 43 N. H. 515 (1862); s. c., 40 N. H. 548. Union Locks and Canals v. Towne, 1 N. H. 44 (1817); Ireland v. Palestine, etc. Turnp. Co., 19 Ohio St. 369 (1869). Where the directors

interests are involved.[1] Stockholders are presumed to have assented to a change in the charter.[2]

vote at the stockholders' meeting in favor of amending the charter, this removes an objection that as directors they should have voted for the change in the first instance at a directors' meeting. Bernstein *v.* Kaplan, 43 S. Rep. 581 (Ala. 1907). If a statute authorizing an increase of stock is unconstitutional the subscribers therefor are not liable. Marion T. Co. *v.* Bennett, 82 N. E. Rep. 782 (Ind. 1907).

1 See ch. XLIV, *infra*.

2 Holmes *v.* Royal, etc. Assoc., 107 S. W. Rep. 1005 (Mo. 1908).

CHAPTER XXIX.

"TRUSTS" AND UNINCORPORATED JOINT-STOCK ASSOCIATIONS.

§ 503a. *Definition and legality of a "trust"—Decisions in the various states on this subject—The anti-trust act of Congress.*—The word "trust" was first used to mean an agreement, between many stockholders in many corporations, to place all their stock in the hands of trustees and to receive therefor trust certificates from the trustees. The stockholders thereby consolidated their interests and became trust-certificate holders. The trustees owned the stock, voted it, elected the officers of the various corporations, controlled the business, received all the dividends on the stock, and used all these dividends to pay dividends on the trust-certificates. The trustees were periodically elected by the trust-certificate holders. The purpose of the "trust" was to control prices, prevent competition, and cheapen the cost of production. The Standard Oil Trust, the American Cotton-Seed Oil Trust, and the Sugar Trust were examples of this method of combination.[1]

Later the word "trust" was given a wider and more popular meaning. It is used to designate any combination of producers for the purpose of controlling prices, reducing cost of production, and sup-

[1] The committee of the House of Representatives at Washington, in their report, explained the nature of the Standard Oil Trust and Sugar Trust very clearly. The committee reported "that there exist a certain number of corporations organized under the laws of the different states and subject to their control; that these corporations have issued their stock to various individuals, and that these individual stockholders have surrendered their stock to the trustees named in the agreements creating these trusts, and accepted in lieu thereof certificates issued by the trustees named therein. The agreements provide that the various corporations whose stock is surrendered to the trustees shall preserve their identity and carry on their business." See 4 Ry. & Corp. L. J. 98. Mr. S. C.

pressing competition. In this sense of the word all schemes whereby those who were competitors combine their interest are "trusts."

During the past ten years trusts have come into great prominence. They have multiplied rapidly and have extended into many branches of business. They have been the object of great popular opposition, and their legality has been assailed, both in the courts and by prohibitory statutes.

The courts have held with great uniformity that these combinations are illegal if their purpose is to restrict production, raise prices, or restrain trade. The law is clear that any combination of competing concerns for the purpose of controlling prices, or limiting production, or suppressing competition, is contrary to public policy and is void. This principle of law has been applied with great rigor to some of the trusts. The two leading cases on the subject are the Sugar Trust decision in New York[1] and the Standard Oil Trust decision in Ohio.[2] Many cases showing the different circumstances under which this rule has been applied are given in the notes below, arranged in the alphabetical order of the various states.[3]

T. Dodd, the general solicitor and originator of the Standard Oil Trust, defined a trust as "an arrangement by which the stockholders of various corporations place their stocks in the hands of certain trustees, and take in lieu thereof certificates showing each shareholder's equitable interest in all the stock so held. The result is twofold: 1. The stockholders thereby become interested in all the corporations whose stocks are thus held. 2. The trustees elect the directors of the several corporations." See 7 Ry. & Corp. L. J. 236.

1 The state will, at the instance of the attorney-general, forfeit the charter of a corporation whose stockholders have entered into a "trust" with the stockholders of competing corporations for the purpose of forming a monopoly in and raising the price of sugar. People *v.* North River, etc. Co., 121 N. Y. 582 (1890). This case broke up the "Sugar Trust" and drove it into transferring all its property to a New Jersey corporation organized for that purpose.

2 The next important case was State *v.* Standard Oil Co., 49 Ohio St. 137 (1892). This case declared illegal the Standard Oil Trust. That trust was also subsequently reorganized into a New Jersey corporation.

3 *California:* The vendor of stock in a California corporation cannot legally contract not to engage in the line of business conducted by the corporation, because the California statutes prohibit such a contract, unless the vendor sells the good will of the business. Dodge Stationery Co. *v.* Dodge, 145 Cal. 380 (1904). Master stevedores may form an association for the purposes of fixing charges and agreeing that all business done by them shall be for the benefit of the association. Herriman *v.* Menzies, 115 Cal. 16 (1896). "Monopoly signifies the sole power of dealing in a particular thing, or doing a particular thing, either generally or in a particular place." San Diego Water Co. *v.* San Diego Flume Co., 108 Cal. 549 (1895). A contract whose effect is to give a monopoly in the sale of bags by the vendor agreeing to sell to one party exclusively is illegal, and no damages can be collected. Pacific Factor Co. *v.* Adler, 90 Cal. 110

These cases indicate the complicated questions and important litigation that have arisen by reason of the trusts. During the past six

(1891). Although the state is prosecuting a suit to forfeit the charter for entering into a combination, yet a sale of part of the corporate property to a stockholder pending the suit is legal, and the receiver cannot follow the property. A writ of prohibition will issue against him. Havemeyer *v.* Superior Court, 84 Cal. 327 (1890). Where all the manufacturers of lumber at a certain point contracted to sell to a corporation all the product of the mills so far as such product was sold in four counties, and the mills agreed not to sell to any other parties in those counties except upon a forfeit to the corporation, the court held that any one of the mills could repudiate the contract. In a suit brought by the corporation against one of the mills for refusing to live up to the contract, the court held that the corporation could not recover. Santa Clara, etc. Co. *v.* Hayes, 76 Cal. 387 (1888).

Colorado: A lessor to the corporation who is also its manager and director cannot repudiate the lease on the ground that the company was organized for an unlawful business. Consolidated, etc. Co. *v.* Wild, 94 Pac. Rep. 285 (Colo. 1908).

Georgia: The statute against trusts is unconstitutional, inasmuch as it excepts agricultural products and live stock while in possession of the producer. But a merchant may enjoin other merchants from combining and preventing others from selling goods to him, unless he will agree to sell goods at prices fixed by them. Brown *v.* Jacobs, etc. Co., 115 Ga. 429 (1902).

Illinois: Where one corporation purchases a majority of the stock of another corporation, thereby creating a tendency to restrain competition, the purchase is illegal, even though a complete monopoly would not result. Minority stockholders of the purchasing corporation may enjoin the purchase. Dunbar *v.* American, etc. Co. 224 Ill. 9 (1906). For a common law indictment against coal corporations for a conspiracy to fix the price of coal, see Chicago, etc. Co. *v.* People, 214 Ill. 421 (1905). A statute authorizing the consolidation of gas companies is not invalid as creating a monopoly. People *v.* People's etc. Co. 205 Ill. 482 (1903). The Illinois anti-trust act was construed and upheld in People *v.* Butler, etc. Co., 201 Ill. 236 (1903). In Illinois it is held that a contract of a citizen of Illinois not to engage in the manufacture of paper boxes for ten years in Illinois or Indiana is illegal, as in restraint of trade. Lanzit *v.* J. W. Sefton, etc. Co., 184 Ill. 326 (1900). In the case of Harding *v.* American, etc. Co., 182 Ill. 551 (1899), an Illinois stockholder in a New Jersey glucose manufacturing corporation enjoined in the courts of Illinois a transfer of the property of that corporation, including real estate in Illinois, to another New Jersey corporation, the latter being a trust formed to absorb practically all the glucose factories of the country, the court saying that it need not be proved that prices have actually been raised, but it is sufficient if it is within the power of the corporation to raise them. The court said: "Any combination of competing corporations for the purpose of controlling prices, or limiting production, or suppressing competition, is contrary to public policy and is void." A state may maintain a suit for an injunction against an elevator company using all its capacity for the benefit of its stockholders, where the objection is not raised that there is an adequate remedy at law. Central Elevator Co. *v.* People, 174 Ill. 203 (1898). Where a person conveys property to a corporation, the

years the volume of such litigation in the state courts has decreased, but has rapidly increased in the federal courts, in applying the anti-

object being to place the stock of that corporation in the hands of trustees to create a trust, such person, having recovered possession of his property, may defend against his contract to convey. Bishop *v.* American, etc. Co., 157 Ill. 284 (1895). *Quo warranto* lies against a corporation formed to purchase substantially all the distilleries in the country. Distilling, etc. Co. *v.* People, 156 Ill. 448 (1895). The Illinois statute of 1891 against trusts is constitutional. Ford *v.* Chicago, etc. Assoc., 155 Ill. 166 (1895). The state may forfeit the charter of a live-stock corporation where it limits the number of agents which each of its stockholders may employ. People *v.* Chicago L. S. Exchange, 170 Ill. 556 (1897). A stockholder in a corporation cannot sustain a bill to have the charter forfeited and the corporation wound up on the ground that it was formed to purchase and combine various competing linseed-oil mills for the purpose of forming a monopoly. The state alone can ask for such a forfeiture. Moreover, the stockholder, by being a stockholder, is estopped from complaining, and is presumed to have had knowledge of the facts from the time that he became a stockholder. Coquard *v.* National L. S. Co., 171 Ill. 480 (1898). Although the general statute authorizes incorporation for any "lawful purpose," yet an incorporation to buy a majority of the stock of each of four competing gas corporations in a city is illegal where the purpose is to create a monopoly. The state may by suit have the charter forfeited. People *v.* Chicago Gas T. Co., 130 Ill. 268 (1889). All gas companies owe a duty to the public. An agreement of two companies in one city to keep out of each other's territory is void. Chicago Gas L. Co. *v.* People's Gas L. Co., 121 Ill. 530 (1887). In Illinois all the grain dealers in a town secretly combined and made contracts by which they controlled the price of grain and the local storehouse accommodations. The parties succeeded, but disagreed in their division of the profits. An action for an accounting was brought by one against another. The court refused to aid either party. The law will leave the guilty conspirators as it finds them. Craft *v.* McConoughy, 79 Ill. 346 (1875).

Indiana: A combination of individuals or firms to regulate prices and competition is not illegal, if reasonable, and does not control all of the commodity or materially affect the freedom of commerce. Over *v.* Byram, etc. Co., 37 Ind. App. 452 (1906). A contract between two railroads by which one is given the right to cross the other, and agrees not to run any tracks to certain quarries which are reached by the tracks of the other, is illegal as creating a monopoly and destroying competition. Chicago, etc. Ry. *v.* Southern, etc. Ry., 70 N. E. Rep. 843 (Ind. 1904). Where two competing gas companies agree on rates to be charged the public, and agree not to interfere with each other's patrons, the state may forfeit their charters, or the court may in its discretion declare a forfeiture or ouster of the right of the defendants to carry out the illegal acts. State *v.* Portland, etc. Co., 153 Ind. 483 (1899). A depot corporation has no right to give a monopoly to one person of the right to solicit cab business at the entrance of the depot, even though such entrance is on the company's grounds. Indianapolis, etc. Ry. *v.* Dohn, 153 Ind. 10 (1899). *Cf.* § 909, *infra.*

Iowa: The Iowa statute against trusts applies to an agreement of insurance companies to charge uniform

trust act of congress of July 2, 1890. Most of the great trusts have been driven from their original mode of organization and have re-

rates. Beechley *v.* Mulville, 102 Iowa, 602 (1897).

Kansas: A lease by an electric light and power company of its property to a competing corporation with an agreement not to engage in the business is *ultra vires*, and the rent cannot be collected by suit. Keene Syndicate *v.* Wichita, etc. Co., 69 Kan. 284 (1904). A criminal prosecution against the officers of a company for pooling with others to fix the price to be paid for grain, failed in State *v.* Dreany, 65 Kan. 292 (1902), but another prosecution was successful in State *v.* Smiley, 69 Pac. Rep. 199 (Kan. 1902); aff'd, 196 U. S. 447 (1905). A dealer in cattle cannot enjoin a voluntary association of other cattle dealers from expelling one of its members for violating a by-law prohibiting him from trading with the plaintiff. Downs *v.* Bennett, 63 Kan. 653 (1901). Where an association of live-stock commission merchants is formed for the purpose of regulating commissions, with a penalty for violation of the same, a member cannot enjoin the association from expelling him for non-payment of the penalty. Greer *v.* Payne, 4 Kan. App. 153 (1896). Insurance business is not interstate commerce. Foreign insurance companies that combine to control and increase the rates of insurance on property inside the state violate the statute against trusts, and their local agents are subject to prosecution therefor. State *v.* Phipps, 50 Kan. 609 (1893).

Kentucky: A corporation may be convicted for entering into a trust, even though the agreement was made outside of the state, it being shown that it was carried out in part in the state. International, etc. Co. *v.* Commonwealth, 99 S. W. Rep. 637 (Ky. 1907). The anti-trust statute of Kentucky is not void for uncertainty, and an indictment which follows the language of the statute is sufficient. Commonwealth *v.* Grinstead, 108 Ky. 59 (1900). The agreement of two rival boats to divide their earnings in a certain proportion, and if either owner sells he shall not go into the business again for a year, is void. The party who has sold and then returned at once to the business is not liable in damages. Anderson *v.* Jett, 89 Ky. 375 (1889).

Louisiana: Where a draymen's union has obtained a monopoly, and dictates who shall receive a particular contract, and a contract is let to one by a business firm, and then another member claims the contract, which the firm lets to him, and then the firm gives the business to the first member, the second cannot collect damages. Fabacher *v.* Bryant, 46 La. Ann. 820 (1894). A stockholder cannot hold a director liable for the stock becoming worthless by reason of the fact that the director and others sold their stock, amounting to three-fourths of the stock, to the American Cotton Oil Trust, and that the trust then dissolved the corporation by a three-fourths vote, as allowed by statute, although the directors as such voted for the dissolution. Trisconi *v.* Winship, 43 La. Ann. 45 (1891). A pooling contract between two railroads competing for business between the same points is void as against public policy. The court will leave the parties where they are. The arrangement in this case was for a division of earnings. Texas, etc. Ry. *v.* Southern Pac. Ry., 41 La. Ann. 970 (1889). In Louisiana, where several firms owned a large quantity of India bagging, and combined and agreed not to sell except upon the consent of a majority of those who were parties to the agreement, the court refused both to uphold the agreement and to enforce the penalty for a violation of the con-

organized by conveying all their property to a corporation organized for the purpose of taking over the property. Such has been the case

tract. India Bagging Assoc. *v.* Kock, 14 La. Ann. 168 (1859).

Massachusetts: A corporation organized to manufacture and sell printing presses may, in making a sale, agree not to sell similar presses to any one else. New York, etc. Co. *v.* Kidder, etc. Co., 192 Mass. 391 (1906). A granite manufacturer may hold liable in damages an association of his competitors which has a by-law that any member doing business with any one who is not a member of the association shall pay a fine to the association, the result having been that the business of the plaintiff was ruined. Martell *v.* White, 185 Mass. 255 (1904). Where three electric companies are combined into one, and the officers of the new company are the same as the officers of the old, and agree not to engage in the same business for five years in competition with the new company, such agreement is legal. Anchor Electric Co. *v.* Hawkes, 171 Mass. 101 (1898), reviewing the authorities. The combination of two parties who each claim a patent on an article not a prime necessity nor a staple commodity in the market is legal and may be specifically enforced. Gloucester, etc. Co. *v.* Russia Cement Co., 154 Mass. 92 (1891). In Central Shade-Roller Co. *v.* Cushman, 143 Mass. 353 (1887), where certain shade-roller manufacturers formed a corporation to sell their product, the court enjoined one of the parties from repudiating the agreement, but said: "The agreement does not refer to an article of prime necessity, nor to a staple of commerce, nor to merchandise to be bought and sold in the market. . . . It does not look to affecting competition from outside—the parties have a monopoly by their patents—but only to restrict competition in price between themselves. . . . When it appears that the combination is used to the public detriment, a different question will be presented from that now before us." In 1908 a special commission on commerce and industry in Massachusetts made a report on the question of allowing the New York, New Haven & Hartford R. R. Co. to own a majority of the stock of the Boston & Maine R. R. Co., and the following summary of its report is taken from the Railroad Gazette of March 27th, 1908: "The proposals for safeguarding the merger of the two large railroad systems, which, combined, create a unique and firm railroad monopoly in the six New England states, are naturally the real nucleus of this important report. They can be summarized almost in a single sentence. They allow well-nigh free control and operation by the New Haven of the Boston & Maine—the localization features not being important—but subject to some pretty radical restrictions based on new and contingent conditions. Those restrictions are twofold: (1) The right of the state, if the merger in a public sense after five years is unsatisfactory, to buy in the New Haven's Boston & Maine shares, and (2) suspensive repeal of the voting power on Boston & Maine shares if control of the New Haven itself passes to an outside interest. On their face these provisions look severe, striking at a principle of ownership and opening a vista of future legislative interference. . . . To the twofold conditions named of Boston & Maine control should be added a third one suggested by the commission for control by the New Haven of its Massachusetts trolley system by a Massachusetts corporation in which the state shall be rep-

with the Sugar Trust, the Standard Oil Trust, and the Cotton-seed Oil Trust. The decisions of the New York court of appeals against

resented on the board of directors with provision for sale of control if the plan after ten years works out badly for the public. This applies to the trolleys substantially the same policy as that outlined for the steam railroad merger and with the same arguments in its favor."

Michigan: Where by consent of all the stockholders the corporate property is sold and the proceeds distributed and one of them secretly receives an additional price and afterwards is sued by another stockholder for his *pro rata* share thereof, he may defend on the ground that the whole transaction was to create a trust. Erpelding *v.* McKearnan, 143 Mich. 409 (1906). *Quo warranto* lies on the relation of a private individual to compel a foreign corporation to show its existence as a corporation and its authority for doing business in the state, and may attack its corporate existence as being an illegal trust. Attorney General *v.* Booth & Co., 143 Mich. 89 (1906). A pooling agreement between competing interstate steamboat lines whereby the earnings are united and expenses deducted and the balance divided in a certain way is in violation of the anti-trust act of congress. White Star Line *v.* Star, etc., 141 Mich. 604 (1905). A lessee cannot defeat an action for rent on the ground that the property was leased to create a monopoly unless he proves the lessor is a party to the scheme. Hartz *v.* Eddy, 140 Mich. 479 (1905). A contract by which a salt manufacturing company agrees to sell all its output to another corporation, the latter having a right to stop the manufacturing by the former and pay a certain sum in lieu of purchasing such output, may be shown to be a part of a plan to establish a monopoly, even though on the face of the contract it is legal. Detroit Salt Co. *v.* National Salt Co., 134 Mich. 103 (1903). In ascertaining the market price of articles sold, the price as fixed by a combination in the trade will not be considered. Lovejoy *v.* Michels, 88 Mich. 15 (1891). A contract of a concern not to manufacture a certain line of articles in some states for five years is void. Western, etc. Assoc. *v.* Starkey, 84 Mich. 76 (1890). Where three persons interested in a match factory agreed to unite their property with that of their competitors in one large corporation, a monopoly—the Diamond Match Company—the courts will not enforce the contract between these three persons which specifies the proportion in which each of the three was to participate in the profits coming to them jointly from the monopoly. The history, character and purpose of the match monopoly are fully stated in this decision. Richardson *v.* Buhl, 77 Mich. 632 (1889).

Minnesota: A gas manufacturing company may agree to sell all of its coke to a fuel company. State *v.* St. Paul, etc. Co., 92 Minn. 467 (1904). A member of a commission merchant corporation which has been formed to regulate the prices to be paid for produce may sue the corporation for damages caused by his being boycotted, even though he helped to form the corporation and was afterwards suspended. Ertz *v.* Produce, etc. Co., 82 Minn. 173 (1901). It is legal for a large number of retail lumber dealers to form a voluntary association, and agree that they will not deal with any manufacturing or wholesale dealer who sells directly to customers, and thereby deprives the retail dealer of business, and the bylaws of their association may provide that the secretary shall notify all members of the names of wholesalers who sell in this manner to consum-

the Sugar Trust and of the supreme court of Ohio against the Standard Oil Trust convinced the trusts that their original mode of

ers. An injunction against the secretary giving such notices will not be granted. Bohn Mfg. Co. *v.* Hollis, 54 Minn. 223 (1893). By-laws of an exchange restricting the freedom of members to reduce prices and establish offices for selling are void. Kolff *v.* St. Paul Fuel Exchange, 48 Minn. 215 (1892).

Mississippi: Where a New Jersey holding company owns the majority of the capital stock of two competing street railway and electric light companies in Mississippi, the state may enjoin its voting such stock, inasmuch as an illegal trust is thereby created. Southern, etc. Co. *v.* State, 44 S. Rep. 785 (Miss. 1907). The agreement of a cottonseed oil purchasing company to withdraw from certain territory is in violation of the Mississippi statute. Kosciusko, etc. Co. *v.* Wilson, etc. Co., 43 S. Rep. 435 (Miss. 1907). The anti-trust act of Mississippi was construed in Yazoo, etc. R. R. *v.* Searles, 85 Miss. 520 (1905). Although two cotton compress companies have agreed to consolidate, and have put their property in the hands of a governing committee to manage until a new charter is obtained, yet either corporation may withdraw from the arrangement, it being *ultra vires*. Greenville, etc. Co. *v.* Planters', etc. Co., 70 Miss. 669 (1893). As to the Mississippi statute, see also American F. Ins. Co. *v.* State, 75 Miss. 24 (1897).

Missouri: A subscription liability cannot be enforced by one of the promoters, as a corporate creditor, where the corporation was organized to sell the product of various competing plants in violation of the anti-trust act. Euston *v.* Edgar, 105 S. W. Rep. 773 (Mo. 1907). In a proceeding by the state against foreign corporations for violating an anti-trust statute, the state may compel the corporations to produce their stock books in order that the state may investigate whether one company owns a majority of the capital stock of the competing company. State *v.* Standard Oil Co., 194 Mo. 124 (1906). The separate agreements of crushed granite companies with a central company to sell only to the latter are illegal and cannot be enforced. Finck *v.* Schneider, etc. Co., 187 Mo. 244 (1905). The Missouri statute against trusts does not prevent a manufacturing corporation purchasing the plant and business of another manufacturing corporation. State *v.* Continental Tobacco Co., 177 Mo. 1 (1903). In the case State *v.* Armour Packing Co., 173 Mo. 356 (1903), a fine was imposed upon foreign packing corporations for violating the anti-trust act of Missouri. See s. c., 173 Mo. 156. The supreme court of Missouri, in the case of State *v.* Firemen's, etc. Co., 152 Mo. 1 (1899), rendered a judgment of ouster against a large number of insurance companies from doing business within the state on account of their entering into an agreement to maintain uniform premium rates. Where the statute makes it a criminal conspiracy to form a trust, it cannot also require officers of the corporation to make sworn returns which might be used against them. State *v.* Simmons Hardware Co., 109 Mo. 118 (1891). See Skrainka *v.* Sharringhausen, 8 Mo. App. 522 (1880), upholding a pooling contract of certain owners of stone quarries located in St. Louis, on the ground that the restraint was local in its effect.

Montana: A trust is "any form of combination between corporations, or corporations and natural persons, for the purpose of regulating production and representing competition by means of the power thus centralized." MacGinniss *v.* Boston, etc. Co., 29

organization was illegal and must be abandoned. The result has been that the trusts for the most part reorganized and reappeared in the

Mont. 428 (1904). Even though a "trust" has purchased stock in a corporation, yet another stockholder cannot maintain a suit in equity to have such stock forfeited to the corporation itself. His remedy is to compel the corporation to abandon any illegal contract or connection. Hence, the mere fact that the Amalgamated Copper Company, a New Jersey corporation, has acquired a majority of the stock of a Montana Copper Company, as well as of other companies, is not sufficient to enable a minority stockholder in a Montana company to obtain an injunction against the voting of such stock or the paying of dividends thereon, or the directors acting as such. MacGinniss *v.* Boston, etc. Co. 29 Mont. 428 (1904).

Nebraska: An agreement between retail lumber dealers to divide territory and control prices is illegal. State *v.* Adams, etc. Co., 116 N. W. Rep. 302 (Neb. 1908). An association of retail lumber dealers which imposes a penalty on members who sell to consumers or to retailers not eligible to membership is illegal. Cleland *v.* Anderson, 66 Neb. 252 (1902). Under the Nebraska statute, in a suit instituted by the state to enjoin a foreign corporation from doing business in the state on the ground that it is violating an anti-trust statute, the court may order the defendant to allow the plaintiff to examine the defendant's books and records for the purpose of obtaining evidence in the case. State *v.* Standard Oil Co., 61 Neb. 28 (1900). Where the stockholders of a distilling corporation transfer their stock to trustees, for the purpose of entering into a trust, such trustees being the holders of the stock of various other corporations engaged in the same business, and trust certificates are issued by them in place of the stock, the state, at the instance of the attorney-general, will cause the charter to be annulled on the ground of misuser, the corporation being no longer engaged in a lawful business. Although the corporate property was transferred just before judgment, the court will not allow its decree to be evaded. State *v.* Nebraska Distilling Co., 29 Neb. 700 (1890).

New Jersey: A court of equity may enjoin "boycotting" with a view to "unionizing." George, etc. *v.* Glass, etc. Assoc., 66 Atl. Rep. 953 (N. J. 1907). The attorney-general has no inherent power to enjoin insurance companies agreeing on rates in restraint of trade. McCarter *v.* Firemen's Ins. Co., 61 Atl. Rep. 705 (N. J. 1905). Where a holding company has illegally purchased the stock of competing railroads and is compelled by decree of the court to return the same to its stockholders, the stockholders are not entitled to the particular stocks which they turned in, but are entitled to a *pro rata* interest in all the stocks so distributed. Such distribution may be in kind. Continental, etc. Co. *v.* Northern, etc. Co., 66 N. J. Eq. 274 (1904). Even though a corporation is selling its product below cost, in order to force another corporation to combine with it, yet a stockholder in the former cannot enjoin such sales, where neither of the corporations has a natural monopoly. Trimble *v.* American, etc. Co., 61 N. J. Eq. 340 (1901). It is legal for a corporation to purchase all the competing concerns in a particular line of business, even though the result is temporarily to create a monopoly in that business. Even though the agreement of the vendor not to engage in business covers too large a territory, yet the court will enforce it for a reasonable amount of territory. Trenton, etc. Co. *v.* Oliphant, 58 N. J.

form of gigantic corporations. This apparently baffled to a large

Eq. 507 (1899). A corporation formed to create a monopoly in the pottery business cannot enforce an agreement of one of the parties not to engage in the business. Trenton, etc. Co. *v.* Oliphant, 56 N. J. Eq. 680 (1898). An injunction does not lie at the instance of the state to restrain a corporation from transacting business, even though it was formed to bring about, by conditions imposed upon selling agents, a monopoly in the cigarette business, and had largely succeeded in doing so. The remedy, if any, is by *quo warranto*. The court reviewed the cases wherein injunction would lie. Stockton *v.* American, etc. Co., 55 N. J. Eq. 352 (1897). Where a contract between a domestic railroad company and a foreign railroad company is declared illegal and void by the court on the ground that it seeks to create a monopoly in the coal business, and the court orders the domestic railroad company to cease complying with such contract, the court will appoint a receiver of such company if it attempts to evade the decree; but on proof that no evasion has been attempted the court will refuse to appoint a receiver. Stockton *v.* Central R. R. of N. J., 50 N. J. Eq. 489 (1892). It is not illegal for one stockyard company to buy out another stockyard company. Willoughby *v.* Chicago, etc. Co., 50 N. J. Eq. 656 (1892); Ellerman *v.* Chicago, etc. Co., 49 N. J. Eq. 217 (1891).

New York: See People *v.* North River, etc. Co., 121 N. Y. 582 (1890). Where a combination offers to allow a person to participate they may prove this in defence of an action brought by him against them for damages for conspiracy. Kellogg *v.* Sowerby, 190 N. Y. 370 (1907). A publisher's agreement, representing ninety-five per cent. of the book trade, fixing a price at which uncopyrighted as well as copyrighted books shall be sold, is in violation of the New York statute against trusts. Straus *v.* American, etc. Assn., 177 N. Y. 473 (1904). A combination of ninety-five per cent. of all the book publishers in the United States to prevent the sale of books at retail at less than the published price, such combination also having brought about a combination of a majority of the wholesale and retail book sellers in the United States for the same purpose, is illegal, under the anti-trust statute of New York. Straus *v.* American, etc. Assn., 85 N. Y. App. Div., 446 (1903). It is legal for the manufacturers of patent medicines to agree with an association of wholesale dealers that the former will not sell to any wholesale dealers excepting those who conform to the latter's price list in making sales. Park *v.* Natl., etc. Assoc., 175 N. Y. 1 (1903). The agreement of the stockholders upon a sale of the corporate property not to engage in that line of business in a certain county is binding upon them. Union Mills *v.* Harder, 116 N. Y. App. Div. 22 (1906). A state court has no jurisdiction to enforce the anti-trust act of Congress, inasmuch as that applies to interstate commerce only, and the jurisdiction of the federal courts is exclusive. The New York state anti-trust act is not violated by the fact that a company controls ninety per cent. of the tobacco trade, and has appointed a sole selling agent in the state. Locker *v.* American, etc. Co., 121 N. Y. App. Div. 443 (1907). In the case Attorney-General *v.* Consolidated Gas Co., 124 N.Y. App. Div. 421 (1908), it is held that the purchase by one gas company of the stock of other gas companies to prevent competition is legal, if it does not result in limiting the supply and increasing the cost of gas, inasmuch as a new competing company might be organized, and the court held that combinations controlling commercial commodities are different, inasmuch as a new competi-

extent the common law and its application by the state courts. It is

tor could not compete. Under the New York anti-trust statute the court may grant an order at the instance of the attorney-general requiring a person to appear and be examined before the judge or referee in view of a suit to be brought. In the Matter of Davies, 168 N. Y. 89 (1901). Where eighty-five per cent. of the manufacturers of envelopes form a selling corporation, and such corporation agrees with an outside manufacturer to pay him ten cents a thousand for envelopes manufactured by him less that fixed number, and he to pay the corporation ten cents a thousand for those manufactured by him in excess of that number, the agreement is illegal and not enforceable. The court said: "Contracts by which the parties to them combine for the purpose of creating a monopoly in restraint of trade to prevent competition, to control and thus to limit production, to increase prices and maintain them, are contrary to sound public policy and are void." The court also said: "Such a contract threatens a monopoly whereby trade in a useful article may be restrained and its price unreasonably enhanced, and it matters not that the parties to it may have so moderately advanced prices that the sum exacted for the product seems to some persons reasonable, for 'the scope of the contract, and not the possibility of self-restraint of the parties to it, is the test of its validity.'" Cohen *v.* Berlin, etc. Co., 166 N. Y. 292, 304 (1901). In the case of Wood *v.* Whitehead, etc. Co., 165 N. Y. 545 (1901), the New York court of appeals went far towards eliminating the rule prohibiting a party from contracting not to engage in a business, the good will of which he has sold out. An agreement of dealers in stone by which all their product is sold by a selling corporation at prices fixed by them, the sales to be apportioned among them, is illegal and not enforceable. Cummings *v.* Union, etc. Co., 164 N. Y. 401 (1900). It is no defense to an action to enforce a subscription that after incorporation the company proceeded to form an illegal combination of competitors in trade. U. S. Vinegar Co. *v.* Foehrenbach, 148 N. Y. 58 (1895). A person who buys a trust certificate, the certificate containing a stipulation binding the holder to all the terms of the trust agreement, thereby becomes a party to an illegal transaction, and such person has no standing in court to obtain an accounting and distribution of the property or profits. The whole agreement and transaction being illegal, the court will leave the parties where it finds them. The court pointed out that there was no proof in this case that the defendant trustees were seeking to derive any personal advantage from the agreement, but, on the contrary, were endeavoring to carry out the wishes of nearly all of the certificate-holders. Unckles *v.* Colgate, 148 N. Y. 529 (1896). A corporation formed by milk dealers to fix the price to be paid to farmers, etc., for milk is illegal. People *v.* Milk Exchange, 145 N. Y. 267 (1895). Where an Illinois corporation sues in New York on a subscription to its stock, it is no defense to allege that the company was to create a monopoly, where the only proof was certain prospectuses, etc., issued before the company was organized. The defense is not good unless the company "was formed for purposes illegal here, or was doing acts prohibited by the laws of this state to its own citizens and corporations." U. S. Vinegar Co. *v.* Schlegel, 143 N. Y. 537 (1894). It is legal for a party who contemplates constructing water-works to abandon the project and enter the employ of a competitor; and he may collect compensation therefor, although a part of the compensation was due to his having abandoned his own enter-

true that in the Chicago Gas Company case the supreme court of Illi-

prise. Oakes *v.* Cattaraugus Water Co., 143 N. Y. 430 (1894). A carrier may by special agreement give reduced rates to customers who stipulate to give it all their business, and refuse those rates to others who are not able or willing to so stipulate, provided that the charge exacted from those others is not excessive or unreasonable. Lough *v.* Outerbridge, 143 N. Y. 271 (1894). Where manufacturers form an illegal association to which they pay a certain sum, which they are to forfeit if they disobey its regulations and are expelled, one of them cannot enjoin the association from expelling him. This action was to enforce the agreement, and not to recover back his money. Phœnix Bridge Co. *v.* Keystone Bridge Co., 142 N. Y. 425 (1894). In People *v.* Sheldon, 139 N. Y. 251 (1893), the defendant was convicted of the crime of conspiracy under the Penal Code of New York, where he and others combined to raise the price of coal at retail and destroy free competition, even though no excessive price was charged.

A combination between dealers in sheep, to sell only to certain butchers, the butchers agreeing to buy only from them, excepting that such commissions as were received from business transacted with others should be paid into a common pool, is illegal. A penalty for violating the agreement cannot be collected. Judd *v.* Harrington, 139 N. Y. 105 (1893). The purchaser of a trust certificate issued by the trustees, the certificate being in a form similar to that of certificates of stock, may compel the trustees to transfer the same to him on their books, although he is a competitor of the trust and has opposed it in all ways possible. Rice *v.* Rockefeller, 134 N. Y. 174 (1892). In this case the court, speaking of the nature of the trust, said: "The agreement constituted not a partnership, but a trust in behalf of the beneficiaries. And while it is not a corporation, it, by the agreement, took some of the attributes of a corporation, in so far that, through its trustees, certificates of shares in the equity to the property held by them were issued, and were transferable in like manner apparently as are those of corporations." Where several carbon manufacturers have formed a combination by leasing their several concerns to a trustee, and also assigning to him their orders for carbons, and subsequently one of them withdraws, the withdrawing concern cannot sue for and claim the amount due upon one of the orders assigned to and filled by such trustee. The defendant having interpleaded, the trustee takes the money. Pittsburg Carbon Co. *v.* McMillin, 119 N. Y. 46 (1890). Where a manufacturer of a peculiar kind of machinery under a patent agrees with a trustee for several corporations that he, the manufacturer, will sell his machinery to them alone, and they agree to give him a percentage of their profits the agreement is legal and may be enforced by him. Good *v.* Daland, 121 N. Y. 1 (1890). Even though a party has a legal contract with a corporation by which he has the right to purchase certain goods monthly for a certain time, yet if afterwards the corporation has sold out to a trust, and the trust assumes the contract and the party acquiesces therein and sues the trust for violation of the contract, the suit will fail, the trust agreement having limited the manufacture within a thousand miles radius of its headquarters. Falvey *v.* Woolner, 71 N. Y. App. Div. 331 (1902). The owner of a grain elevator may bring suit for damages against the owners of other elevators and a railroad company who have entered into a combination by which the railroad will not carry grain for any owner of an

nois forfeited the charter of the company, on the ground that it was

elevator unless the latter pays a certain sum to the railroad company, the intent being to control the elevator business. Kellogg *v.* Lehigh Valley R. R., 61 N. Y. App. Div. 35 (1901). The statute of New York prohibiting the issue of stock at less than par and of bonds at less than their fair market value does not prohibit the issue of stock and bonds by a gas company in payment for the stock and bonds of a competing gas company, even though a high value is placed upon the franchise of such competing company as a part of the purchase price. Such a transaction is not illegal on the ground of creating a monopoly, nor is it *ultra vires*, provided the charter of the first company allowed it to purchase stock and bonds, as provided in the New York statutes. Rafferty *v.* Buffalo, etc. Co., 37 N. Y. App. Div. 618 (1899). A person agreeing not to engage in a certain business within a certain territory cannot evade the contract by setting up that the other party is an illegal combination. National Wall Paper Co. *v.* Hobbs, 90 Hun, 288 (1895). The members of a retail coal dealers' association formed to prevent and actually preventing competition are liable criminally under the New York statutes, Drake *v.* Siebold, 81 Hun, 178 (1894). The holder of trustees' certificates, where the trust is organized on the plan of trustees holding the shares of stock of the various corporations, is denied all relief by the courts as against the trustees. He cannot compel them to pay dividends or have the property in their hands divided upon the dissolution of the trust. The combination being illegal, the courts will not aid any of the parties. So far as the law is concerned, the trustees can appropriate the property to their own use, and the holders of the trustees' certificates will not be granted any relief. Rice *v.* Rockefeller, Supr. Ct., Sp. T., N. Y. L. J., April 26, 1894. Where many manufacturers under various patents form a corporation and convey to it their patents and take back licenses under which the corporation regulates the price, and they agree not to use any new patents and not to manufacture any new kind of harrow, the combination is illegal. Any one of the parties may by suit in equity be relieved from its terms. Strait *v.* National Harrow Co., 18 N. Y. Supp. 224 (1891). The harrow trust was again declared illegal in National Harrow Co. *v.* Bement, 21 N. Y. App. Div. 290 (1897), but this decision was reversed in 163 N. Y. 505. It is established "that no contracts are void as being in general restraint of trade where they operate simply to prevent a party from engaging or competing in the same business." Hence, an agreement of one steamship company to pay another company a certain sum for withdrawing its line of boats was upheld as against the dissent of a stockholder in the former company. Leslie *v.* Lorillard, 110 N. Y. 519 (1888). A large number of the proprietors of boats on the canals made a combination. The income from every boat, over and above a certain amount allowed to the boat for expenses for wear and tear, was turned into the "pool." At certain times the fund in the "pool" was to be divided among the parties according to the number of their boats. In an action to enforce payment under the agreement the court held that the whole arrangement was illegal, void, and not enforceable. Stanton *v.* Allen, 5 Denio, 434 (1848). The proprietors of five lines of boats engaged in canal transportation agreed to combine and do business at certain rates for freight and passage. The net earnings were to be divided among themselves in a fixed proportion. One of the parties sued another to compel him to make payment. The

formed to bring about an illegal combination, but that was nearly

court held that the combination was void under the statutes of New York, and said: "It is a familiar maxim that competition is the life of trade. It follows that whatever destroys or even relaxes competition in trade is injurious if not fatal to it." Hooker *v.* Vandewater, 4 Denio, 349 (1847).

A coal company bought coal from several corporations upon their contract not to sell to any other parties in that locality. The purpose was to enable the purchaser of the coal to have a monopoly of the market. The party which purchased the coal did not pay for it. The coal company which had sold brought suit for the price, but the court held that the suit must fail. The company had taken part in an illegal contract and combination. In such cases the parties are outside of the pale and protection of the law. The courts will not aid either party. Arnot *v.* Pittston, etc. Co., 68 N. Y. 558 (1877). Many salt manufacturers in New York state combined to limit the production and control the price of salt. They formed a corporation, and each of the parties leased to the corporation his manufactory of salt. Each of the parties was, however, to continue the manufacture of salt in his manufactory, but only to a limited extent, and was to sell the product to a corporation at a fixed price. The agreement was carried out. One of the parties could not collect from the corporation the price for the salt delivered to it, and accordingly he brought suit. But the court decided that he could not collect. He lost his salt, and also the price of it. The law declares such combinations illegal, and will not aid any of the parties. Clancey *v.* Onondaga, etc. Co., 62 Barb. 395 (1862). The agreement of the various members of the "Wire Trust" not to sell at less than a certain price is void. A forfeit cannot be recovered back by one of the parties. De Witt, etc. Co. *v.* New Jersey, etc. Co., 9 Ry. & Corp. L. J. 314 (N. Y. C. P., 1891). The receiver of one of the corporations forming a "trust" may enjoin it from reorganizing in the shape of one large corporation. Gray *v.* De Castro, etc. Co., 10 N. Y. Supp. 632 (1890). Although the charter of one of the corporations whose stock is held by a "trust" is forfeited, yet the receiver cannot have a receiver appointed of the "trust" property. This would amount to a receivership of all the property of a person who happened to be a stockholder in an insolvent corporation. Gray *v.* Oxnard, etc. Co., N. Y. L. J., June 6, 1890. The receiver of the company whose charter is forfeited has no right to an accounting from the other corporations as partners. He is confined to the property of his own company. Gray *v.* Oxnard, etc. Co., 11 N. Y. Supp. 118 (1890); affirmed in 59 Hun, 387 (1891), on the ground that an illegal contract cannot be enforced. A receiver of an insolvent corporation may recover money due it from an illegal "trust" though the corporation was a party to the "trust." Pittsburg Carbon Co. *v.* McMillin, 53 Hun, 67 (1889). A contract whereby the stockholders of one corporation were to buy only from the stockholders of another, and the stockholders of the latter were to sell only to the stockholders of the former, was upheld in Live-Stock Assoc. etc. *v.* Levy, 3 N. Y. St. Rep. 514 (1886). A trust being illegal, a certificate-holder may have a receiver appointed of all the stock and assets held by the trustees, and may have an accounting by the trustees. Cameron *v.* Havemeyer, 12 N. Y. Supp. 126 (1890). Where a "trust" passes into a receiver's hands by reason of insolvency, the receiver may recover debts due the "trust" from the constituent corporations. Pittsburg Carbon Co., *v.* McMillin, 119 N. Y. 46 (1890). The

twenty years ago. New Jersey, where most of these vast companies

case of Diamond Match Co. *v.* Roeber, 106 N. Y. 473 (1887), was not a "trust" case. A stockholder cannot maintain a suit against the corporation to enjoin other stockholders from selling their stock to a second corporation, such second corporation and the other stockholders not being parties to the suit. Ingraham *v.* National Salt Co., 36 N. Y. Misc. Rep. 646 (1902); aff'd, 72 App. Div. 582; appeal dismissed, 172 N. Y. 644.

Ohio: See State *v.* Standard Oil Co., 49 Ohio St. 137 (1892). The promoters of an ice combination were convicted and incarcerated in the workhouse for violation of the anti-trust statute of Ohio, in accordance with the decision in Lemmon *v.* State, 83 N. E. Rep. 608 (Ohio 1908). A statute making it a criminal offense to form a trust to prevent competition is constitutional. State *v.* Gage, 72 Ohio St. 210 (1905); see also State *v.* Smiley, 65 Kan. 240 (1902); aff'd *sub nom.* Smiley *v.* Kansas, 196 U. S. 447 (1905). It is constitutional for the legislature to prohibit corporations from entering into combinations to restrict competition with a view to raising prices. *Quo warranto* lies at the instance of the state against such corporations. State *v.* Buckeye, etc. Co., 61 Ohio St. 520 (1900). Although a combination is illegal, yet the profits thereof, when placed in the hands of a third person for the benefit of one of the corporations, may be garnisheed for a debt of that corporation. Geurinck *v.* Alcott, 66 Ohio St. 94 (1902). The Candle Manufacturers' unincorporated association, formed to control prices, etc., is illegal. A member cannot recover his share of the profits. Emery *v.* Ohio Candle Co., 47 Ohio St. 320 (1890). Many salt manufacturers formed a "trust" by agreeing to sell all their product to an unincorporated joint-stock association. The latter was composed of, and its directors were elected by, the manufacturers. The purpose of the combination was to have the association buy the salt from the manufacturers and sell it to the public. Competition would thereby be prevented. The court held that the combination was void, and enjoined the association from seizing the product of one of the manufacturers. Central Ohio Salt Co. *v.* Guthrie, 35 Ohio St. 666 (1880).

Oklahoma: A lease by one compress company to another to form a monopoly may be set aside at the instance of stockholders of the former. Anderson *v.* Shawnee, etc. Co., 17 Okl. 231 (1906).

Pennsylvania: A coal operator in selling his business may agree not to engage in the business for ten years in territories traversed by the Ohio and Mississippi rivers and their tributaries, and even though such a contract is a violation of the anti-trust act of Congress, yet being divisible it is legal in Pennsylvania. Monongahela, etc. Co. *v.* Jutte, 210 Pa. St. 288 (1904). A combination of brewers to control the price of beer within a city is illegal, and the court will not enforce the agreement. Nester *v.* Continental Brewing Co., 161 Pa. St. 473 (1894). Five Pennsylvania coal corporations, which together controlled a certain kind of coal, combined and agreed that sales should be made through a committee and a general agent, and that thereby prices should be fixed, freights made, and sales and deliveries adjusted. If any company sold more than a fixed proportion it was to pay a certain amount to the others. The combination was made and carried out in New York. In the course of time one of the companies sued another to recover its proportion of the amount which the latter was to pay for the excess of coal sold by it. The Pennsylvania court held that it could not recover; that the combination was

are organized, is not inclined to forfeit charters for any such reason.

illegal and void; and that it was a conspiracy under the New York statute against the commission, by two or more persons, of "any act injurious . . . to trade or commerce." Morris Run Coal Co., *v.* Barclay Coal Co., 68 Pa. St. 173 (1871). The courts will refuse a charter to a company whose business is to be "to promote the business of such retail coal-dealers as become members thereof, and to protect them," etc., the intent being to combine the retail coal-dealers. *Re* Richmond Retail Coal Co., 9 Ry. & Corp. L. J. 31 (Phila. 1890).

Rhode Island: Three out of four oleomargarine companies in New England may legally agree to consolidate into one company in order to stop sharp competition. They may also agree not to do business separately for five years anywhere. Oakdale Mfg. Co. *v.* Garst, 18 R. I. 484 (1894).

South Carolina: Where a New Jersey corporation has brought about an illegal combination and trust of fertilizer corporations and has obtained permission to do business in South Carolina, a suit lies against it at the instance of the state to cancel the conveyances of property to it in the state and to have receivers appointed of the South Carolina corporations that entered into the combination, and to set aside all illegal contracts and to revoke the license to the New Jersey corporation to do business in the state. State *v.* Virginia-Carolina, etc. Co., 71 S. C. 544 (1905).

Tennessee: It is legal for a telephone company to buy out a local competing company, in order to avoid a ruinous rate war. State *v.* Cumberland, etc. Co., 114 Tenn. 194 (1905). The Tennessee statute, prohibiting foreign corporations from doing business in the state where they have combined to lessen competition and influence prices, is legal, and the state may file a bill to restrain foreign corporations from doing business in the state where they have violated such statute. State *v.* Schlitz, etc. Co., 104 Tenn. 715 (1900). Where two manufacturing corporations organize a third to sell their product, and to pay for the stock and distribute the stock among their stockholders, a debt due from one of them to the new corporation will not be allowed to participate in the distribution of the assets of the debtor as against other creditors, under the statute of Tennessee allowing such defense. American, etc. Co. *v.* Standard, etc. Co., 59 S. W. Rep. 709 (Tenn. 1900). A shipper cannot maintain a bill in equity to compel a railroad to forward his freight by a certain route, even though he claims that the reason it is not forwarded by that route is because of an agreement between the railroads fixing the rate and fixing the percentage of traffic which each was to carry. Post *v.* Southern Ry., 103 Tenn. 184 (1899). A by-law of a plumbers' association by which any member who does work in competition with another shall pay a certain sum to the association is illegal. Bailey *v.* Association of Master Plumbers, etc. 103 Tenn. 99 (1899). It is illegal for an Ohio corporation to purchase a majority of the stock of a Tennessee corporation for the purpose of controlling the latter, even though they are engaged in a similar business, the object being to form a monopoly. Hence the purchasing company cannot enforce the contract as to certain things which were to be done by the vendor of the stock. Marble Co. *v.* Harvey, 92 Tenn. 115 (1892). A combination of four cotton-seed oil corporations, by an agreement that the possession and use of all their property should be turned over to certain persons to run, is a partnership, and contrary to the rule of law that a corporation cannot be-

Strangely enough the anti-trust act of congress of July 2, 1890, was

come a partner. One of the four corporations sued and recovered possession of its property. Mallory *v.* Hanaur Oil Works, 86 Tenn. 598 (1888).

Texas: An exclusive right given by a railroad company to an express company to do the express business on that railroad is in violation of the anti-trust statute of Texas. State *v.* Missouri, etc. Ry., 91 S. W. Rep. 214 (Tex. 1906). Where several ice companies in the city agree to sell ice to a single corporation only, this is a violation of the Texas anti-trust law. Crystal, etc. Co. *v.* State, 23 Tex. Civ. App. 293 (1900). The charter of a gas company formed to combine all the electric light and gas interests in the city was forfeited at the instance of that state under the anti-trust statute, in the case of San Antonio, etc. Co. *v.* State, 22 Tex. Civ. App. 118 (1899). Even though a cotton compress company purchases six cotton compresses located in different parts of the state, yet if the price for compressing cotton is fixed by a state commissioner there is no violation of the anti-trust act. State *v.* Shippers', etc. Co., 95 Tex. 603 (1902). In Waters, etc. Oil Co. *v.* State, 19 Tex. Civ. App. 1 (1898), the state forfeited the right of a foreign corporation organized under the laws of Missouri to do business in Texas, the corporation having agreed with various merchants and other dealers in oils in Texas so that such parties should not sell any oils except those of that corporation. The Texas statutes against combinations was declared unconstitutional in *Re* Grice, 79 Fed. Rep. 627 (1897), as violating the right of contract guaranteed by the federal constitution. A contract between a brewer and a dealer by which certain territory is given exclusively to the dealer, and the dealer agrees not to buy of others, is contrary to the Texas statute. Texas Brewing Co. *v* Templeman, 90 Tex. 277 (1896). A manufacturer of windmills may grant an exclusive territory for their sale to a firm, even though such firm agrees not to handle any other kind of windmill. Welch *v.* Phelps, etc. Co., 89 Tex. 653 (1896). An agreement or combination of brewers as to sales of beer to dealers is legal at common law, but void under the Texas statute. Houch *v.* Anheuser, etc. Ass'n, 88 Tex. 184 (1894). The attorney-general cannot maintain an injunction against a combination of insurance companies to fix rates and commissions, inasmuch as insurance business is not a public or quasi-public business, nor does it concern a staple of life. Queen Ins. Co. *v.* State, 86 Tex. 250 (1893), holding also that a statute against trusts and combinations does not apply to a combination of fire insurance companies to fix uniform rates and commissions. It is held in Texas that where the owner of land donates streets to a city but retains the exclusive right thereon for street railways, electric light, gas, sewers, waterworks and telephones, the reservation is a monopoly contrary to public policy and not sustainable. Jones *v.* Carter, 101 S. W. Rep. 514 (Tex. 1907).

Washington: Even though an electric power company in its contract to furnish power to a street railway agrees not to furnish power to any competing street railway, and the contract is void, yet it will be compelled to continue to furnish power until the street railway can make other provision. Seattle, etc. Co. *v.* Snoqualmie, etc. Co., 40 Wash. 380 (1905).

West Virginia: An agreement between coal producers by which they form a selling corporation, and each one makes a further agreement therewith to sell its production for three years, is in restraint of trade, and

at first ignored by the business public and was practically nullified by the decisions of the United States courts.[1]

In 1897, however, the supreme court of the United States passed upon the legality of an interstate railroad pooling contract, and held that such a contract was in violation of this anti-trust act of congress of July, 1890.[2] This was followed by a still more important decision by that court in 1899, when it was held that congress had power to regulate the purchase, sale and exchange of commodities between the states, and hence, under the anti-trust act of 1890, the United States government might enjoin a combination in restraint of trade

hence the selling company cannot enforce such a contract by a bill of injunction. Pocahontas, etc. Co. *v.* Powhatan, etc. Co., 60 W. Va. 508 (1907). The court will not enforce an agreement between two natural gas companies whereby they divide the territory and fix prices. Charleston, etc. Co. *v.* Kanawha, etc. Co., 58 W. Va. 22 (1905).

Wisconsin: A retail dealer in coal to whom the wholesale dealers will not sell by reason of a trust may maintain a bill of injunction against the trust. Hawarden *v.* Youghiogheny, etc. Co., 111 Wis. 545 (1901). A combination of mason builders by which they pay to their association six per cent. on all contracts, and all bids are submitted to the association before they are made, and six per cent. added to the lowest bid, is illegal. Milwaukee, etc. Assoc. *v.* Niezerowski, 95 Wis. 129 (1897). A purchaser of goods cannot defeat an action for the price on the ground that the vendor is an illegal trust or combination. National Distilling Co. *v.* Cream City Imp. Co., 86 Wis. 352 (1893). See Kellogg *v.* Larkin, 3 Pin. (Wis.) 123 (1851). A stockholder in selling his stock in a drug company may agree not to engage in the drug business for five years in that locality. Kradwell *v.* Thiesen, 111 N. W. Rep. 233 (Wis. 1907).

1 The federal statute against trusts and monopolies applies only so far as interstate and international trade is concerned. It does not apply to the sugar-refining business. United States *v.* E. C. Knight Co., 156 U. S. 1 (1895), which also (p. 9) gives a definition of the word "monopoly." A suit for damages, based on the federal anti-trust law, failed in Bishop *v.* American Preservers' Co., 51 Fed. Rep. 272 (1892). The statute applies to illegal trusts of stock to unite competing railroads. Clarke *v.* Central R. R., 50 Fed. Rep. 338 (1892). In this case, however, on the final hearing, the bill was dismissed. See Clarke *v.* Richmond, etc. Co., 62 Fed. Rep. 328 (1894). In United States *v.* Patterson, 55 Fed. Rep. 605 (1893), the federal statute was held to apply in certain particulars, and not to apply in others. The act of congress relative to monopolies does not authorize an injunction except on the part of the government. Blindell *v.* Hagan, 54 Fed. Rep. 40 (1893). An indictment of a number of lumbermen, for raising the price of lumber fifty cents a thousand feet, will not lie under the federal statute. United States *v.* Nelson, 52 Fed. Rep. 646 (1892). Indictments under the federal law against monopolies were quashed in *Re* Corning 51 Fed. Rep. 205 (1892); *Re* Terrell, 51 Fed. Rep. 213 (1892); *Re* Greene, 52 Fed. Rep. 104 (1892); United States *v.* Patterson, 55 Fed. Rep. 605, and 59 Fed. Rep. 280 (1893).

2 United States *v.* Trans-Missouri Freight Assoc., 166 U. S. 290 (1897).

by means of contracts, the purpose of which was to destroy competition and increase prices.[1] This act of congress applies only to interstate and international trade.[2] It does not apply to purchasers of cattle on the market, who form an association by which each agrees not to recognize any yard trader or employ any person to buy or sell cattle unless he be a member of the association. Interstate commerce is not directly involved in such an association, and, moreover, the purpose of the agreement was clearly to regulate and not to restrict trade.[3] Neither does it apply as a defense to a mortgage that has been given by a trust or combination in restraint of trade.[4] A suit by a gas company to enjoin an illegal reduction of rates cannot be defeated on the ground that the company had violated an anti-trust statute.[5] It is a violation of the anti-trust act of congress for a New Jersey corporation to acquire a majority of the stock of two competing interstate railroad companies.[6] A state cannot maintain a bill in equity to enforce the anti-trust act of congress of July 2, 1890.[7] A combination between manufacturers of and dealers in grates, mantels and tiles, whereby the dealers agree to buy and sell for members only, except for higher prices, and the manufacturers agree not to sell to any except members, on penalty of forfeiture of membership, is in violation of the anti-trust act of congress.[8] A city may maintain a suit for damages against a combine that has caused it to pay more than it should for articles purchased, such suit being authorized by the act of congress of July 2, 1890.[9] The idea of monopoly is not now confined to a grant of privileges but is understood to include a condition produced by the acts of individuals and the suppression of competition by unification of interest or management or through agreement and concert of action. It is the power to control prices which makes both the inducement to make such combinations and the concern of the law to prohibit them.[10] The anti-trust act of congress of July 2, 1890, renders illegal a boycott by a labor organization.[11] A corporation may be compelled to pro-

United States *v.* Joint, etc. Assoc., 171 U. S. 505 (1898).

1 Addyston, etc. Co. *v.* United States, 175 U. S. 211 (1899).

2 United States *v.* E. C. Knight Co., 156 U. S. 1 (1895).

3 Anderson *v.* United States, 171 U. S. 604 (1898). The beef trust, however, was held to be in violation of the anti-trust act of Congress of July 2, 1890, in Swift & Co. *v.* United States, 196 U. S. 375 (1905).

4 Dickerman *v.* Northern T. Co., 176 U. S. 181 (1900).

5 Peoria, etc. Co. *v.* Peoria, 200 U. S. 48 (1906).

6 Northern Securities Co. *v.* United States, 193 U. S. 197 (1904).

7 Minnesota *v.* Northern Securities Co., 194 U. S. 48 (1904).

8 Montagu & Co. *v.* Lowry, 193 U. S. 38 (1904).

9 Chattanooga Foundry *v.* Atlanta, 203 U. S. 390 (1906).

10 National, etc. Co. *v.* Texas, 197 U. S. 115 (1905).

11 Loewe *v.* Lawlor, 208 U. S. 274 (1908). *Cf.* 96 Pac. Rep. 127.

duce its books and papers for examination by a grand jury, even though it is charged with a criminal violation of a statute, but where there is no act of congress authorizing such examination, a subpœna *duces tecum* requiring it to produce all its books and papers before a grand jury is unreasonable and as indefensible as a search warrant would be if couched in similar terms.[1] Minority stockholders may maintain a bill in equity to cancel a lease which their corporation has made of its property with a view to establish an illegal monopoly.[2] Congress has power to enact a statute authorizing a legislative committee or the interstate commerce commission to investigate the affairs of corporations engaged in interstate commerce.[3] A statute of a state prohibiting a foreign corporation from doing business in the state, if such corporation is connected with a trust, is constitutional.[4] A statute making it a criminal offense to form a trust to prevent competition is constitutional.[5]

The above are the decisions in the supreme court of the United States. A state court has no jurisdiction to enforce the anti-trust act of congress, inasmuch as that applies to interstate commerce only, and the jurisdiction of the federal courts is exclusive.[6] In addition to these decisions there have been a large number of decisions by the

1 Hale *v.* Henkel, 201 U. S. 43 (1906). Officers of a corporation cannot excuse their failure to produce books and papers called for by a subpœna *duces tecum* in a proceeding before the grand jury on the ground that such books and papers are not in their possession or under their control, and they cannot object on the ground that the books and papers are immaterial. Nelson *v.* United States, 201 U. S. 92 (1906). A subpœna *duces tecum* commanding the secretary and treasurer of a corporation, which is charged with violating an anti-trust act, to appear and produce practically all the correspondence and documents of the corporation since its organization, in order to enable the district attorney to prove a violation of the statute, is an unreasonable search and seizure of papers, which is prohibited by the fourth amendment of the Constitution of the United States. *In re* Hale, 139 Fed. Rep. 496 (1905). For other decisions to the effect that there is a very decided limit to the powers of the legislative or executive branches of the government to compel the production of the private books and papers of a corporation for inspection, and that there is also a limit, even in judiciary proceedings, see Matter of Application of Pacific Railway Commission, 32 Fed. Rep. 241 (1887); Kilbourn *v.* Thompson, 103 U. S. 168 (1880).

2 Shawnee, etc. Co. *v.* Anderson, 209 U. S. 423 (1908).

3 Interstate Com. Commission *v.* Baird, 194 U. S. 25 (1904); Interstate Com. Commission *v.* Brinson, 154 U. S. 447 (1894); *In re* Chapman, 166 U. S. 661 (1897).

4 Waters-Pierce, etc. Co. *v.* Texas, 177 U. S. 28 (1900). The anti-trust statute of Texas was upheld in National, etc. Co. *v.* Texas, 197 U. S. 115 (1905).

5 State *v.* Gage, 72 Ohio St. 210 (1905); see also State *v.* Smiley, 65 Kan. 240 (1902); aff'd *sub nom.* Smiley *v.* Kansas, 196 U. S. 447 (1905).

6 Locker *v.* American, etc. Co., 121 N. Y. App. Div. 443 (1907), holding also that the New York state anti-trust act is not violated by the fact that a com-

circuit court and the circuit court of appeals of the United States. These decisions are given in the notes below.[1]

They demonstrate that the act of congress of July 2, 1890, is ef-

pany controls 90 per cent. of the tobacco trade, and has appointed a sole selling agent in the state.

1 The purchase by the American Sugar Refining Company of the majority of the stock of a competing sugar refining company with a view to eliminating its competition, is not a violation of the anti-trust act of congress of July 2, 1890, inasmuch as trade or commerce was only incidentally affected. Pennsylvania, etc. Co. *v.* American, etc. Co., 160 Fed. Rep. 144 (1908). Even though the Michigan statutes authorize one mining company to purchase the stock of other mining companies, yet where this results in establishing a practical monopoly in a certain kind of copper, a minority stockholder may enjoin the voting of such stock so held by the purchasing company, and no formal demand need first be made by him upon the directors to institute the suit. Bigelow *v.* Calumet, etc. Co., 155 Fed. Rep. 869 (1907). A boycott may be enjoined. Rocky Mountain, etc. Tel. Co. *v.* Montana, 156 Fed. Rep. 809 (1907). A stockholder in a New York City street railway company may file a bill in equity to set aside a purchase by a holding company of the majority of the stock of his company, it being shown that the holding company had acquired control of all street railways, elevated railways and subways in New York City, the basis of this decision being that the New York statute prohibiting monopolies overrides in such a case the New York statute authorizing holding companies. Burrows *v.* Interborough, etc. Co., 156 Fed. Rep. 389 (1907).

In the case United States *v.* Standard Oil Co., 155 Fed. Rep. 305 (1907), a shipper was fined $29,240,000, for obtaining a lower rate than the published rate for transportation by a railroad, in violation of the United States statute. Under the anti-trust act of congress a window-glass dealer may hold liable for treble damages a corporation organized to purchase window glass from manufacturers and sell it to wholesalers, it being shown that such corporation sold more than 75 per cent. of the window glass and had agreed with a manufacturer of more than 70 per cent. of the window glass that the corporation should buy from no other manufacturer, except at lower prices, and the manufacturer agreed to sell to no other party except at higher prices, and the corporation agreed to limit the amount it would sell to wholesale dealers, and authorized the wholesale dealers to fix the price to be charged to retail dealers, and limited the territory of the wholesale dealers, thereby monopolizing the business in restraint of interstate commerce, and it is unnecessary to prove that the restraint of trade was unreasonable. Wheeler, etc. Co. *v.* National, etc. Assoc., 152 Fed. Rep. 864 (1907). An existing combination of foreign ship owners which allows rebates to New York shippers who patronize them exclusively, is not in violation of the act of Congress of July 2, (1890). Thompson *v.* Union, etc. Co. 149 Fed. Rep. 933 (1907). A combination intended to restrain interstate commerce is a violation of the act of congress of July 2, 1890. United States *v.* MacAndrews, etc. Co., 149 Fed. Rep. 836 (1907), holding also that corporate officers who participate in violating the anti-trust act of congress of July 2, 1890, may be indicted jointly with the corporation, although their acts were separate and done at a different time, and that any business scheme which tends to restrain interstate commerce and to deprive the public of the advantages following

fective when rigorously applied, but they also demonstrate that the statute itself is a very dangerous one, in that it declares illegal any combination whatsoever, whether it is a reasonable combination

from free competition, may be in violation of the anti-trust act of congress of July 2, 1890. The measure of damages in a suit by a person against a combination as allowed by the act of congress of July 2, 1890, was considered in Jayne *v.* Loder, 149 Fed. Rep. 21 (1906), that suit having grown out of a combination of manufacturers, wholesalers and retailers in drugs to control the retail prices of patent medicines. A corporation organized by wall paper manufacturers to buy their output and sell the same to wholesalers, the purpose being to control the price, which it does, and establishes a monopoly, is in violation of the anti-trust act of congress, and such corporation cannot collect for goods sold. Continental, etc. Co. *v.* Voight, etc. Co., 148 Fed. Rep. 939 (1906).

The decision in Loewe *v.* Lawler, 148 Fed. Rep. 924 (1906) that a boycott by a trade union is not in restraint of commerce, within the meaning of the anti-trust act of congress of July 2, 1890, was reversed in 208 U. S. 274. Where a holding company turns the control for a number of years over to a person controlling competing companies, and such person causes contracts to be made between the various companies and then sells his own companies at a large profit, the holding company may compel him to divide the profit with it, it appearing that all the transactions were to secure such profit and the profit was due to all the companies being so united. If there is no other basis of division, the profits will be divided half to each. Bay State, etc. Co. *v.* Rogers, 147 Fed. Rep. 557 (1906). In a suit for the price of goods it is no defense that the plaintiff is an illegal trust or monopoly. Chicago, etc. *v.* General, etc. Co., 147 Fed. Rep. 491 (1906). The agreement of a corporation on selling its property not to engage in the same business, does not prevent one of its officers and stockholders engaging in that business, and the stockholders are not individually liable or subject to an injunction because of unfair competition practiced by the corporation. Hall's, etc. Co. *v.* Herring, etc. Co., 146 Fed. Rep. 37 (1906). A brewing company is not responsible for rebates given to a refrigerator company that handles the former's product, even though a minority of the stock of the brewing company is owned by the owners of a majority of the stock of the refrigerator company. United States *v.* Milwaukee, etc. Co., 145 Fed. Rep. 1007 (1906). A criminal prosecution by a government against persons for illegally receiving rebates from a railroad fails, if they were merely stockholders in a corporation that received the rebate. United States *v.* Wood, 145 Fed. Rep. 405 (1906). A holder of notes of the corporation may collect them even though they were issued to purchase stock in violation of an anti-trust statute, he having no notice of such purpose, although he knew of the purchase of the stock. National Salt Co. *v.* Ingraham, 143 Fed. Rep. 805 (1906).

The act of congress of July 2, 1890, does not prevent a vendor of goods collecting the price thereof. Hadley, etc. Co. *v.* Highland, etc. Co., 143 Fed. Rep. 242 (1906). A suit under the act of congress by a retail druggist against three voluntary associations consisting of the manufacturers, wholesalers and retailers of proprietary medicines, drugs, etc., the suit being for an illegal combination in restraint of trade, was sustained in Loder *v.* Jayne, 142 Fed. Rep. 1010 (1906);

or not. This condition of things has been criticised and decried by judges and jurists, but so far it has been impossible to amend the act, so as to confine its application to combinations, which are injurious and prejudicial to the interests of the public. The result is

but this decision was reversed in 149 Fed. Rep. 21. Where a manufacturing company sells its patents, etc. to a holding company in consideration of stock of the latter, under a plan for controlling the patents and business in that line of business, this is entering a combination within the meaning of a contract of the former by which royalties were to be paid to another corporation. Brownsville Glass Co. *v.* Appert Glass Co., 136 Fed. Rep. 240 (1905). A contract in restraint of trade is different from a combination or conspiracy in restraint of trade. Damages cannot be recovered in one suit for both. Rice *v.* Standard Oil Co., 134 Fed. Rep. 464 (1905). A suit for damages by a builder against dealers who combined to control the price of lumber was sustained in Ellis *v.* Inman, etc. Co., 131 Fed. Rep. 182 (1904). In a sale of the corporate property the stockholders may legally agree not to engage in the same business for the term of ten years. Davis *v.* Booth & Co., 131 Fed. Rep. 31 (1904). A corporation purchasing the stock of another corporation cannot repudiate the contract on the ground that it will enable the former to violate an anti-trust statute. Ingraham *v.* National Salt Co., 130 Fed. Rep. 676 (1904). An agreement of the owners of brick-making plants, in selling their plants to a corporation for stock, that they will not engage in the same business within fifty miles for ten years, is valid and is not in violation of the anti-trust act of Congress. Robinson *v.* Suburban Brick Co., 127 Fed. Rep. 804 (1904). So also where the stockholders of a selling corporation agreed not to engage in competition for ten years. Booth & Co. *v.* Davis, 127 Fed. Rep. 875 (1904), modified in 131 Fed. Rep. 32. In the case City of Atlanta *v.* Chattanooga, etc. Pipeworks, 127 Fed. Rep. 23 (1903), aff'd, 203 U. S. 390, a municipality collected damages under the anti-trust act of congress against manufacturers who by combination had exacted an unreasonable price for water pipe.

Contracts by which owners of patents covering similar inventions transfer them to one person who grants licenses to the others, the purpose being to keep up the patent monopoly, is not in violation of the anti-trust act of congress. United States, etc. Co. *v.* Griffin, etc. Co., 126 Fed. Rep. 364 (1903). A contract between a manufacturer and jobbers that the jobbers will not sell their purchases outside of a certain state is not in violation of the anti-trust act of congress, where the chief purpose is to promote the business and increase trade, even though it indirectly or incidentally restricts competition. Phillips *v.* Iola, etc. Co., 125 Fed. Rep. 593 (1903). It is legal for a tobacco company to refuse to sell to persons who deal with the competitors of the former. Such acts are not in violation of the anti-trust act of congress. Whitwell *v.* Continental, etc. Co., 125 Fed. Rep. 454 (1903). A combination of lumber manufacturers to control prices is not in violation of the anti-trust act of congress. Ellis *v.* Inman, etc. Co., 124 Fed. Rep. 956 (1903). State of Minnesota *v.* Northern Securities Co., 123 Fed. Rep. 692 (1903) (rev'd in 194 U. S. 48) refused to follow the decision in United States *v.* Northern Securities Co., 120 Fed. Rep. 721, (aff'd, 193 U. S. 197), and held that a holding corporation owning a majority of the stock of two competing railroads was not illegal either at common law or under the statutes of Minnesota prohibiting trusts or combinations in restraint

that the application of the statute seems to rest largely in the discretion of the executive and judicial departments of the government, a situation which is hardly consistent with the theory that our government is a government of laws.

of trade or under the statutes of Minnesota prohibiting the consolidation of parallel and competing lines of railroad. An agreement of packers not to compete in purchasing cattle and to charge the same prices to the public for meat and to restrict the shipments of meat is in restraint of trade. United States *v.* Swift, 122 Fed. Rep. 529 (1903). The owner of a brewery who has conveyed the same to a corporation cannot retake possession on the ground that the corporation was an illegal trust. Star Brewery, etc. *v.* United Breweries Co., 121 Fed. Rep. 713 (1902). The anti-trust act of congress of 1890 renders it illegal for a corporation to hold a majority of the stock of two competing interstate railroad corporations. United States *v.* Northern Securities Co., 120 Fed. Rep. 721 (1903); aff'd, 193 U. S. 197. An association of shingle manufacturers, which closes the mills of some of its members and reduces the production and increases the prices, is in violation of the anti-trust act of congress of July 2, 1890, where such shingles are shipped from one state to another, even though the association agreement does not mention that fact. Gibbs *v.* McNeeley, 118 Fed. Rep. 120 (1902). An employee who has made a legal contract not to engage in a similar business within a radius of fifteen hundred miles during a specified term of a period of five years cannot set up as a defense to such contract that his employer is an illegal trust. Harrison *v.* Glucose, etc. Co., 116 Fed. Rep. 304 (1902). A contract by which coke manufacturers agree to sell their output to a corporation, to resell the same at not less than a price to be fixed by a committee of the manufacturers, the profit earned above a certain sum per ton to be divided among the manufacturers, the corporation agreeing not to sell the product to any other producers, the amount of coal to be furnished by each producer to be also fixed by the committee, affects interstate commerce and is in violation of the anti-trust act of commerce, the court declaring that the policy of that act was to promote individual competition and prevent combinations which interfered with that competition, either as between the members of the combination or between the members and outsiders, and it is no defense that no harm is done to the public, or that the combination has been able to compete for business in a wider field. Chesapeake, etc. Co. *v.* United States, 115 Fed. Rep. 610 (1902). Under the act of congress of July 2, 1890, a dealer to whom a manufacturer refuses to sell may collect damages, the reason for such refusal being an illegal association of competitors, by which the members charged more to outsiders than to members. Montague *v.* Lowry, 115 Fed. Rep. 27 (1902); aff'd, 193 U. S. 38. The Nebraska anti-trust act of 1897 is unconstitutional as interfering with the right of citizens to make contracts. Niagara, etc. Co. *v.* Cornell, 110 Fed. Rep. 816 (1901). A suit by a stockholder, to set aside an illegal transfer of the corporate property, cannot at the same time ask for the treble damages given by the anti-trust act of congress of July 2, 1890. Such a suit is multifarious, inasmuch as the treble damages would go to the plaintiff, while the damages generally would belong to the corporation. Metcalf *v.* American, etc. Co., 108 Fed. Rep. 909 (1901). It is no defense to a suit for an infringement of patents that the complainant is a combination

The fact is that the industrial movement of the age is irresistibly towards consolidation and combination, in connection with the expansion and extension of trade at home and abroad. The law is designed to check any abuses in this tendency, and has been successful

organized in violation of the anti-trust act of congress. Otis Elevator Co. *v.* Geiger, 107 Fed. Rep. 131 (1901). The liability imposed by section 7 of the anti-trust act of congress of July, 1890, rendering an illegal trust and its members liable in treble damages to a person injured thereby, was enforced in Lowry *v.* Tile, etc. Assoc., 106 Fed. Rep. 38 (1900). A suit giving any person injured by a trust a right to hold it liable in treble damages cannot be brought by a party who helped form the trust. Bishop *v.* American, etc. Co., 105 Fed. Rep. 845 (1900).

A state statute against trusts is no defense to a purchaser from such trusts. Only the state can raise that question in a direct proceeding for that purpose, unless the statute provides other remedies. Lafayette, etc. Co. *v.* City of Streator, 105 Fed. Rep. 729 (1900). An association of fourteen coal dealers to sell their coal through one company, at prices fixed by themselves, is illegal, under the anti-trust act of congress. United States *v.* Chesapeake, etc. Co., 105 Fed. Rep. 93 (1900). A purchaser of a manufactured product from a corporation, who gives his notes in payment, cannot defend against such notes on the ground that the corporation is a "trust" in violation of the common law and of the act of congress. Union, etc. Co. *v.* Connelly, 99 Fed. Rep. 354 (1900); aff'd, 184 U. S. 540. A stockholder in a corporation which has entered a trust need not as a witness answer questions as to his participation therein, inasmuch as it might tend to criminate him and subject him to a penalty. Wyckoff, etc. Co. *v.* Wagner, etc. Co., 99 Fed. Rep. 158 (1900). The fact that a corporation is a member of a trust is no defense to a suit for infringement of a patent. Brown, etc. Co. *v.* Troxel, 98 Fed. Rep. 620 (1899). A perpetual lease which enables one railroad to run over the tracks of another is enforceable, although the lease contains a provision that its operation shall cease during any period of time within which the lessee extends its road into certain coal territory or receives coal from other railroads running through that territory. This last provision is contrary to public policy and is void, but, being a condition subsequent, does not affect the validity of the lease itself. Metropolitan, etc. Co. *v.* Columbus, etc. Ry., 95 Fed. Rep. 18 (1899). A combination of wooden-ware manufacturers, whereby they lease their machines to a corporation which is to fix the price and receive stock therefor, the dividends upon which are guaranteed by still another corporation in the combine, cannot collect such dividends by legal proceedings. Cravens *v.* Carter-Crume Co., 92 Fed. Rep. 479 (1899). In a suit by a corporation to enjoin strikers from obstructing the streets, etc., the defense that the complainant is an illegal combination in trade is not good. Amer. Steel, etc. Co. *v.* Wire Drawers', etc. Unions, 90 Fed. Rep. 608 (1898). Even though insurance companies have combined as to rates, etc., yet they may enjoin a state insurance commissioner from illegally revoking their certificates of authority to do business in the state. Liverpool, etc. Co. *v.* Clunie, 88 Fed. Rep. 160 (1898). The United States government may file a bill in equity to enjoin importers and dealers in coal in a certain city from combining, so as to regulate the retail prices arbitrarily. United States *v.* Coal, etc. Assoc., 85 Fed. Rep. 252 (1898). A corporation

in so doing. The law, however, is not intended to interfere with the legitimate demands of trade, and if such interference is attempted it will be demonstrated, just as it was demonstrated in England in re-

created to form a monopoly in the manufacture of harrows cannot maintain a suit for infringement. National Harrow Co. *v.* Hench, 84 Fed. Rep. 226 (1898). A bill in equity to restrain a live-stock exchange from carrying out certain by-laws which tended to monopolize the business was sustained in United States *v.* Hopkins, 82 Fed. Rep. 529 (1897), but was reversed in Hopkins *v.* United States, 171 U. S. 578 (1898), on the ground that the business involved was not interstate commerce. The arrangement of the harrow trust, whereby seventy per cent. of the manufacturers assigned their patents and good will to a corporation, and then acted as agents or licensees of such corporation to manufacture and sell on the terms prescribed by it, is illegal. National Harrow Co. *v.* Hench, 83 Fed. Rep. 36 (1897). Where a car-manufacturing corporation leases all its property to another corporation for a term of years and agrees not to engage in business during that time, "the contract between the parties is void, because in unreasonable restraint of trade, and therefore contrary to public policy." Central Transp. Co. *v.* Pullman's Palace Car Co., 139 U. S. 24, 53 (1891), quoting from and approving Alger *v.* Thacher, 36 Mass. 51 (1837). A person may purchase at foreclosure even though he represents the stockholders, and even though the intention may be to organize a new company to continue an illegal combination in trade. Olmstead *v.* Distilling, etc. Co., 73 Fed. Rep. 44 (1895). In McCutcheon *v.* Merz Capsule Co., 71 Fed. Rep. 786 (1896), several corporations agreed to turn over their property to one corporation and to take stock and bonds in payment, the price to be thereafter fixed by appraisers. After the stock was issued one of the companies withdrew, and the court held that the company withdrawing could file a bill to cancel the agreement on the ground that the company had no power to hold stock in other corporations, and that the agreement was not yet executed. An illegal combination cannot maintain a bill to enjoin infringement upon its patents. National Harrow Co. *v.* Quick, 67 Fed. Rep. 130 (1895). Rent may be collected on a lease of a manufacturing plant to a competing concern, even though the intent was to decrease competition. An agreement of the lessor not to engage in the business during the term of the lease is valid. U. S. Chemical Co. *v.* Provident Chemical Co., 64 Fed. Rep. 946 (1894). A contract by a manufacturing company not to manufacture for a certain period if it is paid a certain percentage on sales made by others is illegal and void. Oliver *v.* Gilmore, 52 Fed. Rep. 562 (1892). It is no defense to an infringement suit that the complainant has formed a monopoly of all patents bearing upon the matter. Strait *v.* National Harrow Co., 51 Fed. Rep. 819 (1892). An assignment of patents by one of several parties to a corporation formed to unite various patents in a certain business is absolute and cannot be revoked, even though the party was by agreement to have a salary of $6,000 per year and this salary has not been paid. Bracher *v.* Hat Sweat Mfg. Co., 49 Fed. Rep. 921 (1892). A combination of coal dealers, to regulate prices and provide for the division of prices with the miners of the coal, is contrary to the act of congress, where the coal-mining companies operate chiefly in one state, and the contract is made and carried out in a city in another state. United States *v.* Jellico, etc. Co., 46 Fed. Rep. 432 (1891). A person who has sold his bakery to a

gard to statutory prohibitions against the consolidation of railroads, that the laws of trade are stronger than the laws of men.[1]

In England in a celebrated litigation it was held that a combination of steamship companies as to rates was not illegal at common law.[2]

corporation which is a "trust," taking stock in the corporation in payment, may tender back the stock and retake possession of his bakery. The act of congress against combinations applies. American, etc. Co. *v.* Klotz, 44 Fed. Rep. 721 (1891). Where the stockholders of a corporation enter into a contract for and in behalf of the corporation and for its benefit, and the corporation accepts that benefit, the latter is bound and affected by the contract and subject to the liabilities of the contract the same as though it had directly entered into it. Hence it is that a corporation is guilty of entering into a "trust" in a case where its stockholders enter into the "trust." American Preservers' Trust *v.* Taylor Mfg. Co., 46 Fed. Rep. 152 (1891). In this case the court held that the trustees were agents, and that the corporations were among the principals, and that it was *ultra vires* of the corporations to purchase stocks, bonds, and various properties through these agents, the trustees. Hence one of the corporations cannot be enjoined from breaking the contract. Where, in order to enter into a combination, one of the corporations assigns all its property to its stockholders, and they assign it to the new consolidated and absorbing corporation, and also agree with that corporation not to compete with it in business, the first-named corporation may be started in the business anew and will not be enjoined. American Preservers' Co. *v.* Norris, 43 Fed. Rep. 711 (1890).

In controversies between a certificate-holder and the trustees the court will not consider the legality of the "trust." Gould *v.* Head, 41 Fed. Rep. 240 (1890). A certificate-holder cannot enjoin an *ultra vires* or illegal act of the trustees where he obtains service on only four out of the nine trustees. Each trustee is liable personally for past breaches of trust, but an injunction against future acts can only be where all the trustees are made parties. Wall *v.* Thomas, 41 Fed. Rep. 620 (1890).

1 In England, for more than thirty years, parliament legislated against the consolidation of railroads. This legislation proved to be utterly ineffective, and in 1872 a parliamentary committee made an elaborate and exhaustive report on the subject, and said, among other things, that consolidation "had not brought with it the evils that were anticipated, but that, in any event, long and varied experience had fully demonstrated the fact that, while parliament might hinder and thwart it, it could not prevent it." An able article on "Legal Monopoly," by A. D. Adams, is to be found in 19 Political Science Quarterly 173.

2 *England:* The House of Lords, the highest court in England, in 1891 affirmed the decisions of the courts below in Mogul Steamship Co. *v.* McGregor, L. R. 17 App. Cas. 25, affirming L. R. 23 Q. B. D. 598, and L. R. 21 Q. B. D. 544, and held that an action of conspiracy would not lie against a company that gave lower rates of freight to parties who shipped exclusively by them, there being in this transaction no desire to injure others and no ill-will. The defendant shipping companies and owners had combined together and formed a "conference" or "ring," and their agents in China had issued circulars to shippers there to the effect that exporters in China who confined their shipments of goods to vessels owned by members

In England the genuine "trust" has been used for legitimate investment purposes. The trustees are authorized to invest the funds of the "trust" in the stocks and bonds of miscellaneous corporations. Generally, however, they are limited in the amount which they may invest in any one direction. That which is lost in one investment is expected to be made up by large profits in another. It is a mode of investment on a large scale, and is made on the principle of an average gain and loss.[1] In England it has been held that a workman who has been discharged by his employer at the instance of a delegate of a workmen's organization, because he, the workman, had at a previous time done work other than that which was his regular trade, cannot hold the delegate liable in damages, even though the dis-

of the "conference" should be allowed a certain rebate, payable half-yearly, on the freight charged. The court held that the "conference," being formed by the defendants with a view of keeping the trade in their own hands, and not with the view of ruining the trade of the plaintiffs, or through any personal malice or ill-will toward them, was not unlawful, and that no action for conspiracy was maintainable. Lord Coke, in the great and leading "Case of the Monopolies," 11 Coke, 84*b* (1602), declared that a monopoly was illegal and void. Lord Coke said that a monopoly led to three results: an increase in price, a decrease in quality and the impoverishment of artisans and others. An agreement of manufacturers that one shall not employ the discharged hands of any other except upon the written consent of the latter is void. Mineral Water, etc. Soc. *v.* Booth, L. R. 36 Ch. D. 465 (1887). A company which is organized in violation of a statute cannot collect debts which are due to it. Jennings *v.* Hammond, L. R. 9 Q. B. D. 225 (1882), the company in this case being organized in violation of a statute which prohibited more than twenty persons uniting in an association or partnership except under certain conditions. In another case many manufacturers, in consequence of troubles between themselves and their employees, entered into an agreement and gave a bond that they all would abide by the rates of labor, hours of work, and other regulations which a majority of those who entered into the combination should decide upon. The court held that the compact was in restraint of trade; that it was illegal and void, and that the bond could not be enforced. Hilton *v.* Eckersley, 6 El. & Bl. 47 (1856). *Cf.* Ontario Salt Co. *v.* Merchants' Salt Co., 18 Grant (U. C.) Ch. 540 (1871), where a Canadian "pool" on salt was sustained; Wickens *v.* Evans, 3 Y. & J. 318 (1829). The word "monopoly" originally meant an exclusive privilege granted by the crown. The courts held that the crown could not grant it. See Case of the Monopolies, 11 Coke, 84 (1602); Mitchell *v.* Reynolds, 1 P. Wms. 181, 187 (1711).

[1] See Healey, Company Law and Practice (2d ed.), p. 191. For the form of articles of agreement of this kind of a "trust," and for a detailed statement of the various provisions that are made, varying according to the character of the enterprise and the purposes of the participants, see Sykes *v.* Beadon, L. R. 11 Ch. D. 170 (1879); Smith *v.* Anderson, L. R. 15 Ch. D. 247 (1880); Wigfield *v.* Potter, 45 L. T. Rep. 612 (1882); Crowther *v.* Thorley, 32 W. Rep. 330 (1884); Credit Mobilier *v.* Commonwealth, 67 Pa. St. 233 (1870), the last case being a "trust"

charge was caused by threats of the delegate to the employer that unless the discharge was made all the men would quit work.[1]

The American "Car Trust" is practically an agreement of several owners of cars to place them in the hands of an agent to sell on the instalment plan, the agent having the power to issue certificates representing an interest in the instalments.[2]

B. UNINCORPORATED JOINT-STOCK ASSOCIATIONS.

§ 504. *Definitions—Joint-stock associations, clubs, exchanges, etc.—Ownership of land.*—A joint-stock company may be defined to be an association of persons for the purpose of business, having a capital stock divided into shares, and governed by articles of associations which prescribe its objects, organization, and procedure, and the rights and liabilities of the members, except that the articles cannot release the members from their liability as partners to the creditors of the company.[3]

created to construct a railroad, the *cestui que trust* being the stockholders of a designated corporation.

1 Allen *v.* Flood, [1898] A. C. 1. *Cf.* Curran *v.* Galen, 152 N. Y. 33 (1897). A labor union is not liable in damages to a person who is discharged by an employer at the instance of the union, on the ground that the person so discharged is not a member of its organization, it being shown that the purpose of the agreement was to secure efficient and approved workmen or preference in employees, no force or unlawful act being involved. National etc. Assoc. *v.* Cumming, 170 N. Y. 315 (1902).

2 See § 855, *infra*.

3 "A joint-stock company is an association of individuals possessing a common capital divided into shares, of which each member possesses one or more. These shares represent the interest of the members, and are transferable by the owners without the consent of the other members or the creditors of the association." Kossakowski *v.* People, 177 Ill. 563 (1899). In Hedge's Appeal, 63 Pa. St. 273 (1869, following the statute 8 & 9 Vict., c. 110), it is defined to be "a partnership whereof the capital is divided, or agreed to be divided, into shares, and so as to be transferable without the express consent of all the copartners." In the statutes of Massachusetts the words "joint-stock company" are used to mean a corporation organized under the general incorporation act of the state. Attorney-General *v.* Mercantile Ins. Co., 121 Mass. 524 (1877). But this is not an accurate use of the term. "The articles of association of an unincorporated joint-stock company bear the same relation to it that the charter bears to an incorporated company; they regulate the duties of the officers and the duties and obligations of the members of such a company among themselves; they specify the capital, limit the duration, and define the business of the company." Bray *v.* Farwell, 81 N. Y. 600 (1880), per Earl, J. See also White *v.* Brownell, 4 Abb. Pr. (N. S.) 162, 193 (1868); s. c., 2 Daly 329. Robbins *v.* Butler, 24 Ill. 387, 426 (1860), it is said that joint-stock companies "have none of the rights and immunities of . . . a regularly incorporated company. These stock companies are nothing

A joint-stock company lies midway between a corporation and a copartnership;[1] and while it has many of the advantages and characteristics of each, it is to be distinguished from them,[2] also from clubs,[3]

more than partnerships; and every member of the company is liable for the debts of the concern, no matter what the private arrangements among themselves may be." To the same effect, see Moore *v.* Brink, 4 Hun, 402 (1875); Skinner *v.* Dayton, 19 Johns. 513 (1822); Wells *v.* Gates, 18 Barb. 554 (1854); Keasley *v.* Codd, 2 Car. & P. 408 (1826). "The term 'joint-stock company' appears to have originated in England in comparatively recent times. Joint-stock companies may be said to be partnerships, or individuals associated for some specified purpose, under a designated name or description, to which, by some general or special statute, when they have been formed or composed in a specified manner, some of the powers or proper attributes of a corporation have been given." Dayton, etc. R. R. *v.* Hatch, 1 Disney (Ohio), 84, 90 (1855). Factors', etc. Ins. Co. *v.* New Harbor, etc. Co., 37 La. Ann. 233, 239 (1885), speaks of a joint-stock company as "a nondescript organization, composed of the owners of certificates showing the proportion of their respective interests in its assets and liability for its obligations, and who are co-owners or proprietors in common. As no one is bound to own property in indivision, it follows that such owners who wish a division have a right to have that property sold, and after a liquidation of the affairs of the concern to have the residue distributed ratably among themselves." At common law a partnership or joint-stock association may do business under any name that it chooses. See § 233, note, *supra;* Preachers' Aid Soc. *v.* Rich, 45 Me. 552 (1858); 2 Perry, Trusts, § 730; Swasey *v.* American Bible Soc., 57 Me. 523 (1869).

1 The similarity of an unincorporated joint-stock association to a corporation was pointed out and explained in Hibbs *v.* Brown, 190 N. Y. 167 (1907).

2 It differs from a corporation in that a joint-stock company has no limited liability as regards its stockholders; and it cannot sue or be sued in the name of the association. It differs from a copartnership in that it is not dissolved by a transfer of stock; and each member has not the same powers of transacting business and disposing of the assets as in a partnership. See Cox *v.* Bodfish, 35 Me. 302 (1853). In Illinois it is a criminal offense for individuals or an unincorporated association to use a name that implies incorporation. Hazelton Boiler Co. *v.* Hazelton, etc. Co., 142 Ill. 494 (1892).

3 Park *v.* Spaulding, 10 Hun, 128 (1877); Ridgely *v.* Dobson, 3 Watts & S. (Pa.) 118 (1842); Loubat *v.* Le Roy, 40 Hun, 546 (1886); Flemyng *v.* Hector, 2 M. & W. 172 (1836); *Re* St. James Club, 2 De G., M. & G. 383 (1852); Ewing *v.* Midlock, 14 Ala. (O. S.) 82 (1837); Todd *v.* Emly, 8 M. & W. 505 (1841); Reynell *v.* Lewis, 15 M. & W. 517 (1846); Wood *v.* Finch, 2 F. & F. 447 (1861); Cross *v.* Williams, 10 W. R. 302 (1862); Cockerell *v.* Aucompte, 5 W. R. 633 (1857); Koehler *v.* Brown, 31 How. Pr. 235 (1866); Waller *v.* Thomas, 42 How. Pr. 337 (1871); Hopkinson *v.* Exeter, L. R. 5 Eq. 63 (1867); Gardner *v.* Fremantle, 19 W. R. 256 (1870); Delauney *v.* Strickland, 2 Stark. 416 (1818); Caldicott *v.* Griffiths, 8 Exch. 898 (1853); Ebbinghousen *v.* Worth Club, 4 Abb. N. Cas. 300 (1878). The ordinary attachment statute authorizing the attachment of shares of stock does not apply to a club organized for lawful sporting purposes and being more of the nature of a statutory joint-stock association than a

from social, benevolent,[1] and mutual-aid[2] organizations, and from associations formed for business purposes, but without a capital stock, such as stock and other exchanges,[3] especially in respect to

corporation. Lyon v. Denison, 80 Mich. 371 (1890). Even though the trustees of a club have been obliged to pay the debts of the club, yet they cannot collect from the members. Wise v. Perpetual, etc. Co., [1903] A. C. 139, the court saying: "Clubs are associations of a peculiar nature. They are societies the members of which are perpetually changing. They are not partnerships; they are not associations for gain; and the feature which distinguishes them from other societies is that no member as such becomes liable to pay to the funds of the society or to any one else any money beyond the subscriptions required by the rules of the club, to be paid so long as he remains a member. It is upon this fundamental condition not usually expressed, but understood by every one, that clubs are formed; and this distinguishing feature has been often judicially recognized." An unincorporated club is not a partnership, although the members may be liable as partners, and hence a member has no power to make contracts for the association. Lumbard v. Grant, 35 N. Y. Misc. Rep. 140 (1901). A member of the club may object to an increase of the annual dues where there was no provision in the rules authorizing the alteration thereof. Harrington v. Sendall, [1903] 1 Ch. 921.

1 Penfield v. Skinner, 11 Vt. 296 (1839); Beaumont v. Meredith, 3 Ves. & B. 180 (1814). See also Thomas v. Ellmaker, 1 Pars. Sel. Eq. Cas. 98 (1844). Or Masonic lodges. See Ash v. Guie, 97 Pa. St. 493 (1881). See also Cohn v. Borst, 36 Hun, 562 (1885); Goodman v. Jedidjah Lodge, 67 Md. 117 (1887); Schmidt v. Abraham Lincoln Lodge, 84 Ky. 490 (1886). A by-law of a benevolent society, that, for non-payment of dues, the names of members shall be dropped, is legal and self-executing. Rood v. Railway, etc. Assoc., 31 Fed. Rep. 62 (1887). See McCallion v. Hibernia, etc. Soc., 70 Cal. 163 (1886), involving a secession from a benevolent association. Benevolent associations are not necessarily copartnerships. Brown v. Stoerkel, 74 Mich. 269 (1889).

2 Lafond v. Deems, 81 N. Y. 507 (1880); Fritz v. Muck, 62 How. Pr. 69 (1881); Pipe v. Bateman, 1 Iowa, 369 (1855). *Cf.* Thomas v. Ellmaker, 1 Pars. Sel. Eq. Cas. 98 (1844); Olery v. Brown, 51 How. Pr. 92 (1875). An unincorporated society which has existed for nearly one hundred years, organized by an agreement by which there is a community of property, and any member dying or withdrawing not to be entitled to any part of such property, is valid in law, and such agreement will be upheld. Schwartz v. Duss, 93 Fed. Rep. 528 (1899); aff'd, 187 U. S. 8 (1902). A by-law in a mutual insurance association that payment of dues shall be made to a certain person, but that if the latter does not transmit them a member shall still be liable and subject to a forfeiture of his insurance, is unreasonable and void. Matter of Brown v. Order, etc., 176 N. Y. 132 (1903).

3 Such as stock exchanges. See White v. Brownell, 2 Daly, 329 (1868); s. c., 4 Abb. Pr. (N. S.) 162; Clute v. Loveland, 68 Cal. 254 (1885); Leech v. Harris, 2 Brewst. (Pa.) 571 (1869); State v. Chamber of Commerce, 20 Wis. 63 (1865); Weston v. Ives, 97 N. Y. 222 (1884), relative to sale of a seat by the exchange to pay the member's debts. See also Platt v. Jones, 96 N. Y. 24 (1884). As to a levy of execution on a seat in an exchange, see Bowen v. Bull, 12 N. Y. Supp. 325 (1890); Powell v. Waldron, 89 N. Y. 328 (1882); Ritterband v. Baggett, 42 N. Y. Super. Ct. 556

the right of expulsion.[1] In the matter of the expulsion of a mem-

(1877); Londheim *v.* White, 67 How. Pr. 469 (1884). A seat in a stock exchange owned by a bankrupt vests in the trustee and may be sold by him. Page *v.* Edmunds, 187 U. S. 596 (1903). A seat in a stock exchange is property and is subject to an inheritance tax. Matter of Hellman, 174 N. Y. 254 (1903). A stock exchange seat is not taxable in Maryland. Mayor, etc. *v.* Johnston, 96 Md. 737 (1903). A stock exchange seat may be pledged to secure a loan and such pledge need not be recorded. Upon the death of the pledgor, the stock exchange has no right to pay the proceeds of the sale of the seat to his administrator, where notice of the pledge had been given. Nashua Sav. Bank *v.* Abbott, 181 Mass. 531 (1902). A seat in the exchange is property which may be reached by creditors. But, if an assignee in bankruptcy refuses to take it and pay the dues, the bankrupt who pays them may retain the seat. Sparhawk *v.*

[1] A member of a union cannot bring a suit in equity to declare void and illegal a by-law that members shall be fined for accepting employment in connection with non-union persons, and to enjoin the infliction of a fine upon himself. His remedy is at law or by application to the attorney-general. Thomas *v.* Musical, etc. Union, 121 N. Y. 45 (1890). A by-law that the members of a news association shall not publish news furnished by other associations in the same territory is valid. The penalty for violation may be suspension. Matthews *v.* Associated Press, 136 N. Y. 333 (1893). Where a member of a stock exchange delays a year before complaining of expulsion for non-payment of dues, and in the meantime the seats have become valuable, his suit will fail, on account of his laches. Konta *v.* St. Louis, etc. 189 Mo. 26 (1905). The directors of a chamber of commerce corporation having by-laws authorizing them to fine or expel members guilty of misconduct may try a member on charges filed by themselves, and a court of equity will not interfere before a hearing has taken place. Wood *v.* Chamber of Commerce, 119 Wis. 367 (1903). A live stock exchange may expel a member, even though it has property, it being shown that expulsion is a proper penalty for his conduct, and he was given a reasonable opportunity to defend and a fair hearing. Harris *v.* Aiken, 92 Pac. Rep. 537 (Kan. 1907). Where a member of a lodge was expelled for entering into a conspiracy to blackball applicants for admission, the court refused to restore him by *mandamus*, and said that such a case was different from one where property rights or money demands are involved. State *v.* Grand Lodge, 53 N. J. L. 536 (1891). Where the expelled member has the right by by-law to appeal from the decision to a corporate meeting, the courts will not interfere until such appeal is taken. Screwmen's Benev. Assoc. *v.* Benson, 76 Tex. 552 (1890). As to expulsion of a member from a club under a by-law, see Commonwealth *v.* Union League, 135 Pa. St. 301 (1890). An action is not maintainable to compel an unincorporated voluntary political association to admit a person to membership. McKane *v.* Adams, 123 N. Y. 609 (1890). Such organizations as chambers of commerce sometimes provide for forfeiture of membership for non-payment of dues, and such provision is legal. The corporation may, however, sue for its dues instead of forfeiting the membership. Denver, etc. Commerce *v.* Green, 8 Colo. App. 420 (1896). As to expulsion of members from unincorporated associations, see Otto *v.* Journeymen Tailors' Union, 75 Cal. 308 (1888). See also § 4*a*, *supra*.

ber from an incorporated exchange, the court may pass upon the question of the jurisdiction of the board of directors to expel a member, and also as to whether there was any evidence at all justifying the expulsion.[1] Where the charter of a mutual protective

Yerkes, 142 U. S. 1 (1891). It is legal for an exchange to have and enforce a by-law providing that the seat of a member shall be sold in case of his failure to fulfill his contracts. Rorke *v.* San Francisco Stock, etc. Board, 99 Cal. 196 (1893). A seat in the stock exchange cannot be sold under levy of execution. The purchaser takes nothing. Lowenberg *v.* Greenebaum, 99 Cal. 162 (1893). The seat of a member of an exchange may be reached by judgment creditors of the owner, although the by-laws provide otherwise. Habenicht *v.* Lissak, 78 Cal. 351 (1889). Members of a board of trade who agree in writing to abide by the rules are bound by one of the rules providing for arbitration. Pacaud *v.* Waite, 218 Ill. 138 (1905). Where, under a by-law of a board of trade, differences between members are arbitrated, a court of equity may review the decision in regard to the measure of damages. Ryan *v.* Cudahy, 157 Ill. 108 (1895). A fund accumulated by an exchange under its charter, for the benefit of the widows and families of deceased members, cannot, by an amendment of the by-laws, be distributed among the members. Parish *v.* New York, etc. Exchange, 169 N. Y. 34 (1901). A discharge under the bankruptcy act puts an end to the lien of members of an exchange upon the seat of the bankrupt for debts due to such members. State *v.* Chamber of Commerce, etc., 77 Minn. 308 (1899). A telegraph company is not bound to furnish stock exchange quotations to a person where the stock exchange has ordered the telegraph company not to furnish quotations to that person, and the contract between the stock exchange and the telegraph company required the latter to furnish quotations to only such persons as the stock exchange approved, the stock exchange being a voluntary association and not a corporation. Matter of Renville, 46 N. Y. App. Div. 37 (1889). Associations may be for improving a water-power. Troy Iron, etc. Factory *v.* Corning, 45 Barb. 231 (1884). For building a schoolhouse. Marston *v.* Durgin, 54 N. H. 347 (1874). For protecting business interests. Caldicott *v.* Griffiths, 8 Exch. 898 (1853). See also Tenney *v.* New England Protection Union, 37 Vt. 64 (1864); Abels *v.* McKeen, 18 N. J. Eq. 462 (1867); Henry *v.* Jackson, 37 Vt. 431 (1865); Frost *v.* Walker, 60 Me. 468 (1872). A stock corporation organized to build a building for the benefit of a library association may sustain towards the latter the relation of trustee towards a *cestui que trust*, but the corporation may insist on its legal rights. Pittsburgh, etc. *v.* Mercantile, etc. Co., 189 Pa. St. 479 (1899). As to building associations, see also Phelps *v.* American, etc. Assoc., 121 Mich. 343 (1899). In building associations general creditors are prior in right to withdrawing members. Cook *v.* Emmet, etc. Assoc., 90 Md. 284 (1899). As to the nature of a building and loan association and the legality of its stock, loans, and mode of transacting business, see McIlwaine *v.* Iseley, 96 Fed. Rep. 62. Where a New York building association has agreed to return a member's money on a specified date, it cannot set up that the agreement is *ultra vires* when sued therefor. Eastern Building, etc. Assn. *v.* Williamson, 189 U. S. 122 (1903). The character of a building loan association as regards usury was considered in Preston *v.* Rockey, 185 N. Y. 186 (1906).

1 People *v.* New York Produce Exch., 149 N. Y. 401 (1896). See also

corporation does not provide for expulsion, and the corporation has a surplus fund in its treasury, the power of expulsion does not exist unless the member has been guilty of some infamous offense or has done some act tending to the destruction of the society.[1]

In corporations having a capital stock no power of expulsion can be exercised unless expressly conferred by the charter or by statute.[2]

A member who has been unjustly expelled may have *mandamus* to compel the corporation to restore him to membership.[3] Accordingly, where a corporate body strikes off the name of one of its

Re Haebler, 149 N. Y. 414 (1896), holding that a by-law giving the board of managers power to discipline members is legal. A stock exchange may expel a member who does not fulfill his contracts made within the exchange, due notice, etc., being given to him in the matter. Lewis *v.* Wilson, 121 N. Y. 284 (1890). Stock exchanges cannot expel members for carrying cases into courts instead of arbitrating. People *v.* New York Cotton Exch., 8 Hun, 216 (1876). As to the power of a board of trade to expel a member, see Pitcher *v.* Chicago Board of Trade, 121 Ill. 412 (1887). As to the expulsion of a member from the New York Stock Exchange, see Belton *v.* Hatch, 109 N. Y. 593 (1888). The courts will not review the expulsion of a member from the stock exchange, an unincorporated association, unless it is shown that the committee has no jurisdiction of the subject or that it did not follow the procedure required by the constitution of the association. The court will not reverse the decision unless there was a total absence of evidence warranting it or the proceedings were contrary to natural justice. Young *v.* Eames, 78 N. Y. App. Div. 229 (1903); aff'd, 181 N. Y. 542. See also p. 1363, *infra.*

1 Weiss *v.* Musical, etc. Union, 189 Pa. St. 446 (1899).

2 Evans *v.* Philadelphia Club, 50 Pa. St. 107 (1865); State *v.* Chamber of Commerce, 20 Wis. 63 (1865); also State *v.* Milwaukee Chamber of Commerce, 47 Wis. 670 (1879). In Dickenson *v.* Milwaukee Chamber of Commerce, 29 Wis. 45 (1871), it is held that there may be a lawful expulsion under a valid by-law.

Expulsion by virtue of a by-law has been held to be unlawful. People *v.* Saint Franciscus Ben. Soc., 24 How. Pr. 216 (1862); People *v.* Mechanics' Aid Soc., 22 Mich. 86 (1870); Green *v.* African Meth. Epis. Soc., 1 Serg. & R. (Pa.) 254 (1815). A resolution spread upon the corporate records unjustly expelling a member is a libel, and the member offering the resolution is liable to an action thereupon. Fawcett *v.* Charles, 13 Wend. 473 (1835). *Cf.* Adley *v.* Whitstable Co., 19 Ves. Jr. 304 (1815); Chase *v.* East Tennessee, etc. R. R., 5 Lea (Tenn.), 415 (1880). It is doubtful whether a stock corporation may impose a fine upon the stockholders for a violation of its by-laws. Monroe, etc. Assoc. *v.* Webb, 40 N. Y. App. Div. 49 (1899). See also § 4*a*, *supra.*

3 Black, etc. Soc. *v.* Vandyke, 2 Whart. (Pa.) 309 (1837); Commonwealth *v.* German Soc., 15 Pa. St. 251 (1850); People *v.* Saint Franciscus Ben. Soc., 24 How. Pr. 216 (1862); State *v.* Carteret Club, 40 N. J. L. 295 (1878); People *v.* Erie Medical Soc., 32 N. Y. 187 (1865); People *v.* New York Ben. Soc., 3 Hun, 361 (1875); Medical, etc. Soc. *v.* Weatherly, 75 Ala. 248 (1883). As to the damages to be paid to a member who has been unlawfully expelled and is reinstated by the court, see People *v.* Musical, etc. Union, 118 N. Y. 101 (1889).

members without giving him previous notice of their intention so to do, and affording him opportunity to be heard in his own defense, a *mandamus* to restore will be granted;[1] and an injunction lies to restrain a board of brokers from irregularly expelling one of their members.[2] Such organizations, however, as chambers of commerce sometimes provide for forfeiture of membership for non-payment of dues, and such provision is legal. The corporation may sue for its dues instead of forfeiting the membership.[3]

Where the expulsion is regular and authorized by the charter or statute it is conclusive, and *mandamus* will not lie.[4] A court of equity has no inherent absolute power to grant an interlocutory injunction against a member of a voluntary association being suspended.[5] A member of an unincorporated association who has been illegally expelled therefrom may sue for damages and need not resort to a *mandamus* to be reinstated, and such damages may include loss sustained by being deprived of the use or enjoyment of membership and also may be for mental suffering.[6] An act of expulsion cannot be impeached or attacked collaterally.[7] At common law there were three causes for expulsion: where the member was guilty of an infamous, indictable offense; or guilty of an offense against his duty as a corporator; or of an offense compounded of these two.[8] The

1 Delacy *v.* Neuse River Nav. Co., 1 Hawks (N. C.), 274 (1821). The member must have a fair hearing. Southern Plank-road Co. *v.* Hixon, 5 Ind. 165 (1854).

2 Leech *v.* Harris, 2 Brewst. (Pa.) 571 (1869); Hutchinson *v.* Lawrence (N. Y. Supr. Ct.), N. Y. D. Reg., Feb. 8, 1887. *Cf.* Italian Union Soc. *v.* Montedonico, 4 Am. & Eng. Corp. Cas. 22 (1884). But not as against a medical society. Gregg *v.* Massachusetts Medical Soc., 111 Mass. 185 (1872). So, also, the courts will not, upon the application of a member of the corporation, grant an injunction to restrain a corporation from initiating new members when no danger of pecuniary loss is shown as likely to result to the petitioner from such initiation. Thompson *v.* Tammany Soc., 17 Hun, 305 (1879).

3 Denver Chamber, etc. *v.* Green, 8 Colo. App. 420 (1896).

4 Commonwealth *v.* Pike Ben. Soc., 8 Watts & S. 247 (1844); People *v.* Fire Underwriters, 7 Hun, 248 (1876).

5 Bachman *v.* Harrington, 184 N. Y. 458 (1906).

6 Lahiff *v.* St. Joseph's, etc. Society, 76 Conn. 648 (1904).

7 Black, etc. Soc. *v.* Vandyke, 2 Whart. (Pa.) 309 (1837); Commonwealth *v.* Pike Ben. Soc., 8 Watts & S. (Pa.) 247 (1844); Society for Visitation, etc. *v.* Meyer, 52 Pa. St. 125, 131 (1866). *Cf.* Commonwealth *v.* Oliver, 2 Pars. Sel. Cas. 420, 426 (1849).

8 Bagg's Case, 11 Coke, 93*b*, 99 (1616); Rex *v.* Liverpool, 2 Burr, 723, 732 (1759); State *v.* Milwaukee Chamber of Commerce, 20 Wis. 63 (1865); People *v.* New York Comm. Assoc., 18 Abb. Pr. 271 (1864); People *v.* Chicago Board of Trade, 45 Ill. 112 (1867). *Cf.* Smith *v.* Smith, 3 Desauss. (S. C.) 557 (1813), where an expulsion for misconduct was sustained; Woolsey *v.* Independent Order, etc., 1 Am. & Eng. Corp. Cas. 172 (1883); Fisher *v.* Keane, L. R. 11 Ch. D. 353

remedy for expulsion from a corporation not for profit is at law and not in equity.[1]

A mutual insurance company may pay dividends.[2] A joint-stock company, although it exercises the power to issue stock, the same as a corporation, yet when organized for the purpose of transacting any lawful business, is itself a lawful means of carrying on business.[3]

The earlier cases declaring that joint-stock companies were illegal were so decided largely because of the Bubble Act, which was in force from 1720 to 1826.[4]

(1878); Hopkinson *v.* Exeter, L. R. 5 Eq. 63 (1867); Dawkins *v.* Antrobus, L. R. 17 Ch. D. 615 (1881); Gardner *v.* Fremantle, 19 W. R. 256 (1871); People *v.* New York Cotton Exch., 8 Hun, 216 (1876); Dean *v.* Bennett, L. R. 6 Ch. App. 489 (1871). In Sturges *v.* Chicago Board of Trade, 86 Ill. 441 (1877), it was held that the remedy of the expelled member was at law, and not in equity. But see State *v.* Lusitanian, etc., Soc., 15 La. Ann. 73 (1860); Wood *v.* Woad, L. R. 9 Exch. 190 (1874); Bostwick *v.* Detroit Fire Dept., 49 Mich. 513 (1883); Hassler *v.* Philadelphia Musical Assoc., 14 Phila. 233 (1880); Anacosta Tribe *v.* Murbach, 13 Md. 91 (1858); State *v.* Georgia Med. Soc., 38 Ga. 608 (1869); Washington Ben. Soc. *v.* Bacher, 20 Pa. St. 425 (1853); Riddell *v.* Harmony Fire Co., 8 Phila. 310 (1871); State *v.* Adams, 44 Mo. 570 (1869); Harmstead *v.* Washington Fire Co., 8 Phila. 331 (1871); Commonwealth *v.* Philanthropic Soc., 5 Binn. (Pa.) 486 (1813); Commonwealth *v.* St. Patrick Benev. Soc., 2 Binn. (Pa.) 448 (1810); People *v.* Fire Underwriters, 7 Hun, 248 (1876). Upon the general question of the power to expel members, see Ang. & A. Corp., § 410 *et seq.*; 2 Kent, Com. 297. Where the by-laws specify the grounds for expelling members from the association they cannot be expelled for other reasons. Dingwall *v.* Amalgamated, etc. Ry., 88 Pac. Rep. 597 (Cal. 1906).

1 Allen *v.* Chicago, etc. Assoc., 83 N. E. Rep. 952 (Ill. 1908).

2 In McKean *v.* Biddle, 181 Pa. St. 361 (1897), where a mutual insurance company for one hundred and thirty-two years had not paid dividends, but had accumulated a surplus of over $4,000,000, the court held that the company might resume the payment of dividends. The court also held that every corporation has the inherent right to declare dividends.

3 "It is too late to contend that partnerships with transferable shares are illegal in this commonwealth. . . . The grounds upon which they were formerly said to be illegal in England, apart from statute, have been abandoned in modern times." Phillips *v.* Blatchford, 137 Mass. 510 (1884). In the case Merchants' National Bank *v.* Wehrmann, 202 U. S. 295 (1906), the court said: "As the supreme court of Ohio assumes such partnerships and certificates to be valid, we assume them to be." "These companies, being consonant with the wants of a growing and wealthy community, have forced their way into existence, whether fostered by the law or opposed to it." Greenwood's Case, 3 De G., M. & G. 459, 477 (1854); Townsend *v.* Goewey, 19 Wend. 424 (1838). A laboring men's association for the purpose of opposing capitalists has been upheld. Snow *v.* Wheeler, 113 Mass. 179 (1873).

4 Enacted 6 Geo. I, c. 18, § 18; re-

Very high English authority, after a thorough review of the English cases, gives the opinion that at common law joint-stock associations are legal.[1]

pealed, 6 Geo. IV, c. 91. Lindley says of this act: "Juster views of political economy and of the limits within which legislative enactments should be confined have led to the repeal of the statute in question, which, though deemed highly beneficial half a century ago, probably gave rise to much more mischief than it prevented."

1 Quoted and approved in Spotswood *v.* Morris, 12 Idaho, 360 (1906). In England there formerly was doubt upon this subject, but this doubt was due to the "Bubble Act." This statute was passed in 1720 for the purpose of suppressing unincorporated companies. At that time they were regarded as "dangerous, mischievous, and, in short, public nuisances." But the statute was repealed in 1826, and Lindley, the great English judge and jurist, says of it: "Juster views of political economy and of the limits within which legislative enactments should be confined have led to the repeal of the statute in question, which, though deemed highly beneficial half a century ago, probably gave rise to much more mischief than it prevented." Lindley, Company Law (5th ed.), p. 132. Moreover, a careful examination of the English authorities up to the present day shows conclusively that at common law an unincorporated joint-stock association is legal and valid. Lindley, Company Law (5th ed.), p. 133. *Cf.* Greene *v.* People, 21 N. E. Rep. 605 (Ill. 1889). In a thorough and exhaustive note on this subject the learned author refers to Rex *v.* Dodd, 9 East, 516 (1808), holding that a company with a prospectus limiting the liability of subscribers is illegal, as a trap to ensnare the unwary; Josephs *v.* Pebrer, 3 B. & C. 639 (1825), holding that unincorporated companies with transferable shares are illegal; and Buck *v.* Buck, 1 Campb. 547 (1808), and Rex *v.* Stratton, 1 Campb. 549, n. (1809), to same effect. He states that Kinder *v.* Taylor, Coll. Partn. 917 (2d ed., 1825); s. c., 3 L. J. Ch. 69; Duvergier *v.* Fellows, 5 Bing. 248 (1828); aff'd, 10 B. & C. 826, and Blundell *v.* Winsor, 8 Sim. 601 (1837), contained dicta only, so far as they passed on the legality of these companies. The following cases clearly establish the legality of joint-stock associations: Harrison *v.* Heathorn, 6 Man. & G. 81 (1843); Garrard *v.* Hardey, 5 Man. & G. 471 (1843); Barclay's Case, 26 Beav. 177 (1858); *Re* Aston, 27 Beav. 474 (1859); Grisewood's Case, 4 De G. & J. 544 (1859); Sheppard *v.* Oxenford, 1 K. & J. 491 (1855); Rex *v.* Webb, 14 East, 406 (1811); Walburn *v.* Ingilby, 1 M. & K. 61 (1833); and see Pratt *v.* Hutchinson, 15 East, 511 (1812); Ellison *v.* Bignold, 2 Jac. & W. 510 (1821); Nockels *v.* Crosby, 3 B. & C. 814 (1825); Kempson *v.* Saunders, 4 Bing. 5 (1826); Brown *v.* Holt, 4 Taunt. 587 (1812). And the learned jurist comes to this conclusion: "The case of Blundell *v.* Winsor, always relied upon as an authority by those who contend that such a company is illegal, has never met with approbation from the bench, nor has it ever been followed. Upon the whole, therefore, it apears that there is no case deciding that a joint-stock company with transferable shares, and not incorporated by charter or act of parliament, is illegal at common law; that opinions have nevertheless differed upon this question; that the tendency of the courts was formerly to declare such companies illegal; that this tendency exists no longer; and that an unincorporated company with transferable shares will not be held illegal at common law unless it can be shown

In Louisiana and formerly in Illinois a contrary conclusion was arrived at,[1] but in Illinois the rule is now undoubtedly different.[2]

The real estate of an unincorporated joint-stock association is generally held in the names of trustees for its benefit.[3] A deed of land to certain grantees as trustees for an unincorporated associ-

to be of a dangerous and mischievous character, tending to the grievance of her majesty's subjects. The legality at common law of such companies may therefore be considered as finally established."

1 See § 622*h*, *infra;* Greene *v.* People, 21 N. E. Rep. 605 (Ill. 1889). The highest court in Louisiana has held that the American Cotton Oil Trust was illegal and disqualified from doing business within that state. The court held that, under the statutes of Louisiana, an unincorporated joint-stock association is illegal; that a "trust" was one kind of an unincorporated joint-stock association, and consequently that it was illegal and void. State of Louisiana *v.* American Cotton Oil Trust, 1 Ry. & Corp. L. J. 509 (1887), the court saying: "A joint-stock company is not known to the laws of Louisiana." A mutual insurance company may be sufficiently a corporation, or assuming to be such, to sustain *quo warranto* against it. Greene *v.* People, 150 Ill. 513 (1894); State *v.* Ackerman, 51 Ohio St. 163 (1894).

2 It is legal for an unincorporated association to use what apparently is a corporate name. People *v.* Rose, 219 Ill. 46 (1905). The Secretary of State will not be ordered by *mandamus* to file a certificate of incorporation of a company to be known as the "United States Express Company" where there is an unincorporated association which has used that name for many years. People *v.* Rose, 219 Ill. 46 (1905). The Illinois statute rendering personally liable directors and officers of a pretended corporation which has not complied with the statutes does not apply to an unincorporated joint-stock association. Gay *v.* Kohlsaat, 223 Ill. 260 (1906).

3 When an association holds land in the name of trustees for the benefit of certificate-holders, the certificates constitute an equitable lien on the proceeds from the sale of the lands, and even a consolidation with another association does not disturb this lien. Crawford *v.* Gross, 140 Pa. St. 297 (1891). A conveyance of land to certain individuals as trustees for the members of an unincorporated association is not void by the statute of uses and trusts. Turner *v.* Ontonagon, etc. Co., 77 Mich. 603 (1889). In matters of deeds, usage and long lapse of time may validate deeds made out by an unincorporated association as a corporation. Baeder *v.* Jennings, 40 Fed. Rep. 199 (1889). Where an unincorporated association owns land which is held in trust for it by individuals, it may, upon becoming incorporated, compel the trustees to deed to it the land. Organized Labor Hall *v.* Gebert, 48 N. J. Eq. 393 (1891). If a trustee who holds land for the benefit of a corporation commits a breach of trust, any stockholder may cause him to be removed. Fisk *v.* Patton, 7 Utah, 399 (1891). A new unincorporated association cannot claim the land of the one which it succeeds, where the members are not the same. Allen *v.* Long, 80 Tex. 261 (1891). Although the association has been dormant for many years, yet a new association formed of part of the members of the old cannot convey the land of the old one. Allen *v.* Long, 80 Tex. 261 (1891). A deed to an unincorporated association vests title in it as soon as it is incorporated. Clifton, etc. Co. *v.* Randell, 82 Iowa, 89 (1891). *Cf.* ch. XLI, *infra.* An

ation is not void, but is upheld by the court. The trust is an active one, and is not executed at once by force of the statute.[1] An unincorporated joint-stock association to buy, lease, and sell land is legal, even though the title to the land is held in the name of trustees who cannot act except upon a three-fourths vote of the shareholders. A shareholder cannot have a receiver appointed and the business wound up on the ground of such an association being illegal.[2] The agreement under which an unincorporated joint-stock association is formed may provide that the title to land purchased by the organization shall be taken by a trustee and shall not be sold except with the concurrence of the shareholders.[3] Shares of stock in a joint-stock association are personal property, even though the property of the association consists of real estate.[4] A deed to persons as trustees, the beneficiaries being the members of an association, transfers title, and the New York statute does not vest the title in the beneficiaries, the trustees being beneficiaries also.[5] The English cost-book mining companies were organized on this principle.[6] A

absolute deed to an individual may nevertheless be construed as in trust, where there is a declaration in writing by him that he holds it in trust for a church. Reorganized Church, etc. *v.* Church of Christ, 60 Fed. Rep. 937 (1894). If the trustees have no power to sell the land, except on the vote of the stockholders, a conveyance without that consent is void. Willis *v.* Greiner, 26 S. W. Rep. 858 (Tex. 1894). Where an unincorporated association pays for land and takes title in the name of a corporation, the latter may be compelled to convey the land to the former, upon the former becoming incorporated. Church, etc. *v.* Algemeine, etc. 31 N. Y. App. Div. 133 (1898); aff'd, 164 N. Y. 606. It is well settled that the shareholders in an unincorporated association cannot convey or dedicate to the public any land that is held by trustees for its benefit. Ward *v.* Davis, 3 Sandf. 502 (1850). The interest of one of the *cestuis que trust* of such a trust, consisting of real estate, is personalty, and descends as such upon his death. Mallory *v.* Russell, 71 Iowa, 63 (1887). A scheme by which shares are sold, each share representing a lot in a tract of land, and upon a sale of all the shares the shareholders elect a board of directors, who sell at auction the best lots and distribute the remaining lots by the remaining shareholders drawing the remaining lots "by lot," is not a lottery scheme prohibited by statute. Elder *v.* Chapman, 176 Ill. 142 (1898).

1 Hart *v.* Seymour, 147 Ill. 598 (1893).

2 Howe *v.* Morse, 174 Mass. 491 (1899).

3 Spotswood *v.* Morris, 12 Idaho, 360 (1906).

4 Matter of Jones, 172 N. Y. 575 (1902). Even though the property of an unincorporated joint-stock association consists of real estate, yet the stock is personal property and cannot be sold under an execution as real estate. *In re* Pittsburg, etc. 204 Pa. St. 432 (1903).

5 King *v.* Townshend, 141 N. Y. 358 (1894).

6 These mining companies existed in the counties of Cornwall and Devonshire. They were first heard of in the courts about the year 1850. Their plan of reorganization and operation arose from custom. Their organiza-

deed or devise to an unincorporated association is not a valid con-

tion and mode of business were as follows: Many persons, desirous of working a mine, would cause the title or lease thereto to be taken in the names of one or more persons called trustees. The business was then carried on by an agent called a "purser," or by a board of managers elected by the participants, who were called the "adventurers." The latter, of course, were the beneficiaries of the "trust." Any adventurer had a right to transfer his interest to a transferee. There was no fixed capital stock. Calls for money were made on the adventurers, according to their shares, as often as it was needed. For a full statement of the character of these mining companies, see Kittow *v.* Liskeard Union, L. R. 10 Q. B. 7 (1874). See also *Re* Bodmin, etc. Co., 23 Beav. 370 (1857), holding that the court would not take judicial notice of the nature of a cost-book mining company; Hybart *v.* Parker, 4 C. B. (N. S.) 209 (1858), holding that the purser could not sue at law on an unpaid call; *Re* Wrysgan, etc. Co., 28 L. J. (Ch.) 894 (1859), as to right to relinquish shares, also describing the functions of the purser and managing directors; Johnson *v.* Goslett, 18 C. B. 728 (1856), affirmed in 3 C. B. (N. S.) 569 (1857), giving the full terms of the articles of agreement; Thomas *v.* Clark, 18 C. B. 662 (1856), where the court said: "Every partnership has a right to make its own regulations as to the mode of transferring shares or interests therein;" *Re* Prosper, etc. Co., L. R. 7 Ch. 286 (1872), relative to rights upon a resignation; Mayhew's Case, 5 De G., M. & G. 837 (1854), holding that by a transfer of his share "the liability of the transferrer is entirely divested from him and passes to the transferee;" *Re* Wrysgan Co., 5 Jur. (N. S.) 215 (1859), where the court said: "The various phases of absurdity which these joint-stock companies display are such that the marvel in my mind is daily increasing how any man can become a member of a joint-stock company;" Northey *v.* Johnson, 19 L. T. Rep. (O. S.) 104 (1852), holding that after transfer the transferrer is not liable for the debts incurred.

It is clearly established that the adventurers in a cost-book mining company are personally and individually liable as partners for the debts incurred in the enterprise. Peel *v.* Thomas, 15 C. B. 714 (1855); Newton *v.* Daly, 1 F. & F. 26 (1858); Harvey *v.* Clough, 8 L. T. Rep. (N. S.) 324 (1863); Tredwen *v.* Bourne, 6 M. & W. 461 (1840); Ellis *v.* Schmoeck, 5 Bing. 521 (1829); Lanyon *v.* Smith, 3 B. & S. 938 (1863), holding a transferrer liable for debts incurred previous to the transfer. To same effect, Geake *v.* Jackson, 15 W. R. 338 (1867). They are liable, also, to indemnify the directors or trustees. *Ex parte* Chippendale, 4 De G., M. & G. 19, 52 (1854). See also Birch's Case, 2 De G. & J. 10 (1857), and Fenn's Case, 4 De G., M. & G. 285 (1854), where the members who had exercised their right to withdraw were held not liable. In Hart *v.* Clarke, 6 De G., M. & G. 232 (1854), an adventurer compelled the company to account to him for his share of the profits. The adventurers have no interest in the land, and consequently a transfer of their shares is not a transfer of an interest in land. Sparling *v.* Parker, 9 Beav. 450 (1846); Powell *v.* Jessopp, 18 C. B. 336 (1856); Hayter *v.* Tucker, 4 K. & J. 243 (1858). The cost-book mining company was frequently spoken of as a species of joint-stock company. *Re* Wrysgan Co., 5 Jur. (N. S.) 215 (1859); Geake *v.* Jackson, 15 W. R. 338 (1867); Watson *v.* Spratley, 10 Exch. 222 (1854), where the court said: "The interest of the shareholder in the great incorporated joint-stock companies, and in the smallest

veyance of title.[1] However, a deed dated before incorporation, but actually delivered after incorporation is good.[2] An unincorporated association may take a bequest.[3] A bequest to a supposed corporation, the charter of which has expired, is valid.[4] In New York it is held that a devise to a trustee for the benefit of an unincorporated association is invalid at common law because the beneficiary is indefinite and uncertain and because the power of alienation is unlawfully suspended, and because it is a passive trust which fails because there is no competent *cestui que trust*.[5] But in New Jersey a different rule prevails and it is held that a devise of real estate to an unincorporated association does not fail. The title descends to the heir at law, who holds the same as trustee for the use and benefit of the association.[6] A devise or bequest to a corporation to be thereafter created is valid.[7] A deed to a corporation before its charter was taken out may be accepted after the charter is granted and is valid, even though a slightly different name is adopted from that which appears in the deed.[8] "That a valid devise or bequest

mine conducted upon the cost-book principle, is, in its essential nature and quality, identical." For an American mining case applying similar principles, see Treat *v.* Hiles, 68 Wis. 344 (1887).

1 As to the effect of a deed, grant, or bequest of real estate to an unincorporated association, see Webb *v.* Weatherhead, 17 How. 576 (1854); Gerard, Titles to Real Estate (3d ed.), p. 420; Owens *v.* Missionary Soc., 14 N. Y. 380 (1856); 3 Washb. Real Prop. 264 (4th ed.); Holmes *v.* Mead, 52 N. Y. 332 (1873); Goesele *v.* Bimeler, 5 McLean, 223 (1851); s. c., 10 Fed. Cas. 528; aff'd, 14 How. 589; German Land Assoc. *v.* Scholler, 10 Minn. 331 (1865); Peabody *v.* Eastern Methodist Soc., 87 Mass. 540 (1863); Towar *v.* Hale, 46 Barb. 361 (1866); 1 Dart, Vend. & P. (5th ed.) 21; Chapin *v.* Chicopee Universalist Soc., 74 Mass. 580 (1857); African M. E. Church *v.* Conover, 27 N. J. Eq. 157 (1876); Leonard *v.* Davenport, 58 How. Pr. 384 (1877); Sherwood *v.* American Bible Soc., 4 Abb. App. Dec. 227 (1864); McKeon *v.* Kearney, 57 How. Pr. 349 (1878); Gibson *v.* McCall, 1 Rich. L. (S. C.) 174 (1844); Byam *v.* Bickford, 140 Mass. 31 (1885), holding that, although a deed to the association is ineffectual, yet that it passes title to the members of the association. They cannot take by devise in New York. White *v.* Howard, 46 N. Y. 144 (1871); Philadelphia Bapt. Assoc. *v.* Hart, 4 Wheat. 1 (1819).

2 San Diego, etc. Co. *v.* Frame, 137 Cal. 441 (1902).

3 *In re* Winchester's Estate, 133 Cal. 271 (1901). An unincorporated association may be made the recipient of a bequest. Hadden *v.* Daudy, 51 N. J. Eq. 154 (1893).

4 Snider *v.* Snider, 70 S. C. 555 (1905).

5 Murray *v.* Miller, 178 N. Y. 316 (1904).

6 American Bible Soc. *v.* American Tract Soc., 62 N. J. Eq. 219 (1901), the court refusing to follow the New York decisions to the contrary.

7 See § 694, *infra.*

8 Sumter, etc. Co. *v.* Phœnix Ins. Co. 56 S. E. Rep. 654 (S. C. 1907). A deed to a corporation before it is organized is not void, but is valid in equity and conveys title to the individuals as partners. Smith *v.* First,

may be limited to a corporation to be created after the death of the testator, provided it is called into being within the time allowed for the vesting of future estates is not denied."[1] A deed to a corporation not in existence is void.[2] But where promoters pay for land and take a deed in the name of the proposed corporation, the vendor cannot claim that the deed was void, even though the corporation was not actually organized until three years after such deed was given.[3]

The question of whether a deed to a *de facto* corporation may be questioned by any one other than the state is considered elsewhere.[4] An unincorporated association may enjoin a corporation from taking its name where injury is shown.[5]

§ 505. *Statutory joint-stock association—Conduct of business and meetings.*—There is an essential difference between a joint-stock company as it exists at common law and a joint-stock company having

etc. Bank, 95 S. W. Rep. 1111 (Tex. 1906).

1 Tilden *v.* Green, 130 N. Y. 29, 47 (1891), the court holding, however, that the devise should be to the corporation to be formed, and should not be in trust to the executors to convey to such corporation when formed if the executors think best. See also Burrill *v.* Boardman, 43 N. Y. 254 (1871); Inglis *v.* Trustees of Sailors' Snug Harbor, 3 Pet. 99 (1830).

2 Provost *v.* Morgan's, etc. R. R., 42 La. Ann. 809 (1890). A lease to a corporation not yet organized is void. Utah, etc. Co. *v.* Keith, 18 Utah, 464 (1899). See also § 243, *supra*. A deed to certain persons "as incorporators" of a company not yet incorporated does not vest title in the company when incorporated. McCandless *v.* Inland, etc. Co., 112 Ga. 291 (1900); s. c., 115 Ga. 968. A statute validating deeds made to supposed corporations, which afterwards become incorporated, applies to deeds made after such statute. Cumberland, etc. Co. *v.* Daniel, 52 S. W. Rep. 446 (Tenn. 1899). Where no organization meetings are held and no officers elected, and no by-laws adopted, and no certificates of stock issued, and no seal adopted, and no records kept, the incorporation does not exist, even though a certificate of incorporation was issued by the state officers. Hence a deed delivered to such corporation does not give title. Wall *v.* Mines, 130 Cal. 27 (1900). A vendor of property to a concern which he supposed was a partnership, but turns out to be a corporation, may repudiate the contract on discovering that fact, inasmuch as the minds of the parties never met. Consumers' Ice Co. *v.* Webster, etc. Co., 32 N. Y. App. Div. 592 (1898).

3 White Oak, etc. *v.* Murray, 145 Mo. 622 (1898).

4 See §§ 637, 694, *infra*.

5 Aiello *v.* Montecaloo, 21 R. I. 496 (1899). It is legal for an unincorporated association to use what apparently is a corporate name. People *v.* Rose, 219 Ill. 46 (1905). The Secretary of State will not be ordered by *mandamus* to file a certificate of incorporation of a company to be known as the "United States Express Company" where there is an unincorporated association which has used that name for many years. People *v.* Rose, 219 Ill. 46 (1905). Where a person is doing business under a company name he may transfer title to notes running to such company by signing his own name. Gardner *v.* Wiley, 46 Or. 96 (1905).

extensive statutory powers conferred upon it by the state within which it is organized. The latter kind of joint-stock companies are found in England and in the state of New York. To such an extent have these statutory powers been conferred on joint-stock companies that the only substantial difference between them and corporations is that the members are not exempt from liability as partners for the debts of the company. Accordingly, joint-stock companies, both those of England and New York, have been held to be corporations in many respects, although expressly declared by statute not to have that character.[1] A joint-stock association under the laws of the

[1] In the case of Ostrom *v.* Greene, 161 N. Y. 353 (1900), the court said that a voluntary unincorporated association of seven or more persons, without capital stock, is, under the statutes of New York, neither a joint-stock company, nor a corporation, nor a partnership, but that its proceedings would be tested by the law of corporations and partnerships so far as applicable. See Thomas *v.* Dakin, 22 Wend. 9 (1839); Warner *v.* Beers, 23 Wend. 103 (1840); Parmly *v.* Tenth Ward Bank, 3 Edw. 395 (1840); People *v.* Watertown, 1 Hill, 616 (1841); Bank of Watertown *v.* Watertown, 25 Wend. 686 (1841); Willoughby *v.* Comstock, 3 Hill, 389 (1842); Leavitt *v.* Yates, 4 Edw. 134 (1843); Leavitt *v.* Tylee, 1 Sandf. Ch. 207 (1843); People *v.* Niagara County, 4 Hill, 20 (1842); Boisgerard *v.* New York Banking Co., 2 Sandf. Ch. 23 (1844); *Re* Bank of Dansville, 6 Hill, 370 (1844); Gifford *v.* Livingston, 2 Denio, 380 (1845); Case *v.* Mechanics' Banking Assoc., 1 Sandf. 693 (1848); Leavitt *v.* Blatchford, 17 N. Y. 521 (1858); s. c., 5 Barb. 9; Cuyler *v.* Sanford, 8 Barb. 225 (1850); Gillet *v.* Moody, 3 N. Y. 479 (1850); Talmage *v.* Pell, 7 N. Y. 328 (1852); Tracy *v.* Talmage, 18 Barb. 456 (1854); Gillet *v.* Phillips, 13 N. Y. 114 (1855); Falconer *v.* Campbell, 2 McLean, 195 (1840); s. c., 8 Fed. Cas. 963; Duncan *v.* Jones, 32 Hun, 12 (1884). A joint-stock association existing in New York and suable by the laws of New York by service on its president may be sued as a corporation in Ohio, although not actually incorporated in New York. Adams Express Co. *v.* State, 55 Ohio St. 69 (1896). The United States Express Company, an unincorporated association under the laws of the state of New York, is treated as a corporation in other states. Edgeworth *v.* Wood, 58 N. J. L. 463 (1896). The taxation statutes of Pennsylvania imposing taxes upon corporations organized in another state do not apply to an unincorporated association, an express company organized in New York. Sanford *v.* Gregg, 58 Fed. Rep. 620 (1893). The English joint-stock company is much the same. "The company has a name as an association, maintaining the identity of the body through all changes of its members; its property is divided into transferable shares; and it has conferred upon it the legal capacity to sue and be sued in the name of one of its officers, and such a suit . . . may be brought by or against a member as well as a third person." It is a corporation, though the English statute declares it is not. Oliver *v.* Liverpool, etc. Ins. Co., 100 Mass. 531 (1868); aff'd *sub nom.* Liverpool Ins. Co. *v.* Masachusetts, 10 Wall. 566 (1870). So, also, with the New York joint-stock companies. Fargo *v.* Louisville, etc. Ry., 6 Fed. Rep. 787 (1881); Sanford *v.* Supervisors of New York, 15 How. Pr. 172 (1858); Waterbury *v.* Merchants' Union Exp. Co., 50 Barb. 157 (1867). As regards the

state of New York is sufficiently a corporation to sustain an indictment in Illinois against an employee for embezzling the funds.[1] Where a voluntary unincorporated association has no constitution, or by-laws, or rules, the conduct of its meetings may be in accordance with the ordinary parliamentary rules of deliberative assemblies.[2] Notice of the time and place must be given.[3] A minority of an unincorporated voluntary association may adjourn from time to time, even if a majority of all the members is necessary to constitute a quorum in order lawfully to transact business.[4] A voluntary unincorporated association, without articles, constitution, or rules, may remove its president or other officer at any time and without notice, except that the meeting held for that purpose must be duly held, but cannot expel a member without notice.[5] Neither the president nor the treasurer of an unincorporated joint-stock

liability of the members for the debts of the company, it is held to be a copartnership. Boston, etc. R. R. *v.* Pearson, 128 Mass. 445 (1880); Oliver *v.* Liverpool, etc. Ins. Co., 100 Mass. 531 (1868); aff'd *sub nom.* Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. 566 (1870). The refusal of the legislature to call them corporations is important as cutting off the exemption of the members from liability to creditors; an exemption which, at common law, belongs to all corporations. Joint-stock companies in England have always been largely statutory. See Van Sandau *v.* Moore, 1 Russ. 441 (1826). In New York the English decisions on these companies are doubtless good authority, since they exist under statutes which are much alike. In New York the statutes relative to taxation of corporations do not apply to joint-stock companies. They are not corporations. People *v.* Coleman, 133 N. Y. 279 (1892); Hoey *v.* Coleman, 46 Fed. Rep. 221 (1891). An unincorporated joint-stock association is legal in New York. Under the statutes of that state such associations are corporations for many purposes. People *v.* Wemple, 117 N. Y. 136 (1889).

1 Kossakowski *v.* People, 177 Ill. 563 (1899).

2 Ostrom *v.* Greene, 161 N. Y. 353 (1900). The majority rule does not apply to a community irrigation ditch. Cendelaria *v.* Vallejos, 81 Pac. Rep. 589 (N. M. 1905). The members cannot act except in meeting assembled. The majority do not rule. Livingston *v.* Lynch, 4 Johns. Ch. 573 (1820); Irvine *v.* Forbes, 11 Barb. 587 (1852). But the articles may provide otherwise. Waterbury *v.* Merchants' Union Exp. Co., 50 Barb. 157 (1867).

3 Irvine *v.* Forbes, 11 Barb. 587 (1852).

4 Ostrom *v.* Greene, 161 N. Y. 353 (1900), the court saying in regard to the adjourned meeting: "Personal notice to every member was unnecessary, for it was the same in effect as if the association had sat in continuous session and had adjourned each day to the next." In this case the court stated that it was open to question as to whether a majority of all the members in an unincorporated association was necessary in order to constitute a quorum.

5 Ostrom *v.* Greene, 161 N. Y. 353 (1900), the court saying: "The holding of an office unprotected by rules is not an individual right, but is subject to change at the pleasure of the association."

association need be stockholders unless the agreement so provides.[1] An unincorporated association may purchase its own stock, and a question of whether a reduction of the capital stock is thereby effected is a question of intention.[2] A bond issued by an unincorporated joint-stock association, negotiable in form, is negotiable in law.[3] An unincorporated express company cannot be compelled to divulge to railroad commissioners the business it does outside of the state, the purpose of the investigation not being connected with taxation.[4] A limited partnership under the Pennsylvania statutes is not a corporation sufficient for purposes of jurisdiction in the federal court.[5]

1 National Casket Co. *v.* Stolts, 135 Fed. Rep. 534 (1905).

2 Booth *v.* Dodge, 60 N. Y. App. Div. 23 (1901). Treasury stock in a limited partnership held in the name of a trustee for the purposes thereof is legal. Stradley *v.* Cargill, etc. Co., 135 Mich. 367 (1904).

3 Hibbs *v.* Brown, 190 N. Y. 167 (1907).

4 State *v.* United States, etc. Co., 81 Minn. 87 (1900).

5 Great, etc. Co. *v.* Jones, 177 U. S. 449 (1900), overruling Andrews Bros. Co. *v.* Youngstown Coke Co., 86 Fed. Rep. 585. A joint stock association is not a corporation as regards the jurisdiction of the federal court. Saunders *v.* Adams, etc. Co., 136 Fed. Rep. 494 (1905). An unincorporated association is not a corporation, so far as the jurisdiction of the federal courts is concerned, even though by statute the members are not liable for its debts. Fred Macey Co. *v.* Macey, 135 Fed. Rep. 725 (1905). An unincorporated express company need not obtain a permit from a state under a statute requiring foreign corporations to do so. Commonwealth *v.* Adams Express Co., 97 S. W. Rep. 386 (Ky. 1906).

A New York joint-stock association cannot sue as such in the federal courts. Chapman *v.* Barney, 129 U. S. 677 (1889). A partnership association under the statutes of Pennsylvania is not a corporation to the extent that the estate of a stockholder is liable on a claim arising after the death of such stockholder. Bodey *v.* Cooper, 82 Md. 625 (1896). Nor is it a corporation within the meaning of the tax statutes. Gregg *v.* Sanford, 65 Fed. Rep. 151 (1895). An association formed under the Pennsylvania statutes is a partnership and not a corporation. Hence it cannot be sued in Massachusetts in the name under which it does business. Edwards *v.* Warren, etc. Works, 168 Mass. 564 (1897). In Carter *v.* Producers' Oil Co., 182 Pa. St. 551 (1897), the court said in regard to Pennsylvania joint-stock associations organized under the statutes: "Whether the partnership association ought to be classified by the professor of legal science as a species of the genus corporation, or the genus partnership, or whether it should be set apart as a new genus, seems to me unimportant. If a corporation, it is so peculiar in its features that the general law of corporations cannot be applied to it without important modifications; if a partnership it so differs from the common type that the general law of partnerships is but slightly applicable. Both the law of corporations and the law of partnerships are to be resorted to in the absence of statutory regulations, the choice being determined by the nature of the feature under consideration. . . . A partnership association differs from the common type of partnerships in that the members vote, and do not act with

Partnership associations organized under the laws of Michigan are controlled by the laws relative to corporations.[1] But the Michigan statute allowing cumulative voting does not apply to an unincorporated joint-stock association, even though the latter exercises certain statutory powers, and not even a provision in the constitution that certain provisions therein shall apply to all associations and joint-stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships affects this conclusion.[2] Under the partnership association statute of Pennsylvania, a by-law may be enacted taking away the voting power from any stock which is sold, even though it is purchased by an existing member.[3] The vice-president or secretary of an unincorporated joint-stock association has no authority to sell any of its property.[4] An unincorporated joint-stock association is not such a general partnership as gives each partner the right to sell property or borrow money.[5]

§ 506. *Joint-stock associations may arise by implication of law.*—Joint-stock associations are generally formed by the mutual agreement and direct intent of the parties. They may, however, arise by implication of law. Thus, an ineffectual attempt at an incorporation may make the parties members, not of a corporation, but of a joint-stock company.[6] In like manner, after the charter of a corporation expires and the parties continue to do business, they do so as a joint-stock company.[7] An unincorporated association of the owners of an irrigation plant may be bound by the by-laws, even though it has no capital stock.[8]

the powers of partners, and in that they are subject to no joint liability. It differs from the common type of corporations in that the members have a right to admit or refuse membership in the company to the transferee of the interest, as well as in some other particulars."

1 Rouse, etc. Co. *v.* Detroit, etc. Co., 111 Mich. 251 (1896).

2 Attorney General *v.* McVichie, 138 Mich. 387 (1904).

3 Carter *v.* Producers' Oil Co., 182 Pa. St. 551 (1897).

4 Spotswood *v.* Morris, 12 Idaho, 360 (1906).

5 Spotswood *v.* Morris, 12 Idaho, 360 (1906).

6 *Re* Mendenhall, 9 Nat. Bankr. Reg. 497 (1874); s. c., 17 Fed. Cas. 10; Whipple *v.* Parker, 29 Mich. 369, 380 (1874); and see ch. XIII, *supra. Cf.* Foster *v.* Moulton, 35 Minn. 458 (1886). A purchaser of stock in a company which both the vendor and the vendee believe to be incorporated, and which has not been incorporated, may rescind, where the vendor stated that the company was incorporated, and it is no defense that the property of the company has since depreciated in value. In this case the attorney was instructed to procure a charter, but made no attempt to do so. Bolton *v.* Prather, 35 Tex. Civ. App. 295 (1904).

7 Watertown Nat. Bank *v.* Landon, 45 N. Y. 410 (1871).

8 Strang *v.* Osborne, 94 Pac. Rep. 320 (Colo. 1908).

§ 507. *How a person becomes a member—Transfers.*—A person becomes a member of a joint-stock company by any act which indicates an intent to become a member on his part, and a consent or acquiescence therein by the company itself.[1] He may also become a member by a transfer made to him of another member's interest, unless the articles of association restrict the right of transfer.[2] A shareholder in an unincorporated joint-stock company who has sold his stock cannot then claim that the association became dissolved by the death of a member.[3] A member of an old association, which

1 The formalities need be no greater than in forming an ordinary partnership. Schuylerville Nat. Bank *v.* Van Derwerker, 74 N. Y. 234 (1878); Pettis *v.* Atkins, 60 Ill. 454 (1871); Machinists' Nat. Bank *v.* Dean, 124 Mass. 81 (1878). *Cf.* Volger *v.* Ray, 131 Mass. 439 (1881). It is not necessary that certificates of the stock be issued in order to constitute membership. Dennis *v.* Kennedy, 19 Barb. 517 (1854); Boston, etc. R. R. *v.* Pearson, 128 Mass. 445 (1880). Evidence of subscription and payment of an assessment is sufficient. Frost *v.* Walker, 60 Me. 468 (1872). But not of subscription without any participation. Hedge's Appeal, 63 Pa. St. 273 (1869).

2 A transfer of the certificate of stock has such effect although not registered in the stock book. Butterfield *v.* Beardsley, 28 Mich. 412 (1874). Transfer may be before the certificates are issued. Butterfield *v.* Spencer, 1 Bosw. 1 (1856). But if the articles of association prohibit transfer, the transferee takes only the right to profits, not as a partner, but as an assignee, and a transfer does not carry dividends already declared. Harper *v.* Raymond, 3 Bosw. 29 (1858). So, also, where transfer is allowed only on consent of certain officers who refuse. Kingman *v.* Spurr, 24 Mass. 235 (1828). If a transfer is improperly allowed, the company is liable to the party injured. Cohen *v.* Gwynn, 4 Md. Ch. 357 (1848). Although an unincorporated association's articles provide that transfers of stock shall be made only with consent of the directors, yet, where such provision is for many years disregarded, a stockholder who so transferred his stock at a time when the assets equaled the liabilities cannot be held liable as a stockholder. Wadsworth *v.* Duncan, 164 Ill. 360 (1896); Wadsworth *v.* Lawrie, 164 Ill. 42 (1896). See also § 622, *infra*. Where an unincorporated partnership issues so-called certificates of stock representing a specified interest in such partnership, and one of the partners assigns his certificates as collateral security and afterwards sells them, the purchaser is entitled to his share of the partnership property and to demand an accounting, even though the certificates provided that they were not transferable. The transfer of such certificates as security need not be recorded as a chattel mortgage. Rommerdahl *v.* Jackson, 102 Wis. 444 (1899). As to the liability of the transferee, see next section.

A member's interest cannot be reached by execution. Kramer *v.* Arthurs, 7 Pa. St. 165 (1847). But see Lindley, Partn. (2d Am. ed.), p. 837. The holders of certificates in an unincorporated irrigating ditch association are tenants in common, and any one may sell his interest without the consent of the other. A transfer conveys his water rights and interest in the property. Biggs *v.* Utah, etc. Co., 7 Ariz. 331 (1901).

3 Taber *v.* Breck, 192 Mass. 355 (1906).

ells all its property to a new one, does not become a member of the ew one until he in some way assents to its constitution and by-laws.[1] . provision in the articles of association of a joint-stock association) the effect that no member nor his executors, administrators, or ther legal representatives should sell or transfer his stock until after , had been offered to the association or other members, does not revent an executor transferring the stock to the residuary legatee.[2]

§ 508. *Liability of members to creditors and to the association.*— . joint-stock company is, in regard to the liability of its members to reditors of the company, a partnership; its members are liable as artners;[3] and the ordinary rules of partnership exist between the

1 Konta *v.* St. Louis, etc., 189 Mo. 5 (1905).

2 Lane *v.* Albertson, 78 N. Y. App. iv. 607 (1903). See also §§ 622*c* ad 622*d*, *infra*.

3 Wadsworth *v.* Duncan, 164 Ill. 360 1896); McFadden *v.* Leeka, 48 Ohio t. 513 (1891); Jenne *v.* Matlack, 41 , W. Rep. 11 (Ky. 1897); Westcott Fargo, 61 N. Y. 542 (1875); Withhead *v.* Allen, 3 Keyes, 562 (1867); ross *v.* Jackson, 5 Hill, 478 (1843); kinner *v.* Dayton, 19 Johns. 513 1822); Wells *v.* Gates, 18 Barb. 554 1854); Boston, etc. R. R. *v.* Pearson, 28 Mass. 445 (1880); Taft *v.* Warde,)6 Mass. 518 (1871); s. c., 111 Mass. 18 (1873); Bodwell *v.* Eastman, 106 Iass. 525 (1871); Tappan *v.* Bailey, 5 Mass. 529 (1842); Cutler *v.* homas, 25 Vt. 73 (1852); Kramer Arthurs, 7 Pa. St. 165 (1847); Gott Dinsmore, 111 Mass. 45 (1872); ewell *v.* Borden, 128 Mass. 31 (1879). ee also § 504, *supra*. *Contra*, Irvine Forbes, 11 Barb. 587 (1852); Livgston *v.* Lynch, 4 Johns. Ch. 573 1820), overruled as dicta by Townend *v.* Goewey, 19 Wend. 424 (1838); llen *v.* Long, 80 Tex. 261 (1891); idenour *v.* Mayo, 40 Ohio St. 9 1883). In Frost *v.* Walker, 60 Me. 38 (1872), the court said: "An unicorporated joint-stock company is mere partnership, and each member ; personally liable for all its debts. ; is important for the public to know hat if persons connect themselves with a company of this description they are every one of them liable to pay the demands upon it." The officers who enter into a contract for the company are liable thereon personally. "It is immaterial whether they be so held because they held themselves out as agents for a principle that had no existence, or on the ground that they must, under the contract, be regarded as principals for the simple reason that there is no other principal in existence." Lewis *v.* Tilton, 64 Iowa, 220 (1884); Fredendall *v.* Taylor, 26 Wis. 286 (1870). Acquiescence in the dealings of other members with third persons binds a member. Pennsylvania Ins. Co. *v.* Murphy, 5 Minn. 36 (1860); Wells *v.* Gates, 18 Barb. 554 (1854). A national bank which has taken as security for a debt and then acquired shares of stock in an unincorporated association, formed for speculative purposes, is not liable on said stock, its acquisition having been *ultra vires*. Merchants' National Bank *v.* Wehrmann, 202 U. S. 295 (1906). Those who actively take part in a purchase are liable whether the others are or not. Winona Lumber Co. *v.* Church, 6 S. D. 498 (1895). A member of a mutual insurance company cannot contest an assessment by the receiver on the ground that it is excessive. Collins *v.* Welch, 141 Mich. 676 (1905). This liability as partners applies only to associations having

members themselves,[1] including the right to contribution as between

a definite membership, and does not apply to a public meeting held to promote the construction of a shoe shop, the subscriptions made at such meeting having been duly paid, even though it was further voted "to stand back of the committee." In any case the suit would be at law and not in equity. Cheney *v.* Goodwin, 88 Me. 563 (1896). A lease to an unincorporated association binds personally all members assenting to it. Reding *v.* Anderson, 72 Iowa, 498 (1887). Members of co-operative trading associations are liable as partners for the debts of the concern. Davidson *v.* Holden, 55 Conn. 103 (1887). And sometimes are liable also for debts contracted after they have sold their stock. See Shamburg *v.* Abbott, 112 Pa. St. 6 (1886). The members of an unincorporated association to enforce the liquor laws are not liable to an attorney for services in prosecuting cases. McCabe *v.* Goodfellow, 133 N. Y. 89 (1892). The vice-president and the treasurer of an unincorporated fair association are liable for premiums offered. Murray *v.* Walker, 83 Iowa, 202 (1891). Members of a joint-stock company are personally liable for the debts of the company. Durham Fertilizer Co. *v.* Clute, 112 N. C. 440 (1893); People *v.* Coleman, 133 N. Y. 279 (1892). In the case of Seacord *v.* Pendleton, 55 Hun, 579 (1890), the court reviewed the authorities and decided that the stockholders in a bank which was not incorporated were not liable to depositors, there being no allegation that the stockholders had any articles of association or partnership, or had performed any act, or had knowledge of the business or consented thereto.

A subscription of specified amounts by several individuals to drill and operate a gas well does not render them partners as to creditors who were aware of the terms of the subscription. Clark *v.* Rumsey, 59 N. Y. App. Div. 435 (1901). See also § 76, *supra*. A joint-stock association to organize and carry on a school is a partnership. Sebastian *v.* Booneville, etc. Co., 56 S. W. Rep. 810 (Ky. 1900). A member of an unincorporated church is not liable for its debts unless he authorized the incurring of the same or ratified them. First, etc. Bank *v.* Rector, 59 Neb. 77 (1899). A note signed by the trustees as trustees of an unincorporated association is personally binding upon them. McKenney *v.* Bowie, 94 Me. 397 (1900). The note of an unincorporated association signed by the treasurer as treasurer may be collected from him personally. Kierstead *v.* Bennett, 93 Me. 328 (1899). A subscriber to stock in an unincorporated association is not re-

[1] Bullard *v.* Kinney, 10 Cal. 60 (1858). The remedy of one member against another is in equity. Huth *v.* Humboldt Stamm, 61 Conn. 227 (1892). One member cannot sue another at law for his part of the profits of the business, which is under control of the latter. Myrick *v.* Dame, 63 Mass. 248 (1852); Duff *v.* Maguire, 99 Mass. 300 (1868); Whitehouse *v.* Sprague, 7 Atl. Rep. 17 (Me. 1886). A person induced to put money into an enterprise on false representations that it is a joint-stock company may recover back his money. Lebby *v.* Ahrens, 26 S. C. 275 (1887). A director of an unincorporated association who contracts for it is not liable personally. Abbott *v.* Cobb, 17 Vt. 593 (1845); Alexander *v.* Worman, 6 H. & N. 100 (1860). A person taking a lease to himself as a committee for an unincorporated association is personally liable thereon. McKinnie *v.* Postles, 4 Pen. (Del.) 16 (1901).

themselves.[1] The members of a pilot association are not personally liable for the negligence of one of them.[2] The members of a political organization are not liable for its debts except debts necessary for the preservation of the association.[3] The individual members of a club are not liable for the salary of the manager, even though the club is unincorporated.[4]

The question whether a stockholder may limit his common-law or statutory liability by an express contract with the company's creditors to that effect is discussed elsewhere.[5] The underwriters of an unincorporated Lloyds insurance association may be liable personally on its policies, even though by the terms of the policy each underwriter assumed only his proportionate part of the loss, where that provision is not prominently set forth. The rule is that the members of an association may contract against personal liability, but the notice to that effect must be so plain and fair that

lieved from liability, even though some of the subscriptions necessary to make up the amount required by the subscription paper were forgeries and others obtained by false representations, if it be shown that the association accepted the building to construct which it was formed. Haney, etc. Co. *v.* Adaza, etc. Co., 108 Iowa, 313 (1899). In Pennsylvania the probate court may allow the executor of an estate to loan the funds of the estate to an unincorporated association in which the estate is interested. *In re* Mustin's Estate, 188 Pa. St. 544 (1898). If proof is given by plaintiff that a copartnership existed, and the defense is that it was a corporation, the defendant must prove that fact. Although the company had a president and secretary, this in itself does not raise a presumption of a corporation. Clark *v.* Jones, 87 Ala. 474 (1889). A notice to stockholders that they will be held liable under a statute is not served on the members of an unincorporated association by serving such notice on the chief officer of such association. Wells *v.* Robb, 43 Kan. 201 (1890). Where a creditor of a bank sues the stockholders as partners, the burden of proof is on him to prove that no corporation existed, it being shown that the bank always acted as a corporation and held itself out as such and was supposed so to be by the stockholders. Hallstead *v.* Coleman, 143 Pa. St. 352 (1891). The supposition or belief of the members that they are not liable beyond the par value of their stock does not protect them from liability. Farnum *v.* Patch, 60 N. H. 294 (1880); and see § 233, note, *supra.*

1 Morrissey *v.* Weed, 12 Hun, 491 (1878); Skinner *v.* Dayton, 19 Johns. 513 (1822); Ray *v.* Powers, 134 Mass. 22 (1883); Whitman *v.* Porter, 107 Mass. 522 (1871); Tyrrell *v.* Washburn, 88 Mass. 466 (1863). But not if the expense was incurred contrary to the articles of association. Danforth *v.* Allen, 49 Mass. 334 (1844); Clark *v.* Reed, 28 Mass. 446 (1831). Where the constitution of an unincorporated association limits the debts, and the directors incur a larger amount of debts, the directors cannot obtain contribution from the stockholders. McFadden *v.* Leeka, 48 Ohio. St. 513 (1891).

2 Guy *v.* Donald, 203 U. S. 399 (1906).

3 Hosman *v.* Kinneally, 43 N. Y. Misc. Rep. 76 (1904).

4 Georgeson *v.* Caffrey, 1 Hun, 472 (1893). See also § 504, *supra.*

5 See § 216, *supra.*

the person contracting with the association knew of it, or it was his own fault that he did not know it.[1] But where the articles of association of an unincorporated joint-stock association provide that the members shall not be personally liable for the debts, a person who loans money to the association on its note, which expressly states that it is given under such articles, cannot hold the members personally liable.[2] The bonds and coupons of an unincorporated joint-stock association may be negotiable, even though they provide against personal liability of the stockholders, and even though the trustee of the mortgage securing their payment may with the consent of a majority of the bondholders in interest waive default in payment of the coupons.[3] A member's subscription in an association may be enforced by a suit at law.[4]

1 Imperial, etc. Co. *v.* Jewett, 169 N. Y. 143 (1901). A case is not made out against the members of an insurance association by proving a policy signed by the manager, there being no proof as to who the members were, even though their names were printed on the back of the policy. Scranton Traction Co. *v.* Schlichter, 202 Pa. St. 6 (1902).

2 Bank of Topeka *v.* Eaton, 100 Fed. Rep. 8 (1900). In the case Hibbs *v.* Brown, 112 N. Y. App. Div. 214, (1906); aff'd, 190 N. Y. 167, the court said (p. 219): "There can be no doubt, however, that it is competent for the members of a joint-stock association to have the contracts so drawn as to confine the liability to the assets, and thus create the same situation as to their rights and liabilities as if the joint-stock association were a corporation and they were stockholders." The members of a joint-stock association are liable as partners, but a creditor may agree to waive such personal liability. Industrial, etc. Co. *v.* Texas, etc. Assoc., 31 Tex. Civ. App. 375 (1903). Coupons are negotiable, even though the trust deed securing them provides for a waiver of default in and postponed payment of such coupons, inasmuch as such provisions merely control any procedure under the trust deed for enforcing payment. Neither is negotiability destroyed by a provision that the members of the unincorporated joint-stock association shall not be personally liable. Hibbs *v.* Brown, 190 N. Y. 167 (1907), a minority of the court declaring, however that the provision exempting the stockholders from personal liability was void.

3 Hibbs *v.* Brown, 112 N. Y. App. Div. 214 (1906); aff'd, 190 N. Y. 167.

4 If the subscription runs to the trustees personally they may sue thereon. Otherwise all must join as plaintiffs. Cross *v.* Jackson, 5 Hill, 478 (1843); Townsend *v.* Goewey, 19 Wend. 424 (1838). It seems that a subscription to a voluntary association is enforceable by a corporation which took the place of the proposed voluntary association, where the subscriber knew of the change of plan and did not object. Osborn *v.* Crosby, 63 N. H. 583 (1885). Subscriptions to its stock are collectible the same as subscriptions to stock of corporations. Bullock *v.* Falmouth, etc. Co., 85 Ky. 184 (1887). See ch. IV, *supra.* A subscription agreement signed by various parties to pay the amount set opposite their respective names towards a creamery is several and not joint. Cornish *v.* West, 82 Minn. 107 (1901). A citizen of Maryland who holds a loss claim against a Pennsylvania mutual insurance company which is insolvent cannot have

In enforcing the liability of members of a joint-stock company by a suit in equity, if the parties are very numerous or unknown, they need not all be joined as defendants.[1] Suits by or against unincorporated associations must be brought in the name of or against all the members.[2] One stockholder cannot bring a suit at law against

a receiver appointed in Maryland if it is impracticable for the Maryland courts to levy the necessary assessments to wind up the affairs of the association. Stockley *v.* Thomas, 89 Md. 663 (1899).

1 Mandeville *v.* Riggs, 2 Pet. 482 (1829), reversing Riggs *v.* Swann, 3 Cranch, C. C. 183 (1827); s. c., 20 Fed. Cas. 788. See also Phipps *v.* Jones, 20 Pa. St. 260 (1853); Dennis *v.* Kennedy, 19 Barb. 517 (1854); Wood *v.* Draper, 24 Barb. 187 (1857); Smith *v.* Lockwood, 1 Code Rep. (N. S.) 319 (1851); Birmingham *v.* Gallagher, 112 Mass. 190 (1873); Snow *v.* Wheeler, 113 Mass. 179 (1873); Pipe *v.* Bateman, 1 Iowa, 369 (1855); Marshall *v.* Lovelass, Cam. & N. (N. C.) 217 (1801); Lloyd *v.* Loaring, 6 Ves. Jr. 773 (1802); Deems *v.* Albany, etc. Line, 14 Blatchf. 474 (1878); s. c., 7 Fed. Cas. 348. See also note 3, p. 1357, *supra.* As regards the practice in bringing actions against members of an unincorporated association, see Kneeland, Attachments, ch. XVI. The directors of an unincorporated club may be personally sued on a lease without joining the remaining members. Pelton *v.* Place, 71 Vt. 430 (1899). The trustees of an unincorporated association may sue on a bond given to them and need not add their title as plaintiffs. Hecker *v.* Cook, 20 Colo. App. 282 (1904). In New Jersey an unincorporated express company may be sued in its own name whether it be regarded as a corporation or not. Saunders *v.* Adams Exp. Co., 71 N. J. L. 520 (1904). Although an unincorporated express company is sued as a company, yet the proofs may show that it is a partnership. A statute relative to "express companies" applies to an unincorporated company. United States Exp. Co. *v.* State, 164 Ind. 196 (1905).

2 Williams *v.* Bank of Michigan, 7 Wend. 539, 542 (1831); Detroit Schuetzen Bund *v.* Detroit Agitations Verein, 44 Mich. 313 (1880); Mears *v.* Moulton, 30 Md. 142 (1868); McGreary *v.* Chandler, 58 Me. 537 (1870). In Minnesota suits by or against an unincorporated association must be in the names of members. St. Paul, etc. *v.* St. Paul, etc., 94 Minn. 351 (1905). Where the bondholders are reconstructing the property they may be personally liable, but a suit against them must be against them individually and not as "bondholders." Standard, etc. Co. *v.* Muncey, 33 Tex. Civ. App. 416 (1903). Where several persons construct a telephone line, each paying his proportion of the cost, the telephone line to be for their personal use, and there being no profit involved, they are liable jointly for repairs, but they are not partners, and in a suit against them all must be joined. Clements *v.* Miller, 13 N. Dak. 176 (1904). An unincorporated trade union cannot be sued in its company name, but must be sued in the name of all its members. Karges, etc. Co. *v.* Amalgamated, etc. 165 Ind. 421 (1905). An unincorporated telephone association cannot maintain a suit in the name of two of its members for themselves and the others. Westbrook *v.* Griffin, 132 Iowa 185 (1906). One or more members of an unincorporated association may sue for the benefit of all. Liggett *v.* Ladd, 17 Oreg. 89 (1888). In Perine *v.* Grand Lodge A. O. U. W., 48 Minn. 82 (1892), where an insurance policy was sued upon, the court held that it was immaterial that the defendant was

another on a demand growing out of the association until a settlement and a balance is struck, unless payment is fraudulently withheld, the parties being partners.[1] But often suit may be maintained against the officers or a committee of a voluntary association without bringing in all the members.[2] An unincorporated association formed for pecuniary profit is a partnership, it being different in this respect from an association formed for other objects. The obligation of its members for the debts is joint, and if a creditor enters a judgment against one of the members, he cannot thereafter obtain judgment against any other member.[3] A statute may provide that service upon an officer of an unincorporated association shall be binding on all the parties in enforcing their liability.[4] A member who transfers his interest is nevertheless liable for precedent debts of the association.[5] Members who sell their stock and withdraw are liable for subsequent debts where proper notice of their withdrawal has not been given, the same as in a partnership.[6] The members are liable for past contracts, even though they dissolve the association.[7] A purchaser of stock in an unincorporated association is not liable to creditors for debts contracted before he became a member.[8] The

not incorporated, inasmuch as it had held itself out as a corporation. The court may direct a writ of *mandamus* to be served upon the resident general agent of the company. State *v.* Adams, etc. Co., 66 Minn. 271 (1896). By statute, in Ohio, one or more of the stockholders may sue for the benefit of the association. Platt *v.* Colvin, 50 Ohio St. 703 (1893). In a suit against an unincorporated association, the members of which are so scattered as to render service upon all impossible, service upon its officers is sufficient to give the court jurisdiction over the members. An unincorporated association acting as a corporation may be sued as a corporation in its corporate name by one of its members. Fitzpatrick *v.* Rutter, 160 Ill. 282 (1895). A member of an unincorporated church may bring suit in behalf of himself and the other members for a debt due the church. Perkins *v.* Siegfried's Adm'r, 97 Va. 444 (1899). As to a bill in equity in the United States court against an unincorporated association having many members, see Amer. Steel, etc. Co. *v.* Wire Drawers', etc. Unions, 90 Fed Rep. 598 (1898). An agreement between an improvement company and purchasers of lots that the profits will be used for certain improvements may be enforced by one lot purchaser in behalf of all. Whiting *v.* Elmira, etc. Assoc., 45 N. Y. App. Div. 349 (1899).

1 Milligan *v.* Mackinlay, 209 Ill. 358 (1904).

2 Spaulding *v.* Evenson, 149 Fed. Rep. 913 (1906); aff'd, 150 Fed. Rep. 517.

3 United Press *v.* Abell Co., 87 N. Y. App. Div. 345 (1903).

4 Patch Mfg. Co. *v.* Capeless, 79 Vt. 1 (1906).

5 Morgan's Case, 1 De G. & Sm. 750 (1849); Tyrrell *v.* Washburn, 88 Mass. 466 (1863). For the liability as affected by the transfer of stock, see Smith *v.* Virgin, 33 Me. 148 (1851).

6 New York, etc. Bank *v.* Crowell, 177 Pa. St. 313 (1896).

7 Camden, etc. R. R. *v.* Guarantors of Pennsylvania, 59 N. J. L. 328 (1896).

8 Christy *v.* Sill, 131 Pa. St. 492

rights and liabilities of a member depend upon the law of the place of the domicile of the company itself.[1] The rules applicable to stockholders in corporations are, by analogy, applied to members in these companies, especially as regards their defenses to subscriptions [2] and meetings of the company.[3] These associations cannot be taxed on a franchise, as corporations may be.[4] Although a law library corporation has a capital stock which is fully paid, yet a by-law may assess annual dues upon the members.[5] In Rhode Island it is held that *mandamus* does not lie against an unincorporated association nor its officers in their official or unofficial capacity.[6]

§ 509. *Actions by members against officers and the association.*— The members may bring an action to remedy the fraud,[7] *ultra*

(1890). The transferee of a share in an unincorporated company is liable for all debts existing at the time of or after the transfer. Taylor *v.* Ifill, 1 N. R. 566 (1863). Although a stockholder purchased his stock from the association, which was insolvent at the time, yet he cannot offset this as capital contributed by him. Barndollar *v.* Du Bois, 142 Pa. St. 565 (1891). A member is not liable for debts contracted before he became a member. Hornberger *v.* Orchard, 39 Neb. 639 (1894).

1 Cutler *v.* Thomas, 25 Vt. 73 (1852).

2 That the full capital stock must be subscribed before any subscription is collectible; see Bray *v.* Farwell, 81 N. Y. 600 (1880). *Contra*, Tappan *v.* Bailey, 45 Mass. 529 (1842); Boston, etc. R. R. *v.* Pearson, 128 Mass. 445 (1880); Pitchford *v.* Davis, 5 M. & W. 2 (1839). Forfeiture of stock releases the member only as to subsequent debts. Skinner *v.* Dayton, 19 Johns. 513 (1822).

3 See § 505, *supra*.

4 Hoadley *v.* Essex County, 105 Mass. 519 (1870); Gleason *v.* McKay, 134 Mass. 419 (1883), holding the statute to be unconstitutional. *Cf.* § 505, *supra*.

5 Omaha L. L. Assoc. *v.* Connell, 55 Neb. 396 (1898). *Cf.* §§ 241–243, *supra*.

6 Doyle *v.* Burke, 69 Atl. Rep. 362 (R. I. 1908).

7 The other members are not proper parties. Boody *v.* Drew, 46 How. Pr. 459 (1874). A farmers' co-operative store carried on by farmers who contribute to the capital and take a certificate of stock is a partnership, it being unincorporated, and if the manager by a fraudulent chattel mortgage gets possession of the assets he may be brought to account therefor by one of the members. Snyder *v.* Lindsey, 157 N. Y. 616 (1899). An officer may be enjoined, but not removed. The suit must not be in the interest of a rival company. Waterbury *v.* Merchants' Union Exp. Co., 50 Barb. 157 (1867). Trustees receiving gifts are liable therefor to the company. *Re* Fry, 4 Phila. Rep. 129 (1860). Trustees cannot sell to the company. Robbins *v.* Butler, 24 Ill. 387 (1860). The treasurer may be compelled to pay over funds belonging to the company. Sharp *v.* Warren, 6 Price, 131 (1818). The trustees are liable in tort for their frauds on the company. Dennis *v.* Kennedy, 19 Barb. 517 (1854). A committee to build may be made to account where they secretly contract with themselves, though the contract is nominally with other persons. Whitman *v.* Bowden, 27 S. C. 53 (1887).

vires acts,[1] and negligence[2] of the trustees. In New York a member may, by statute, sue the company, in the same manner that a stockholder in a corporation may sue the corporation.[3] A bill in equity by a member of an unincorporated association to enjoin the directors from enforcing an alleged illegal by-law must join all the directors as defendants.[4]

§ 510. *Dissolution — Disposition of property.*—Where the term of existence of a joint-stock company is fixed by its articles of association, it cannot be dissolved at the instance of a member before the expiration of that time.[5] It may, however, be dissolved where

1 A member cannot be compelled to accept the stock of another company for his interest, a consolidation of the two having been made. Frothingham *v.* Barney, 6 Hun, 366 (1876). But he may not be able to prevent the consolidation. McVicker *v.* Ross, 55 Barb. 247 (1869). An *ultra vires* act may be enjoined. Abels *v.* McKeen, 18 N. J. Eq. 462 (1867). The members need not make good the officers' debts paid by the latter, growing out of *ultra vires* acts. Crum's Appeal, 66 Pa. St. 474 (1870). But the officers themselves are liable to third persons. Sullivan *v.* Campbell, 2 Hall (N. Y.), 271 (1829). And possibly the members. Sullivan *v.* Campbell, 2 Hall (N. Y.), 271 (1829). If a member has not participated or acquiesced in the *ultra vires* act he is not liable thereon. Roberts's Appeal, 92 Pa. St. 407 (1880). *Cf.* Van Aernam *v.* Bleistein, 102 N. Y. 355 (1886), holding the members liable for a libel; aff'g Van Aernam *v.* McCune, 32 Hun, 316.

2 *Re* Fry, 4 Phila. 129 (1860). The trustees of an unincorporated bank are liable for depositing its money with a stock brokerage house even though the agreement exempted them from liability except for willful misconduct. Holmes *v.* McDonald, 226 Ill. 169 (1907).

3 Code Civ. Proc., § 1919; Westcott *v.* Fargo, 61 N. Y. 542 (1875); Saltsman *v.* Shults, 14 Hun, 256 (1878). At common law the name is not recognized and the suit would fail. Habicht *v.* Pemberton, 4 Sandf. 657 (1851); Pipe *v.* Bateman, 1 Iowa, 369 (1855); Ewing *v.* Medlock, 14 Ala. (O. S.) 82 (1837); Schmidt *v.* Gunther, 5 Daly, 452 (1874).

4 Greer, etc. Co. *v.* Stoller, 77 Fed. Rep. 1 (1896).

5 Von Schmidt *v.* Huntington, 1 Cal. 55 (1850). See also Smith *v.* Virgin, 33 Me. 148 (1851). *Cf.* Lindley, Partn. 234; Lafond *v.* Deems, 81 N. Y. 507 (1880). The minority cannot force a dissolution as in the case of partnership. Equity will not aid, unless there is good reason for dissolution. Hinkley *v.* Blethen, 78 Me. 221 (1886). The minority of an Odd Fellows' lodge cannot compel a sale of the property and distribution. Robbins *v.* Waldo Lodge, 78 Me. 565 (1887); and see Bagley *v.* Smith, 10 N. Y. 489 (1853). Where the articles of association of an unincorporated joint-stock association authorize dissolution at any time upon the vote of a majority in interest, such dissolution may be had, although it is for the purpose of transferring all the assets to a foreign corporation for stock of the latter, the privilege, however, being given to each stockholder to receive payment in cash on the basis of a certain valuation of the assets, which valuation is fair and adequate. Francis *v.* Taylor, 31 N. Y. Misc. Rep. 187 (1900). The nature of a horticultural society issuing a certificate of interest in the property to each member was considered in *Re* Jones, [1898] 2 Ch. 83,

the enterprise becomes wholly impracticable or its attainment impossible, but not always because of the misconduct of its officers.[1] The death of a member does not dissolve it;[2] nor does a transfer of one's interest.[3] The dissolution of one of the subordinate unincorporated organizations by the general organization does not vest in the latter the property of the former.[4] The incorporation of the association by a part of the members does not dissolve the association.[5] The incorporation of an association is a material change in the association, which is not legal unless authorized by an amend-

upon an application for dissolution and distribution of the assets. An unincorporated bank which is owned entirely by one individual is his private property, even though the bank has a president and cashier. Longfellow *v.* Barnard, 58 Neb. 612 (1899). A court will wind up a partnership, even before its fixed time of existence has expired, if it is insolvent or unprofitable or incapable of proceeding. Jennings *v.* Baddeley, 3 K. & J. 78 (1856); Baring *v.* Dix, 1 Cox, Ch. 213 (1786); Bailey *v.* Ford, 13 Sim. 495 (1843); Holladay *v.* Elliott, 8 Oreg. 84 (1879); Seighortner *v.* Weissenborn, 20 N. J. Eq. 172 (1869); Brien *v.* Harriman, 1 Tenn. Ch. 467 (1873); Howell *v.* Harvey, 5 Ark. 270 (1843); Van Ness *v.* Fisher, 5 Lans. 236 (1871).

1 Waterbury *v.* Merchants' Union Exp. Co., 50 Barb. 157 (1867). *Contra*, Mills *v.* Hurd, 32 Fed. Rep. 127 (1887).

2 McNeish *v.* U. S. Hulless Oat Co., 57 Vt. 316 (1884). *Cf.* Walker *v.* Wait, 50 Vt. 668 (1878). The death of a stockholder does not dissolve the association nor release his estate from subsequently incurred debts. Phillips *v.* Blatchford, 137 Mass. 510 (1884). The death of a member does not dissolve the company, but if it has not paid dividends for twenty-three years and is not likely to pay any, a court may decree dissolution. Willis *v.* Chapman, 68 Vt. 459 (1896). The death of a shareholder does not dissolve an unincorporated joint-stock association where the agreement under which it was organized provides to the contrary. Spotswood *v.* Morris, 12 Idaho 360 (1906). A shareholder in an unincorporated joint-stock company who has sold his stock cannot then claim that the association became dissolved by the death of a member. Taber *v.* Breck, 192 Mass. 355 (1906).

3 A transfer of his stock by a member does not dissolve a joint-stock association under the Pennsylvania law. *Re* Globe Refining Co., 151 Pa. St. 558 (1892).

4 Wicks *v.* Monihan, 130 N. Y. 232 (1891). The withdrawal of a charter by a higher body from one of its branches does not affect the right of the latter to its property. Wells *v.* Monihan, 129 N. Y. 161 (1891).

5 See Schwartz *v.* Duss, 187 U. S. 8 (1902). A part of the members of an unincorporated association cannot proceed to incorporate it against the objections of the others. Rudolph *v.* Southern Ben. League, 23 Abb. N. C. 199 (1889). Where an unincorporated association appoints a committee to incorporate, and they do so, and then proceed to run an opposition business, the association cannot enjoin them from so doing. Paulino *v.* Portuguese Ben. Assoc., 18 R. I. 165 (1893). A committee appointed by a voluntary association to obtain a charter may incorporate in the name of the voluntary association, and the association cannot enjoin the use of such name. Paulino *v.* Portuguese Ben. Assoc., 18 R. I. 165 (1893).

ment to its articles of association.[1] Upon dissolution the trustees of the company are bound to convert the property into cash and distribute it.[2] On winding up an unincorporated banking association,

1 National Grand Lodge *v.* Watkins, 175 Pa. St. 241 (1896). Where the president of an unincorporated association issues treasury stock and thereby obtains control of the association and sells it out to a corporation organized by himself, the minority stockholders of the association may compel him to account for the property. As regards the person to whom the stock was issued, however, a general allegation that he acted in connection with the president is not sufficient to render him liable on the ground of fraud. Booth *v.* Dodge, 60 N. Y. App. Div. 23 (1901). Where an unincorporated association unanimously agrees to incorporate and does so, all rights pass to the new corporation. Red, etc. Club *v.* Red, etc. Club, 108 Iowa, 105 (1899). Where at the time of the organization of a voluntary association, the statutes authorized such an association to become a corporation, a dissenting member cannot prevent such incorporation subsequent to organization. Spiritual, etc. *v.* Vincent, 127 Wis. 93 (1906). A trustee holding property for various persons cannot transfer it to a corporation in exchange for stock of the latter, even though the trust agreement authorizes a sale and provides that the proceeds of the sale shall be divided among the beneficiaries. In a suit to enjoin such sale an action to hold members of the executive committee personally liable for conspiracy should not be joined. Moody *v.* Flagg, 125 Fed. Rep. 819 (1903). The benefits given by a certificate issued by a fraternal benefit or life insurance association, cannot be modified by amendments to the by-laws, even though the certificate provided that the applicant should conform to all by-laws then in force or thereafter adopted, and even though the certificate of incorporation provided that beneficiaries should receive such sums as the by-laws from time to time prescribed. Evans *v.* So. Tier, etc. Assoc., 182 N. Y. 453 (1905).

2 Frothingham *v.* Barney, 6 Hun, 366 (1876); Butterfield *v.* Beardsley, 28 Mich. 412 (1874). Upon the expiration of the time for which the company was organized it becomes dissolved, and the assets must be distributed if any one of the members insists thereon. Mann *v.* Butler, 2 Barb. Ch. 362 (1847). As to the distribution of funds of an incorporated benevolent association, see Ashton *v.* Dashaway Assoc., 84 Cal. 61 (1890). As to the land, see § 504, *supra*. As to the rules governing the distribution of the assets of a mutual benefit building corporation, see People *v.* Lowe, 117 N. Y. 175 (1889). Where the purpose of the organization of a volunteer fire department ceases, and the fund is placed in the hands of trustees for specified purposes, which are not carried out, the money does not go to the state but belongs to the members and their personal representatives. Hopkins *v.* Crossley, 138 Mich. 561 (1904). The winding up of a land-owning joint-stock association was involved in Randolph *v.* Nichol, 74 Ark. 93 (1905). Where a joint-stock association having $12,000,000 surplus invested in securities issues its bonds to the amount of $12,000,000 to its stockholders as a dividend in place of distributing such securities or the proceeds thereof, the interest on the bonds to be paid only from the income from the securities after paying the debts, such bonds do not belong to a life tenant, but belong to the remaindermen. D'Ooge *v.* Leeds, 176 Mass. 558 (1900). Where a majority of a voluntary association secede from the higher organization to

past stockholders do not participate in the final distribution, even though they paid past debts.[1] One stockholder cannot sue another at law for his part of the assets.[2] In proceedings for a dissolution all the members need not be made parties.[3] Where an express company, being an unincorporated stock association, has twelve million dollars surplus and invests it in outside securities, and then deposits the securities with a trust company in New York, and then makes a bond dividend, the bonds to be payable only out of such securities, and the creditors of the company to have recourse to such securities, a tax cannot be levied thereon in Kentucky.[4]

which the lower one belongs, they cannot take the property with them. Gorman *v.* O'Connor, 155 Pa. St. 239 (1893). In general, see Clegg *v.* Ellison, [1898] 2 Ch. 83.

1 Stockdale *v.* Maginn, 207 Pa. St. 227 (1903).

2 Whitehouse *v.* Sprague, 7 Atl. Rep. 17 (Me. 1886).

3 Such as non-residents who cannot be reached. Angell *v.* Lawton, 76 N. Y. 540 (1879). The complainant may bring the proceeding in behalf of himself and others having a common interest with him. Mann *v.* Butler, 2 Barb. Ch. 362 (1847).

4 Coulter *v.* Weir, 127 Fed. Rep. 897 (1904); modified, 128 Fed. Rep. 1019.

CHAPTER XXX.

STOCKHOLDERS' RIGHT TO INSPECT THE BOOKS OF THE CORPORATION.

§ 511. *Common-law rights.*—The stockholders of a corporation had, at common law, a right to examine at any reasonable time, and for any reasonable purpose, any one or all of the books and records of the corporation.[1] This rule grew out of an analogous

[1] "At common law the stockholders of a corporation had the right to examine, at reasonable times, the records and books of the corporation." Stone *v.* Kellogg, 165 Ill. 192 (1896). Stockholders "have the right, at common law, to examine and inspect all the books and records of the corporation at all seasonable times, and to be thereby informed of the condition of the corporation and its property." Per Redfield, J., in Lewis *v.* Brainerd, 53 Vt. 519 (1881). In Commonwealth *v.* Phœnix Iron Co., 105 Pa. St. 111 (1884), the court said: "In the absence of agreement, every shareholder has the right to inspect the accounts —a right subject to the necessities of the company, yet existing. . . . The doctrine of the law is that the books and papers of the corporation, though of necessity kept in some one hand, are the common property of all the stockholders." The right exists although "its exercise be inconvenient to the book-keepers and managers of the partnership business." In Huylar *v.* Cragin Cattle Co., 40 N. J. Eq. 392 (1895), the court said: "Stockholders are entitled to inspect the books of the company for proper purposes at proper times . . . and they are entitled to such inspection though their only object is to ascertain whether their affairs have been properly conducted by the directors or managers. Such a right is necessary to their protection." Deaderick *v.* Wilson, 8 Baxt. (Tenn.) 108 (1874). "The minority stockholder should have the same right to require a statement from the company." Sage *v.* Culver, 71 Hun, 42 (1893); aff'd, 147 N. Y. 241. A stockholder is not entitled as a matter of right to inspect the stock book or other books of the bank. The court will not, although it has the power, grant a *mandamus* for the inspection of the stock book or other books of a bank, unless some special grounds be disclosed to warrant it. *Re* Bank of

rule applicable to public corporations and to ordinary copartnerships, the books of which, by well-established law, are always open to the inspection of members.[1] The general rule is that a stockholder has a right to examine the original papers and vouchers of the corporation, where some property right is involved, or some controversy exists, or some specific and valuable interest is in question, to settle which an inspection of these documents is necessary.[2] The supreme court of the United States has held that a stockholder in a national bank is entitled to inspect its books, accounts, and loans, to ascertain the value of his stock, and whether the business was carried on according to law, and if the inspection is refused a state court may enter judgment of *mandamus* requiring the corporation to allow it.[3] A stockholder in a street railway, which has sold its property and ceased to do business, is entitled to examine the books to ascertain the financial condition, and its financial transactions, and also to ascertain the value of his stock, and may have *mandamus* for that pur-

Upper Canada *v.* Baldwin, 1 Draper (K. B. Can.), 55 (1829). A stockholder in a New York corporation has a common-law right to examine the books and papers of the corporation where a proposition has been made for the purchase of all the stock of the company and the dividends have been greatly reduced. *Re* Application of Steinway, 31 N. Y. App. Div. 70 (1898); aff'd, 159 N. Y. 250. As to the general right of a stockholder to examine the books of a corporation and the recognition of such right in equity by discovery, see Gresley, Eq. Ev. 116, 117; Kynaston *v.* East India Co., 3 Swanst. 249 (1819); Bolton *v.* Liverpool, 3 Sim. 467 (1831); s. c., 1 Myl. & K. 88; Brace *v.* Ormond, 1 Meriv. 409 (1816).

1 Quoted and approved in Matter of Steinway, 159 N. Y. 251 (1899). Commonwealth *v.* Phœnix Iron Co., 105 Pa. St. 111 (1884). As to the right to inspection and to take copies of records in a county clerk's or register's office, see Randolph *v.* State, 82 Ala. 527 (1886); Hanson *v.* Eichstaedt, 69 Wis. 538 (1887); Brewer *v.* Watson, 71 Ala. 299 (1882); Phelan *v.* State, 76 Ala. 49 (1884); Webber *v.* Townley, 43 Mich. 534 (1880); Diamond Match Co. *v.* Powers, 51 Mich. 145 (1883); People *v.* Cornell, 47 Barb. 329 (1866); People *v.* Reilly, 38 Hun, 429 (1886); People *v.* Richards, 99 N. Y. 620 (1885).

2 Ellsworth *v.* Dorwart, 95 Iowa, 108 (1895).

3 Guthrie *v.* Harkness, 199 U. S. 148 (1905), citing § 511, *supra.* The court said: "The decisive weight of American authority recognizes the common-law right of the shareholder, for proper purposes and under reasonable regulations as to place and time, to inspect the books of the corporation of which he is a member. . . . The right of inspection rests upon the proposition that those in charge of the corporation are merely the agents of the stockholders who are the real owners of the property. . . . In issuing the writ of *mandamus* the court will exercise a sound discretion and grant the right under proper safeguards to protect the interests of all concerned. The writ should not be granted for speculative purposes or to gratify idle curiosity or to aid a blackmailer, but it may not be denied to the stockholder who seeks the information for legitimate purposes."

pose.[1] A by-law that no stockholder should have a right to examine the books of the corporation, except by special authority from the board of directors, is illegal under the Louisiana constitution.[2]

A director has an absolute right to examine all the books of the company,[3] even though he is hostile to the corporation.[4] But in Connecticut a contrary rule is laid down where he is seeking information in order to organize a rival company.[5] Where a director acquires knowledge of a secret process and then enters the employ of another company and uses it for the latter company he may be enjoined.[6]

1 State *v.* St. Louis, etc. Co., 124 Mo. App. 111 (1907).

2 State *v.* Citizens' Bank, etc., 51 La. Ann. 426 (1899).

3 People *v.* Throop, 12 Wend. 181 (1834); Charlick *v.* Flushing R. R., 10 Abb. Pr. 130 (1860); *Re* Ciancimino, N. Y. L. J. Dec. 23, 1890. *Cf.* State *v.* Einstein, 46 N. J. L. 479 (1884). A director has an absolute right to examine the books of the company and may have a *mandamus* to enforce that right. People *v.* Central Fish Co., 117 N. Y. App. Div., 77 (1907). A director of a New York corporation is entitled as a matter of right to a pre-emptory *mandamus* allowing him to examine the books either alone or with the aid of some competent person approved by the court, but he cannot continue the examination for three months, when four weeks is enough, and cannot have a number of accountants assist him when one is enough. People *v.* Columbia, etc. Co., 103 N. Y. App. Div., 208 (1905). Even though the secretary and treasurer takes away and secretes all the books and papers of the company, yet the president cannot have a receiver appointed in order to carry on the business and collect accounts, no charge of fraud being made and no request to the board of directors being shown. Fallon *v.* United States, etc. Co., 86 N. Y. App. Div. 29 (1903). A corporation may maintain replevin to recover its records and seal from one who claims to be its secretary. Stovell *v.* Alert, etc. Co., 38 Col. 80 (1906). The president of a corporation is entitled to a *mandamus* directing the secretary to allow him and his attorney to inspect the stock book and make extracts therefrom, and it is immaterial what the motive of the president is. "An inspection of its books by the president of the company is a matter of right." People, etc. *v.* Goldstein, 37 N. Y. App. Div. 550 (1899). Where a director was not qualified and a new director has been elected in his place, the former cannot have *mandamus* to allow him to inspect the company's books and exercise other rights of a director, even though for a time he was permitted to act as director. People *v.* N. Y., etc. Co., 34 N. Y. Misc. Rep. 326 (1901). After the courts have decided that certain persons are directors, *mandamus* will be granted that the defeated parties turn over the books and papers to the former. Matter of Journal Pub. Club, 30 N. Y. Misc. Rep. 326 (1900).

4 People *v.* Throop, 12 Wend. 181 (1834).

5 A director who is actively organizing a rival company has no right to examine the latter files of the former in order to aid the latter. The secretary may forcibly take them from him. Heminway *v.* Heminway, 58 Conn. 443 (1890).

6 Vulcan Detinning Co. *v.* American Can Co., 67 Atl. Rep. 339 (N. J. 1907).

A creditor of the corporation or any person who is a stranger to it can obtain access to its record by a bill in equity for discovery.[1] Corporate books in the hands of a receiver should be open to all parties.[2]

§ 512. *Common-law action for damages for refusal.*—The legal right of a stockholder of a corporation to examine the corporate books is a right which gives him a cause of action at law for damages against the corporate officers if they refuse to allow the inspection.[3] The plaintiff is entitled to nominal damages, and to such further damages as he may prove. It has been held that he need not allege or prove any special reason or purpose of his desire and request to examine the books;[4] but the vast size of modern

1 A bill of discovery lies at instance of corporate creditors in the courts of one state to compel corporate officers to give the names of stockholders of the corporation in another state with a view to enforcing the statutory liability in the latter state. Post *v.* Toledo, etc. R. R., 144 Mass. 341 (1887). As to the remedy by subpœna, etc., see § 519, *infra.*

2 See § 872, *infra; Re* Kent, etc. Syndicate, [1898] 1 Q. B. 754. A receiver of an insolvent bank must allow the district attorney to examine the books and papers to ascertain the condition of the bank and whether the officers had criminally received deposits after the bank became insolvent. McElree *v.* Darlington, 187 Pa. St. 593 (1898).

3 Lewis *v.* Brainerd, 53 Vt. 510 (1881). A stockholder has the legal right to inspect the books of the corporation of which he is a member, but the company is not liable for a refusal of the secretary to allow a stockholder to examine the books. Legendre *v.* New Orleans Brewing Assoc., 45 La. Ann. 669 (1893). Where the president has custody of the books and refuses to allow a stockholder to examine them, and the stockholder desires to examine them for the purpose of ascertaining whether he should sell his stock, and is obliged to obtain a *mandamus*, he may hold the president liable in an action for damages, and if the price of the stock has fallen during the delay in obtaining access to the books his measure of damages is his loss, especially where the president was in the meantime selling his own stock. Bourdette *v.* Sieward, 52 La. Ann. 1333 (1900). In a suit by a stockholder against an officer for damages for refusal to allow him to examine the books, remote, collateral and speculative damages cannot be recovered. Even though he alleges that he would have sold his stock if he had been allowed to examine the books, and that the stock subsequently declined in price, yet if there was no mismanagement and the decline of the stock is due to causes which an inspection of the books would not disclose, he cannot recover the loss due to the decline in the stock. Bourdette *v.* Sieward, 107 La. 258 (1902). A minority stockholder is not entitled to a receiver in a suit brought by him for an accounting and winding up the company, even though he is refused an inspection of the books of the company, and especially so where he was denied the right for several years for the reason that he did not pay his subscription, and he finally sold his stock. Ridpath *v.* Sans Poil, etc. Co., 26 Wash. 427 (1901).

4 Lewis *v.* Brainerd, 53 Vt. 510 (1881).

corporations, with thousands of stockholders and many clerks, renders it impossible to open all the books to all the stockholders, and renders necessary the rule that some good reason be given by the stockholder applying to examine the books. A stockholder in a New Jersey corporation cannot maintain a suit in equity to require the corporation to bring its books into the state merely that he may have access to them.[1]

§ 513. *Mandamus is the preferable remedy.*—An action for damages is generally totally inadequate as a remedy.[2] The stockholder wishes to inspect the corporate books and does not wish damages or a lawsuit. Accordingly, in certain cases, upon the application of a stockholder who has been denied the privilege of examining the corporate records, it has been the practice of the courts to issue a *mandamus* to the corporate officers commanding them to allow a specified stockholder to examine the books of the corporation.[3] The remedy of a stockholder who wishes to examine the corporate books in order to bring suit against the directors for fraud is by *mandamus,* not by an order for inspection.[4] The usual statute giving to the courts the power to order a corporation to allow its stockholders to examine its books does not take away the common-law right of stockholders to have such an inspection, and does not take away the power of the court to grant a *mandamus* to enforce such common-law

1 Maeder *v.* Buffalo, etc. Co., 132 Fed. Rep. 280 (1904).

2 In Cockburn *v.* Union Bank, 13 La. Ann. 289 (1858), the court said a suit for damages "might last for a long time and petitioner suffer great loss by being debarred from an examination" of the books. "He does not ask for damages, but for the exercise of a right. If he has the right he ought to have the exercise of it as soon as possible; for the deprivation of his right cannot, perhaps, be accurately estimated in damages. It may be many years before the amount of the damage can be known."

3 Guthrie *v.* Harkness, 199 U. S. 148 (1905). "It would seem, from the weight of authority and in reason, that a shareholder is entitled to *mandamus* to compel the *custos* of corporate documents to allow him an inspection, and copies of them, at reasonable times, for a specific and proper purpose, upon showing a refusal on the part of the *custos* to allow it, and not otherwise." Commonwealth *v.* Phœnix Iron Co., 105 Pa. St. 111 (1884); s. c. *sub nom.* Phœnix Iron Co. *v.* Commonwealth, 113 Pa. St. 563 (1886), explaining the method of procedure, and holding that the applicant need not institute a suit in a court of equity. The old rule that *mandamus* will issue only for a public purpose is no longer a rule of law so as to prevent its use herein. Commonwealth, etc., *supra,* questioning Rex *v.* Bank of England, 2 B. & Ald. 620 (1819); and Rex *v.* London Assur. Co., 5 B. & Ald. 899 (1822); s. c., 1 Dowe & R. 510. See also Rex *v.* Clear, 4 Barn. & C. 899 (1825); Foster *v.* White, 86 Ala. 467 (1889).

4 Walsh *v.* Press Co., 48 N. Y. App. Div. 333 (1900).

right.[1] A stockholder's bill against a corporation and directors may be to remedy certain alleged frauds, and also incidentally to obtain a disclosure and discovery. The stockholder need not resort to a *mandamus*.[2] Even though a stockholder is also a stockholder in a competing company, yet he is entitled to examine the books and records of his company, a trading corporation, on his allegations showing reckless mismanagement, and an intent to file a bill in equity to restrain the same. It is no answer that the company has offered to buy his shares at a fixed price.[3] In New Jersey it has been held that *mandamus*, and not an order under a statute, is the sole remedy of a stockholder wishing to inspect the books of the company, there being no suit pending.[4] A federal court cannot grant a *mandamus* in behalf of a stockholder against a national bank to allow him to inspect its stockholders' list, unless the amount in dispute exceeds two thousand dollars. Moreover, a federal court has no jurisdiction to issue a *mandamus* independent of a suit.[5] A secretary who has resigned in good faith cannot be punished for contempt in not producing the corporate books in accordance with a *mandamus*.[6]

§ 514. *Not granted as a matter of course unless the right is statutory.*—The writ of *mandamus*, however, does not issue herein as a matter of course. It is an extraordinary remedy, to be invoked only upon special occasions. The court does not grant the *mandamus* until it has taken into careful consideration all the facts and circumstances of the case. The condition and character of the books, the reasons for refusal by the corporation, the specific purpose of the stockholder in demanding inspection, the general reasonableness of the request, and the effect on the orderly transaction of the corporate business in case it is granted, are all considered in granting or refusing the writ. It is granted only in furtherance of essential justice.[7]

1 Matter of Steinway, 159 N. Y. 251 (1899); aff'g 31 N. Y. App. Div. 70.

2 Weir *v.* Bay State Gas Co., 91 Fed. Rep. 940 (1898). Where the suit is brought by the stockholder against the corporation alone to remedy the frauds of directors and have a receiver appointed and obtain a disclosure, the bill is defective for nonjoinder of the guilty parties. Edwards *v.* Bay State Gas Co., 91 Fed. Rep. 942 (1898); Morse *v.* Bay State Gas Co., 91 Fed. Rep. 944 (1898).

3 Kuhbach *v.* Irving Cut Glass Co., 69 Atl. Rep. 981 (Penn. 1908).

4 Fuller *v.* Alex. Hollander, etc. Co., 61 N. J. Eq. 648 (1900).

5 Large *v.* Consolidated, etc. Bank, 137 Fed. Rep. 168 (1905).

6 Egilbert *v.* Superior Court, 91 Pac. Rep. 748 (Cal. 1907). Bauter *v.* Superior Court, 91 Pac. Rep. 749 (Cal. 1907).

7 Quoted and approved in State *v.* Williams, 110 Tenn. 549 (1903). "The application is addresed to the sound discretion of the court." The reasons for granting the writ "should be clear and cogent. . . . To hold that every person who shows himself to be a stockholder of stock is at liberty to demand an examination of the transfer books when and as often as he pleases, and, if refused, to apply for

Where, however, a statute gives to stockholders the right to examine corporate books, *mandamus* seems to be granted as a matter of right.[1] In New Jersey it is held that *mandamus* does not lie to

a writ of *mandamus* to enforce an absolute right, would be to establish a rule highly prejudicial to the interests of all corporations and their stockholders. . . . The power of the court should be exercised in such cases with great discrimination and care." People *v.* Lake Shore, etc. R. R., 11 Hun, 1 (1877); affirmed *sub nom.* *Re* Sage, 70 N. Y. 220 (1877). See also People *v.* Northern Pac. R. R., 50 N. Y. Super. Ct. 456 (1884). "Discretion in these matters should be exercised in a reasonable manner and subject to precedent." Regina *v.* Wilts, etc. Canal Nav., 29 L. T. Rep. 922 (1874). A reference may be ordered by the court to determine the truth of the allegations in the affidavits used to obtain a *mandamus*. People *v.* St. Louis, etc. Ry., 44 Hun, 552 (1887). *Mandamus* is the preferable remedy. Legendre *v.* New Orleans Brewing Assoc., 45 La. Ann. 669 (1893).

1 Coquard *v.* National, etc. Co., 171 Ill. 480 (1898); Cobb *v.* Lagarde, 30 S. Rep. 326 (Ala. 1901). A statutory right of stockholders to inspect the books is mandatory, while the common law right is discretionary. Under the New York statute a stockholder may copy the names of the stockholders of record in order that he may negotiate for their stock. This statute applies also to a national bank located in New York state. The court may regulate the hours of inspection, and may refuse to enforce this statutory right, if it is for an illegitimate purpose. The statute enlarges and does not restrict the common law right. People *v.* Consolidated Nat. Bank, 105 N. Y. App. Div. 409 (1905). A director of a New York corporation is entitled as a matter of right to a peremptory *mandamus* allowing him to examine the books either alone or with the aid of some competent person approved by the court, but he cannot continue the examination for three months, when four weeks is enough, and cannot have a number of accountants assist him when one is enough. People *v.* Columbia, etc. Co., 103 N. Y. App. Div., 208 (1905). As to foreign corporations in New York, see § 515, *infra*. See also § 518, *infra*. A statute requiring corporations to file certificates stating the amount of the capital stock paid in may be enforced by *mandamus*. Bay State Gas Co. *v.* State, 4 Pen. (Del.) 497 (1904). Where the right of inspection is statutory, *mandamus* will issue, even though a stockholder desires to examine the books for the benefit of a competing concern in which he is interested. Johnson *v.* Langdon, 67 Pac. Rep. 1050 (Cal. 1902). A statute giving the right to examine the books and records gives the right to examine contracts, and this right may be enforced by *mandamus*. Stone *v.* Kellogg, 165 Ill. 192 (1896). *Mandamus* lies at the instance of a stockholder to compel his corporation to allow him to inspect the books of the company relative to the stock in accordance with the constitution of Louisiana, the object of the stockholder being to ascertain the value of his stock and to guide his future action in regard thereto. State *v.* New Orleans, etc. Co., 49 La. Ann. 1556 (1897). Under the Wisconsin statute authorizing a stockholder to examine the stock books and accounts, a *mandamus* may be issued to the officer having the books in charge. State *v.* Bergenthal, 72 Wis. 314 (1888). Under a constitutional right to see the list of stockholders, a stockholder has no absolute right to take a list of them. Commonwealth

enforce a statutory right to examine the books, except where it would lie at common law.[1]

§ 515. *When it will and will not be granted.*—It will not be granted to satisfy curiosity, nor to aid the stock-market speculations of the stockholders.[2] Either some property rights of the

v. Empire Pass. Ry., 134 Pa. St. 237 (1890). *Mandamus* lies to enforce the statutory right of inspection. People *v.* Pacific Mail S. S. Co., 50 Barb. 280 (1867). *Mandamus* will lie in behalf of the wife of a deceased stockholder, who holds the certificates made out in his name, to compel the corporation to allow her to examine the transfer books in order that she may vote intelligently at a coming election. People *v.* Eadie, 63 Hun, 320 (1892); aff'd, 133 N. Y. 573. *Mandamus* lies to open for the inspection of a stockholder and for taking memoranda therefrom such corporate books as the statute prescribes shall be open to him. *Re* Martin, 62 Hun, 557 (1891). *Mandamus* lies to allow inspection as required by the statute, and the fact that the applicant holds a certificate of stock is sufficient. Martin *v.* Johnston Co., 25 Abb. N. Cas. 350 (1890). Where there is a state statute allowing stockholders to examine the corporate books, a national bank in the state is subject thereto and *mandamus* will issue. Winter *v.* Baldwin, 89 Ala. 483 (1889). Under a statute to the effect that "the stockholders of all private corporations have the right of access to, inspection, and examination of the books, records, and papers of the corporation, at reasonable and proper times," a stockholder has the "right to examine the books at any and all reasonable times," and "when this right is claimed and refused, he is entitled to a *mandamus* on the averment that he is a stockholder of the corporation; that he has demanded the right of inspection; that the time was reasonable and proper; and that the right was denied him." He may make the examination through an agent. Foster *v.* White, 86 Ala. 467 (1889). *Contra,* State *v.* National Biscuit Co., 69 N. J. L. 198 (1903). Concerning the New York act requiring resident transfer agents of foreign corporations to exhibit to stockholders the transfer book and a list of stockholders, and concerning an alternative writ of *mandamus* therein, see People *v.* Crawford, 68 Hun, 547 (1893). *Mandamus* lies to compel the resident agent of a foreign corporation to open its transfer books to a stockholder as required by statute. People *v.* Paton, 20 Abb. N. Cas. 195 (1887); s. c., 5 N. Y. St. 316. *Mandamus* lies to compel corporate officers to exhibit to a stockholder the books specified in the statute giving this right. Ellsworth *v.* Dorwart, 95 Iowa, 108 (1895). See also, concerning such statutes, §§ 515, 518, *infra.*

1 State *v.* National Biscuit Co., 69 N. J. L. 198 (1903).

2 The writ will not be "granted to enable a corporator to gratify idle curiosity." Foster *v.* White, 86 Ala. 467 (1889); People *v.* Walker, 9 Mich. 328 (1861). "The interests of all the corporators require that the writ shall not go at the caprice of the curious or suspicious." Commonwealth *v.* Phœnix Iron Co., 105 Pa. St. 111 (1884). "Courts should guard against all attempts by combinations hostile to the corporation or its existing officers to use its writ of *mandamus* to accomplish their personal or speculative ends." People *v.* Lake Shore, etc. R. R., 11 Hun, 1 (1877). Affirmed *sub nom. Re* Sage, 70 N. Y. 220 (1877). Nor will the court grant "a mere wrecking petition to ruin a going concern." *Re* West Devon, etc. Mine, L. R. 27 Ch. D. 106 (1884). Mere suspicion is not enough to jus-

stockholder must be involved, or some controversy exist, or some specific and valuable interest be in question, to settle which an inspection of the corporate records becomes necessary.[1] At common

tify an order of inspection, even though the applicant stockholder intends to bring suit against the directors. Central, etc. R. R. *v.* Twenty-third Street Ry., 53 How. Pr. 45 (1877). See 69 Atl. Rep. 1008.

1 It has been granted to allow the applicant to ascertain whether a by-law existed entitling him to an office by promotion. Reg. *v.* Saddlers' Co., 10 W. R. 87 (1861). Mismanagement and intent to bring suit need not be alleged. "Oftentimes frauds are discoverable only by examination of the books by an expert accountant." Huylar *v.* Cragin Cattle Co., 40 N. J. Eq. 392 (1885). It is granted also to a stockholder who has a suit or controversy with a party other than the corporation itself. Rex *v.* Hostmen, 2 Stra. 1223 (1745); Mayor of Southampton *v.* Graves, 8 T. R. 590 (1800). It has been granted to enable a stockholder to see the discount book, although there is no suit between him and the corporation, and no intent to bring one. Cockburn *v.* Union Bank, 13 La. Ann. 289 (1858). At an early day, however, it was held that "the members have no right, on speculative grounds, to call for an examination of the books and muniments in order to see if, by possibility, the company's affairs may be better administered than they think they are at present. If they have any complaint to make, some suit should be instituted, some definite matter charged, . . . or there should be some particular matter in dispute between members, or between the corporation and individuals in it; there must be some controversy, some specific purpose, in respect of which the examination becomes necessary." King *v.* Merchant Tailors' Co., 2 B. & Ad. 115 (1831). A charter provision that the corporate powers "shall be exercised by a board of directors" is immaterial herein. State *v.* Bienville Oil Works, 28 La. Ann. 204 (1876). Where a reduction of capital stock is contemplated, a large stockholder has a right to inspection to ascertain whether the business is being "prudently and profitably" carried on. State *v.* Bienville Oil Works, 28 La. Ann. 204 (1876). The general purpose of ascertaining "the condition of the company" was held insufficient in People *v.* Walker, 9 Mich. 328 (1861). The stockholder may take memoranda or a list of the stockholders. Commonwealth *v.* Phœnix Iron Co., 105 Pa. St. 111 (1884); Cotheal *v.* Brouwer, 5 N. Y. 562 (1851), affirming Brouwer *v.* Cotheal, 10 Barb. 216 (1850); Hide *v.* Holmes, 2 Molloy, 372 (1825). In Stettauer *v.* New York, etc. Co., 42 N. J. Eq. 46 (1886), where a stockholder filed a bill in equity to compel corporate officers to allow himself and his accountant to examine the corporate books, its business having been closed and distribution of assets made, but a statement of its affairs refused, the court held that the bill would not lie, since no fraud or insufficient distribution of assets was alleged. *Mandamus* is the proper remedy. Swift *v.* Richardson, 7 Houst. (Del.) 338 (1886), holds that *mandamus* will issue to the officers of a foreign corporation to exhibit its books then in the state, and allow copies of records to be taken by a stockholder who intends to commence suit against a pledgee of his stock; the controversy turning on the question of the earnings and expenses of the corporation. A person who has been induced to transfer property to a corporation in exchange for stock may maintain a *mandamus* to compel the company to allow him to examine the books, papers and records of the com-

law a stockholder has a right to a *mandamus* to compel the corporate officers to allow him to examine certain books and papers of the corporation, where a proposition has been made for the purchase of all the stock of the corporation, and a large reduction has been made in the dividends, and the stockholder is unable to ascertain the real value of his stock.[1] The court will grant a *mandamus* to a corporation to allow a stockholder to examine its books of account where he honestly believes that the company is being mismanaged, and it appears that no harm will be done by allowing the inspection. Such a stockholder may have the assistance of an expert, and may make transcripts.[2] Minority stockholders in order to ascertain the value of their stock have a right to examine the books and papers where the majority have given no information as to the financial condition. This right may be enforced by *mandamus* after due demand, and such demand may be made by mail.[3] .Where the

pany to ascertain whether certain representations made to him are true, to the effect that all the stock had been issued for full value. State *v.* Pan-American Co., 5 Pen. (Del.) 391 (1904). *Mandamus* to open the stock-ledger was denied in a case where the owner of four shares of stock alleged that little or no dividends were paid, and the stock was depreciating, no mismanagement being charged. A by-law authorizing inspection of books of account does not authorize inspection of the stock-ledger. Lyon *v.* American Screw Co., 16 R. I. 472 (1889). *Mandamus* may lie to compel the resident officers of a foreign corporation to permit inspection. State *v.* Farmer, 7 Ohio C. C. 429 (1892). A stockholder sued by a corporation on an ordinary debt, and who sets up in defense that he was induced to buy stock from outside parties by fraudulent statements made by the company, cannot have a *mandamus* to compel the company to allow him to examine its books. His application in such a case is as a creditor and not as a stockholder. Investment Co. *v.* Eldridge, 2 Pa. Dist. 394 (1893); aff'd, 175 Pa. St. 287.

1 *Re* Application of Steinway, 31 N. Y. App. Div. 70 (1898); aff'd, 159 N. Y. 250.

2 The court said: "According to the general rule in this country, it is not necessary that there should be any particular dispute to entitle the stockholder to exercise this right. Nothing more is required than that, acting in good faith for the protection of the interests of the corporation and his own interests, he desires to ascertain the condition of the company's business. . . . The court will consider whether his desire for an examination is reasonable, having reference to the interests of the corporation and his personal interest as a member of it. Its effect upon the corporation in reference to competitors and other interests will not be disregarded." The fact that there is a statute allowing inspection of the stock and transfer books does not take away the common law rights. Varney *v.* Baker, 80 N. E. Rep. (Mass. 1907).

3 Neubert *v.* Armstrong, etc., Co., 211 Pa. 582 (1905). A stockholder may examine the books to ascertain the value of his stock which he wishes in good faith to sell. He will not be allowed to use an accountant where he himself is familiar with the plan of keeping the books. Garcin *v.* Trenton, etc. Co., 60 Atl. Rep. 1098 (N. J. 1905).

charter of a national bank has expired the state court may compel its directors to allow its stockholders to examine its books and papers.[1] Where there had been no dividends for nine years, and the officers were partners in a competing concern, and refused to allow inspection, it was granted in order to enable the applicant to ascertain whether the real facts justified an action for fraud on the part of the officers.[2] Where a Michigan stockholder in a Connecticut corporation is suing in Michigan other stockholders, on contracts relative to stock, he may obtain in Delaware a *mandamus* compelling the president, who resides there and has corporate books and papers there, to allow him to examine the same and take copies.[3] But it is held in Pennsylvania that a stockholder cannot obtain a *mandamus* to allow him to examine the books of the corporation to obtain proof that the stock is not worth a certain sum, which the president in selling him stock represented it was worth, the court saying that the stockholder had a right to examine the books only for purposes affecting his rights as a stockholder, and not his rights as a litigant with a party other than the corporation.[4] A resident stockholder in a foreign corporation having an office in the state for the transaction of business is entitled under the New York statutes to inspect the stock-book kept within the state, and if the corporation has no such book, to inspect any other books in the state which will give the information.[5]

1 Matter of Tuttle *v.* Iron Nat. Bank, 170 N. Y. 9 (1902).

2 Commonwealth *v.* Phœnix Iron Co., 105 Pa. St. 111 (1884).

3 Richardson *v.* Swift, 7 Houst. (Del.) 137 (1885), a carefully considered case; also Richardson *v.* Swift, 7 Houst. (Del.) 137 (1885). In the case Schondelmeyer *v.* Columbia, etc. Co., 69 Atl. Rep. 49 (Penn. 1908), the court held that a stockholder's right to examine the books of a foreign corporation, such books being in the state, was the same as in a domestic corporation.

4 Schondelmeyer *v.* Columbia, etc. Co., 69 Atl. Rep. 49 (Penn. 1908).

5 People *v.* Knickerbocker T. Co., 38 N. Y. Misc. Rep. 446 (1902). The same rule applies to domestic corporations in New York. See § 514, *supra*. See also § 518, *infra*. A foreign corporation, doing business in New York, may be required to keep in New York for inspection, as required by the New York statutes, a stock-book. People *v.* Montreal, etc. Co., Ltd., 40 N. Y. Misc. Rep. 282 (1903). An order to allow the examination of the books of a foreign corporation in order to frame a complaint will not be granted unless it is shown that such books are within the state. Snow, etc. *v.* Snow-Church Co., 80 N. Y. App. Div., 40 (1903). A stockholder in suing a foreign corporation for a penalty for refusing to allow him to inspect its stock-book, as required by law, makes out a *prima facie* case by proving that he went during business hours to the company's office and made a demand upon the person apparently in charge. Pelletreau *v.* Greene, etc. Co., 49 N. Y. Misc. Rep. 233 (1906). The New York statute imposing a penalty on the transfer agent of a foreign corporation having a transfer agent in the state and also upon the corporation itself for refusing to allow inspection of its stock-book was en-

The New York court of appeals has sustained a *mandamus* granted in order to enable the applicant to ascertain who are stockholders,

forced in Tyng *v.* Corporation Trust Co., 104 N. Y. App. Div. 486 (1905). Where a bank refuses to allow a stockholder to examine its stock-book, as authorized by the New York statutes, unless he discloses for whom he is acting and what his purpose is, *mandamus* will not be granted unless the applicant discloses those facts. People *v.* National Park Bank, 122 N. Y. App. Div. 635 (1907). A stockholder in a foreign corporation will not be granted a *mandamus* to allow him to examine its stock-book, as prescribed by the New York statutes, where his purpose is not connected with his interest as a stockholder, but is for the purpose of offering stock in other corporations to the stockholders of the former. People *v.* Giroux, etc. Co., 122 N. Y. App. Div., 617 (1907). A stockholder in a foreign corporation other than a moneyed or railroad corporation, having an office for business in New York state, is entitled by the statutes of the state to inspect the stock-book and make extracts therefrom. Althause *v.* Giroux, 56 N. Y. Misc. Rep. 508 (1907). But where he has already instituted a suit and then makes another request for inspection and then sues for the penalties for refusal, it is a defence that he wishes to obtain the names in order to sell other stocks and that he had brought fourteen similar suits. Althouse *v.* Giroux, 56 N. Y. Misc. Rep. 511 (1907). A stockholder may demand inspection under the New York statute, even though he wishes to get the names of the stockholders to write them in regard to buying or selling the stock. Lawshe *v.* Ruyal, etc. Co., 54 N. Y. Misc. Rep. 220 (1907). In the case State *v.* Lazarus, 105 S. W. Rep. 780 (Mo. 1907), a Missouri stockholder in a foreign corporation, the books of which were in Missouri, was granted a *mandamus* compelling the custodian of the company to show to him the records of stockholders' and directors' meetings, names of stockholders, the accounts, and description of its property, but not a secret process of manufacture, and the *mandamus* was granted although the stockholder was interested in a rival company. A resident stockholder in a foreign corporation may under the Alabama code have a *mandamus* to compel it to allow him to examine its books and papers which are within the state, where he has reason to believe that its affairs are not being properly conducted. Nettles *v.* McConnell, 43 S. Rep. 838 (Ala. 1907). *Mandamus* as a separate proceeding not connected with any suit will not be granted in New York as against a New Jersey corporation to compel the opening of the corporate books to a stockholder. The application should be made in New Jersey. Matter of Rappleye, 43 App. Div. 84 (1899). In the matter of Crosby 28 N. Y. Misc. Rep. 300 (1899), the New York court granted a *mandamus* in behalf of a Texas stockholder in a Colorado corporation which did all its business in Mexico, it being shown, however, that all the books were kept in New York and that the officers resided in New York, and that the applicant had pledged all his stock and was unable to redeem the same for want of information as to the value of the stock. The court held also that in one and the same proceeding *mandamus* may issue to two such corporations which are practically one from a business point of view. The penalty imposed by statute in New York for refusal of a foreign corporation having an office in the state to exhibit its stock-book to a stockholder was applied in Cox *v.* Island, etc. Co., 65 N. Y. App. Div. 508 (1901); modified in Cox *v.* Paul,

with a view to canvassing their votes for an election,[1] and during the past few years there has been a large number of decisions in the New York courts defining the limits within which *mandamus* will be granted in behalf of stockholders.[2]

175 N. Y. 328 (1903), limiting the penalty to one violation. See § 514, *supra*, and § 518, *infra*. *Mandamus* may issue to an officer of a foreign corporation in the state commanding him to show to stockholders books that are within the state, but not books that are outside of the state. State *v.* North American, etc. Co., 106 La. 621 (1902). See 125 N.Y. A.D. 538.

1 *Mandamus* was granted in People *v.* Eadie, 63 Hun, 320 (1892); aff'd, 133 N. Y. 573, to open the stock-books to a stockholder who wished to ascertain who were stockholders in order to confer with them for the purpose of changing the board at an approaching election. *Mandamus* was granted to a stockholder who wished to persuade other stockholders not to appeal a suit in which he was interested adversely to the corporation, the defeated party. Reg. *v.* Wilts, etc. Canal Nav., 29 L. T. Rep. 922 (1874). See also People *v.* Lake Shore, etc. R. R., 11 Hun, 1 (1877); aff'd *sub nom. Re* Sage, 70 N. Y. 220 (1877). A stockholder in Pennsylvania may have a *mandamus* to compel the company to allow him to inspect and take a copy of the list of stockholders, his purpose being to consult them and obtain proxies from other stockholders. It is immaterial that a receiver is in charge of the property under a foreclosure. Such a receiver has nothing to do with the stock-book. Commonwealth *v.* Philadelphia, etc. R. R., 3 Pa. Dist. 115 (1893).

2 A policy holder in a mutual insurance company, without capital stock, may be granted a *mandamus* to be allowed to see the list of policy holders, but not where he is a professional litigant, and to allow him to see the list would divulge private and personal information. People *v.* New York, etc. Co., 111 N. Y. App. Div. 183 (1906). A stockholder is not entitled to *mandamus* to inspect the books for the purpose of maintaining a suit in deceit against the directors on account of a false report published by them, this being a suit not as a stockholder but as a plaintiff in a suit against individuals, and does not affect the management of the corporation. Matter of Taylor, 117 N. Y. App. Div. 348 (1907). A stockholder who was induced to purchase his stock by the president may have a *mandamus* to allow him to inspect the corporate books, it appearing that no report is ever made by the company, and he is unable to ascertain its condition, and it has paid no dividends and apparently is not doing any business. Matter of O'Neill, 47 N. Y. Misc. Rep. 495 (1905). *Mandamus* will be granted at the instance of a stockholder to examine the stock-book, irrespective of his motive, inasmuch as the right is statutory in New York, especially where a meeting is about to be held to increase the capital stock. People *v.* Keeseville, etc. R. R., 106 N. Y. App. Div. 349 (1905), the court saying also: "With respect to the general business books of a corporation, the court will not order an inspection by the stockholder unless he seeks to learn something which he has the right to know for his own protection, and his application must be in good faith and not for the purpose of injuring or annoying the corporation." A *mandamus* will not issue in behalf of a stockholder who is a mere dummy for others, whose purpose is to get control of the company and sell it out. A *mandamus* should not give a stockholder the right to examine all books, vouchers, records, papers and minutes

A pledgee of stock which still stands in the name of the pledgor is not entitled to a *mandamus* to allow him to inspect the corporate books, even though the pledgor is insolvent and is dead.[1]

without restriction as to time and place and without provision against interfering wtih the regular business of the company. Matter of Coats, 73 N. Y. App. Div. 178 (1902). But a *mandamus* will be granted commanding a corporation to allow a stockholder to examine the by-laws unless a very strong case of bad faith is made out against him. Matter of Coats, 75 N. Y. App. Div. 567 (1902). A stockholder will not be granted a peremptory writ of *mandamus* allowing him to examine all the books and accounts of the corporation on the allegation that he wishes to ascertain the names and addresses of the stockholders, and the further allegation that no dividends have been paid, there being no allegation that a demand has been made or that it is necessary to examine all the books and papers, or that there has been any mismanagement, or that the stock has depreciated in value. Matter of Latimer *v.* Herzog, etc. Co., 75 N. Y. App. Div. 522 (1902). *Mandamus* will not be granted to enable a stockholder to obtain proof concerning an alleged improper loan made by the corporation in order that the proof may be used to hold the directors personally liable. People *v.* Produce, etc. Co., 53 N. Y. App. Div. 93 (1900). The president of a corporation is entitled to a *mandamus* directing the secretary to allow him and his attorney to inspect the stock-book and make extracts therefrom, and it is immaterial what the motive of the president is. "An inspection of its books by the president of the company is a matter of right." People, etc. *v.* Goldstein, 37 N. Y. App. Div. 550 (1899). *Mandamus* will not be granted to allow a stockholder to examine the books of the company where such stockholder owns only one-thirtieth of one per cent. of the preferred stock, and his reason for examining the books is that he believes the company is selling its product at less than cost by reason of competition, and that consequently he has received no dividends, it not being shown that the market price of the stock has been decreased. Matter of Pierson, 28 N. Y. Misc. Rep. 726 (1899). *Mandamus* does not lie to compel a corporation to allow a stockholder to examine its books and records, where the only reason given therefor is that the corporation, a gas company, has reduced its price of gas, and the stockholder wishes to ascertain whether it is selling the same at a loss and whether it is paying its fixed charges; it being shown that the reduction was due to other companies having reduced their price. Matter of Pierson, 44 N. Y. App. Div. 215 (1899). *Mandamus* will not lie to compel a corporation to allow a stockholder to examine its books, even though he alleges it is necessary in order to fix the taxable value of the stock in determining an inheritance tax, where it is shown that the real object is to obtain information for the benefit of a competing concern, to the injury of the former. Matter of Kennedy, 75 N. Y. App. Div. 188 (1902). A stockholder has not an absolute right to examine the books in order to enable him to prosecute a suit against the corporation, and *mandamus* will not issue where he has already been defeated in one action. People *v.* American, etc. Co., 31 N. Y. Misc. Rep. 617 (1900).

1 Matter of First, etc. Bank, 28 Misc. Rep. 662 (1899). An unregistered pledgee cannot maintain a suit under the New York statute against the treasurer for the penalty for refusing to furnish to him a statement

Mandamus does not lie where the applicant is not a stockholder of record.[1] A stockholder who has made a contract for the sale of his stock and received a partial payment cannot claim the right to inspect the books, the other payments being not yet due.[2] The temporary administrator of an estate owning stock is not entitled to examine corporate books where there is a contest pending in regard to the will.[3] It has been held in Pennsylvania that *mandamus* will not be granted to allow a stockholder to make a list of the stockholders where the only purpose is to combine them in attacking a lease made by the corporation.[4] Where a stockholder sells his stock after he has applied for a *mandamus* to inspect the books, the *mandamus* will be denied.[5]

§ 516. *Allegation and form of writ.*—The writ should run to the person or officer who has control of the records.[6] The stockholder may make the inspection through an agent, and may have the aid of an interpreter, attorney, or expert.[7] A right to inspect

of the affairs of the company. Pray *v.* Todd, 71 N. Y. App. Div. 391 (1902).

1 Matter of Reiss, 30 N. Y. Misc. Rep. 234 (1900). An unrecorded stockholder is not entitled to inspection under a statute unless he shows that he has applied for a transfer in accordance with the by-law. Butterfly, etc. Co. *v.* Brind, 91 Pac. Rep. 1101 (Col. 1907).

2 State *v.* Whited, etc., 104 La. 125 (1900).

3 Matter of Hastings, 120 N. Y. App. Div. 756 (1907).

4 Commonwealth *v.* Empire Pass. Ry., 134 Pa. St. 237 (1890), and note. See criticism on this case in N. Y. L. J., Oct. 13, 1890.

5 State *v.* New Orleans, etc., 112 La. 868 (1904).

6 "The writ shall be directed to him who is to do the thing required to be done." People *v.* Throop, 12 Wend. 183 (1834). *Mandamus* lies to enforce a statutory right of inspection. Unreasonable delay after a request is sufficient to sustain the *mandamus.* The *mandamus* may run to the president and general manager who has control of the business. The fact that the stockholder is interested in a rival company and is unfriendly towards the officers is immaterial. Cobb *v.* Lagarde, 129 Ala. 488 (1901). In a *mandamus* proceeding to compel a corporation to keep its books open for the inspection of stockholders, in accordance with the statutes, the president may be joined as a party defendant, and it is not a sufficient reply that the books are not in his possession. State *v.* Bay, etc. Co., 4 Pen. (Del.) 214 (1901). A *mandamus* to compel the production of the books of the corporation should run to the corporation itself and not to the manager. State *v.* North American, etc. Co., 105 La. 379 (1901); s. c., 31 S. Rep. 172 (1902). The *mandamus* may run to the secretary who has charge of the books. Merril *v.* Suffa, 93 Pac. Rep. 1099 (Col. 1908). *Mandamus* may be directed against the officer having charge of the books. People *v.* Knickerbocker T. Co., 38 N. Y. Misc. Rep. 446 (1902).

7 In examining the books a stockholder may have with him his attorney and stenographer. Ellsworth *v.* Dorwart, 95 Iowa, 108 (1895). A stockholder who is entitled to examine corporate books may have with him an attorney or other person familiar with that line of business.

gives the right to make memoranda or copies.[1] The request to inspect the books, for refusal of which the *mandamus* is asked, must be alleged to have been made at a proper time and place, and of the proper person, and to have been refused.[2] The application should also state what information the applicant needs, and what

People *v.* Nassau Ferry Co., 86 Hun, 128 (1895). He may inspect through his duly authorized agent. State *v.* Bienville Oil Works Co., 28 La. Ann. 204 (1876); Cincinnati, etc. Co. *v.* Hoffmeister, 62 Ohio St. 189 (1900). The executrix of an estate may obtain a *mandamus* allowing her to examine the books of a bank in which the estate holds stock in order to ascertain the real value of the stock. A by-law prohibiting such examination, except by special authority by the board of directors, is illegal under the Louisiana constitution. The examination may be by an expert representing the executrix. State *v.* Citizens' Bank, etc., 51 La. Ann. 426 (1899). Such inspection may be through agents. Bonnardet *v.* Taylor, 1 J. & H. 383 (1861); Draper *v.* Manchester, etc. Ry., 7 Jur. (N. S.) pt. 1, 86 (1861). But see *Re* West Devon, etc. Mine, L. R. 27 Ch. D. 106 (1884); Bank of Utica *v.* Hillard, 6 Cow. 62 (1826). It includes the agent, solicitor, counsel, or expert of the party asking the inspection. Hide *v.* Holmes, 2 Molloy, 372 (1825); Blair *v.* Massey, L. R. 5 Eq. 623 (1871); Joint-stock Discount Co.'s Case, 36 L. J. (Ch.) 150 (1867); Bonnardet *v.* Taylor, 1 Johns. & H. 383 (1861); Attorney-General *v.* Whitwood Local Board, 40 L. J. (Ch.) 592 (1871); Lindsay *v.* Gladstone, L. R. 9 Eq. 132 (1869); Williams *v.* Prince of Wales Ins. Co., 23 Beav. 338 (1875); State *v.* Bienville, etc. Co., 28 La. Ann. 204 (1876); Ballin *v.* Ferst, 55 Ga. 546 (1875). But see Bartley *v.* Bartley, 1 Drew. 233 (1852); Summerfield *v.* Pritchard, 17 Beav. 9 (1853); Draper *v.* Manchester, etc. R. R., 3 De G., F. & J. 23 (1861); *Re* West Devon, etc. Mine, L. R. 27 Ch. D. 106 (1884). And a shareholder who is also the solicitor of opposing litigants is nevertheless so entitled. Reg. *v.* Wilts, etc. Canal Nav. Co., 29 L. T. Rep. 922 (1874); Kingsford *v.* Great Western Ry., 16 C. B. (N. S.) 761 (1864). But see Hutt's Case, 7 Dowl. Pr. 690 (1839); Herschfeld *v.* Clarke, 11 Exch. 712 (1856). See also notes *supra*. The manner of inspection must be gentlemanly. Williams *v.* Prince of Wales, etc. Co., 23 Beav. 338 (1857). Where the statute gives the stockholders the right to inspect the corporate books, they may make the examination through an agent or attorney. Clawson *v.* Clayton, 93 Pac. Rep. 729 (Utah 1908).

1 Marsh *v.* Sanders, 110 La. 726 (1903). Varney *v.* Baker, 194 Mass. 239 (1907).

2 The stockholder must first apply to the proper corporate officer having authority to grant inspection. Rex *v.* Wilts, etc. Canal Nav., 3 Ad. & El. 477 (1835). And must state to him the reason why he desires inspection. Rex *v.* Wilts, etc. Canal Nav., 3 Ad. & El. 477 (1835); also Rex *v.* Clear, 4 Barn. & C. 899 (1825); People *v.* Walker, 9 Mich. 328 (1861). *Mandamus* lies at the instance of a stockholder to examine the corporate books to enable the stockholder to learn the true condition of the company and of its management and of the value of the stock. There is no presumption that the inspection is hostile to the interest of the company, and it need not be alleged that a demand was made during business hours at the company's office, or that the person making the demand represented the stockholder, where it is shown that the officers refused to grant inspection under any circumstances. State *v.* Pacific, etc. Co., 21 Wash. 451

books of the corporation he wishes to inspect.[1] "The order should be so drawn as not to inconvenience the transaction of business."[2] In a stockholder's application at common law for a *mandamus* to compel the corporation to allow him to inspect the cash book and other books, the papers must show for what purpose the inspection is desired.[3] Even though a corporation does not allow inspection of its stock-book, as required by statute, yet if, after a *mandamus* has been applied for, the corporation offers to pay the costs and open the stock-book for inspection, the applicant is bound to discontinue the proceedings.[4] Pending appeal a stay may be granted on an order giving the right to inspect corporate books.[5]

§ 517. *Right to inspect minutes of meetings of directors.*—It would take a strong case to induce a court to issue a *mandamus* commanding the corporate officers to allow a stockholder to inspect the minutes of the meetings of the directors.[6] The success of the

(1899), giving a very satisfactory discussion and review of the authorities.

1 Morgan's Case, L. R. 28 Ch. D. 620 (1884). This case also states that in England it is customary for many banking companies to insert in their constitutions a provision forbidding the inspection of customers' accounts by shareholders or creditors. Irrelevant parts of the books may be sealed up. Jones *v.* Andrews, 58 L. T. Rep. 601 (1888); Earp *v.* Lloyd, 3 K. & J. 549 (1857); Napier *v.* Staples, 2 Molloy, 270 (1828); Hill *v.* Great Western Ry., 10 C. B. (N. S.) 148 (1861); Clifford *v.* Taylor, 1 Taunt. 167 (1808); Gerard *v.* Penswick, 1 Swanst. 533 (1818); Dias *v.* Merle, 2 Paige, 494 (1831); Titus *v.* Cortelyou, 1 Barb. 444 (1847); People *v.* Pacific Mail S. S. Co., 50 Barb. 280 (1867); Pynchon *v.* Day, 118 Ill. 9 (1886). But if such irrelevant matter cannot be separated, the party must produce the whole. Carew *v.* White, 5 Beav. 172 (1842).

2 Duffy *v.* Mutual Brewing Co., N. Y. L. J., Oct. 3, 1892, p. 18, approving the above text.

3 Bruning *v.* Hoboken, etc. Co., 67 N. J. L. 119 (1902). The applicant must allege the extent of his interest, also wherein his object of inspection is just and useful. Hatch *v.* City Bank, 1 Rob. (La.) 470 (1842). The case of State *v.* Bienville Oil Works, 28 La. Ann. 204 (1876), states that the preceding case "failed through want of precision and definiteness in stating some well-defined purpose, some reasonable cause, and showing that they had some interest in the matter."

4 Boardman *v.* Marshalltown, 105 Iowa, 445 (1898).

5 McAlpin *v.* Universal, etc. Co., 55 Atl. Rep. 999 (N. J. 1903).

6 "It is highly proper that an inspection of the books containing the proceedings of the directors should be obtained on special occasions and for special purposes; . . . but the proposed daily and hourly inspection and publication of all their proceedings would be tantamount to admitting the presence of strangers at all their meetings, and would probably ere long be found very prejudicial to the shareholders." Regina *v.* Mariquita, etc. Min. Co., 1 El. & El. 289 (1858). "A private stockholder of an incorporated company has no right to have access to the minutes of the proceedings of the directors unless that right is expressly given by the charter; and

corporate enterprise depends frequently upon the secrecy of the plans of the directors. In connection with litigations the rule, of course, is different; but, aside from this, it seems that a stockholder is not entitled as a matter of right to a *mandamus* to allow him to inspect the minutes of the directors' meetings. The same rule would seem to apply to miscellaneous questions asked of the directors at stockholders' meetings. A by-law that directors shall establish a secret reserve fund which the shareholders shall know nothing about and which the auditors shall not report to the shareholders, is contrary to the English statute requiring the auditors to report fully to the shareholders.[1]

§ 518. *Statutes giving right of inspection.*—The right to inspect corporate records is frequently given to stockholders by statutory provisions. In New York the statute gives to all stockholders the right to examine the corporate stock-book,[2] and this statute has

consequently, and of necessity, he must remain ignorant of their action until they choose to make that action known" (dictum). Alabama, etc. R. R. *v.* Rowley, 9 Fla. 508, 514 (1861). See also Lindley, Companies, under "Inspection" in Index. In Streit *v.* Citizens' F. Ins. Co., 29 N. J. Eq. 21, 31 (1878), the court said: "The officers ought not to have denied to any stockholder an opportunity, properly applied for, to examine the minutes of the meetings of the directors."

1 Newton *v.* Birmingham, etc. Co., Ltd., 95 L. T. Rep. 135 (1906).

2 As to domestic corporations, see § 514, *supra*, and as to foreign corporations, see § 515, *supra*. The New York statute was construed in Cotheal *v.* Brouwer, 5 N. Y. 562 (1851); People *v.* Pacific Mail S. S. Co., 50 Barb. 280 (1867); Kennedy *v.* Chicago, etc. R. R., 14 Abb. N. Cas. 326 (1884); People *v.* Mott, 1 How. Pr. 247 (1845); Kelsey *v.* Pfaudler, etc. Co., 3 N. Y. Supp. 723 (1889); People *v.* Throop, 12 Wend. 183 (1834). The New York statute in relation to transfer agents in this state of foreign corporations was construed in People *v.* Lake Shore, etc. R. R., 11 Hun, 1 (1877); aff'd *sub nom. Re* Sage, 70 N. Y. 220; People *v.* Northern Pacific R. R., 50 N. Y. Super. Ct. 456 (1884); Kennedy *v.* Chicago, etc. R. R., 14 Abb. N. Cas. 326 (1884); People *v.* U. S. etc. Co., 20 Abb. N. Cas. 192 (1888); People *v.* Paton, 20 Abb. N. Cas. 195 (1887); s. c., 5 N. Y. St. 316. *Re* Commerford *v.* William J. Johnston Co., N. Y. L. J., Oct. 7, 1890; Ervin *v.* Oregon Ry. etc. Co., 22 Hun, 566 (1880). A delay of one day in allowing the inspection, owing to the absence of the person having charge of the books, does not cause the penalty to attach. Kelsey *v.* Pfaudler, etc. Co., 41 Hun, 20 (1886). A statutory right of stockholders to inspect the books is mandatory, while the common law right is discretionary. Under the New York statute a stockholder may copy the names of the stockholders of record, in order that he may negotiate for their stock. This statute applies also to a national bank located in New York state. The court may regulate the hours of inspection, and may refuse to enforce this statutory right, if it is for an illegitimate purpose. The statute enlarges and does not restrict the common law right. People *v.* Consolidated Nat. Bank, 105 N. Y. App. Div. 409 (1905). The right of a stockholder in a foreign corporation having an office or business

been applied to foreign corporations having an office and a stock-book within the state.[1] Sometimes the statute provides for the inspection of all corporate records.[2] *Mandamus* lies to enforce this right.[3]

in the state to examine the stock-book as allowed by the New York statute, gives him the right also to make extracts. Fay *v.* Coughlin, etc. Co., 47 N. Y. Misc. Rep. 687 (1905). *Mandamus* will be granted at the instance of a stockholder to examine the stock-book, irrespective of his motive, inasmuch as the right is statutory in New York, especially where a meeting is about to be held to increase the capital stock. People *v.* Keeseville, etc. R. R., 106 N. Y. App. Div. 349 (1905), the court saying also: "With respect to the general business books of a corporation, the court will not order an inspection by the stockholder unless he seeks to learn something which he has the right to know for his own protection, and his application must be in good faith and not for the purpose of injuring or annoying the corporation."

1 See § 515, *supra*.

2 Ohio Rev. Stat. (1886), § 3312; Cal. Civ. Code, §§ 377, 378; Penal Code, 565; R. I. Pub. St., Ch. 153, § 21, and Ch. 158, § 24 (1882); Mich. Gen. Stat., § 3173, for banks. See also Colo. Gen. Stat. (1882), § 249; Mo. Rev. Stat. (1879, §§ 720, 721; Vermont R. Laws (1880); §§ 3294, 3295; Mass. 1860, Ch. 68, § 10; Ill. Rev. Stat. (1874), Ch. 32, § 13. A statutory right of a creditor to examine such portions of the corporate books and papers as relate to a claim or to the collection thereof is enforceable, not by a proceeding at law or by a bill for discovery, but by *mandamus*, and his motive is immaterial. Hub, etc. Co. *v.* New England, etc. Club, 67 Atl. Rep. 574 (N. H. 1907). In the case State *v.* Lazarus, 105 S. W. Rep. 780 (Mo. 1907), a Missouri stockholder in a foreign corporation, the books of which were in Missouri, was granted a *mandamus* compelling the custodian of the company to show to him the records of stockholders' and directors' meetings, names of stockholders, the accounts, and description of its property, but not a secret process of manufacture, and the *mandamus* was granted although the stockholder was interested in a rival company. A minority stockholder, who has instituted suit against the company for mismanagement and to examine the books and to obtain a transfer of stock on the books, will be allowed to examine the books of the company, under the statutes of Ohio, where he alleges that the company formerly paid dividends for many years, and then ceased paying them, and that it was being managed in the interests of a rival company. The order may be served upon the secretary and general manager, especially where the principal directors are out of the state. If the order is not complied with, the secretary and manager may be imprisoned for contempt. Arbuckle *v.* Spice Co., 11 Ohio Circuits, 726 (1901). Such inspection will be allowed, even though the stockholder making the application is interested in a rival concern, and even though a subpoena *duces tecum* might issue. Arbuckle *v.* Spice Co., 11 Ohio Circuits, 743 (1901). The pleading in a cause of action arising under a statute herein must clearly bring the case within the statute. Lewis *v.* Brainerd, 53 Vt. 510 (1881). The purpose of the inspection need not be stated to the officer. That the officer had notice of plaintiff's stockholdership must be alleged. Williams *v.* College Corner, etc. Co., 45 Ind. 170 (1873). *Cf.* Queen *v.* Grand Canal, 1 Ir. L. R. 337 (1839). For New

3 See § 514, *supra*.

Injunction lies to prevent a corporation refusing the statutory right of a stockholder to examine the books of a private corporation, and it is immaterial what his motive may be.[1] A stockholder suing an officer of a foreign corporation for penalties for refusing to allow inspection of the stock-book cannot accumulate the penalities. He can recover for but one violation.[2] In New Jersey it is held that *mandamus* does not lie to enforce a statutory right to examine the books, except where it would lie at common law.[3] A statute requiring stock ledgers to be kept open for the examination of stockholders applies to pre-existing as well as subsequently organized corporations.[4] Frequently the charter itself states that the stockholder shall have certain rights of inspection. In England the Companies Act regulates specifically the stockholders' right of inspection, and provides for a committee of investigation in behalf of the stockholders whenever an investigation is desired by them.[5] The common-law right of inspection remains, although a

Jersey, see Huylar *v.* Cragin Cattle Co., 40 N. J. Eq. 392 (1885); s. c., 7 Atl. Rep. 521 (1887). Under the statutes of New Jersey the court will order the books of the company to be brought within the state on the petition of the president and a director. A person having a right to examine the books of the company may do so through an attorney. It is immaterial what the motive of the applicant may be. Mitchell *v.* Rubber Reclaiming Co., 24 Atl. Rep. 407 (N. J. 1892). A stockholder in a New Jersey corporation may by *mandamus* compel it to produce within the state its books for examination as authorized by statute. A provision in the certificate of incorporation that the directors shall regulate the stockholders' rights to inspect books or accounts, except as provided otherwise by statute or by resolution of the directors or resolution of the stockholders, does not restrict the above right. Hodgens *v.* United Copper Co., 67 Atl. Rep., 756 (N. J. 1907). As to the law in Connecticut, see Pratt *v.* Meriden Cutlery Co., 35 Conn. 36 (1868). See, in general, Cain *v.* Pullen, 34 La. Ann. 511 (1882). Where the statutes give a stockholder the right to examine all accounts of corporate transactions a stockholder is entitled to a *mandamus* to enforce this right, even though he desires to get information to use in his own business in competition with that of the corporation, but the examination must be at a reasonable time. Weinhenmayer *v.* Bitner, 88 Md. 325 (1898).

1 Cincinnati, etc. Co. *v.* Hoffmeister, 62 Ohio St. 189 (1900).

2 Cox *v.* Paul, 175 N. Y. 328 (1903).

3 State *v.* National Biscuit Co., 69 N. J. L. 198 (1903).

4 Bay State Gas Co. *v.* State, 4 Pen. (Del.) 238 (1904), holding also that *mandamus* lies to compel a corporation to keep stock-books open for examination by the stockholders, in accordance with a statute, and if the president is in charge of the books he may be made a party defendant, and that a statute requiring corporations to file certificates stating the amount of the capital stock paid in may be enforced by *mandamus*.

5 25 & 26 Vict., c. 89, Table A. In England, under a statute allowing a stockholder to inspect the register of stockholders, etc., an injunction lies to restrain corporate officers from refusing this right. Holland *v.* Dickson,

special statutory right is also given.[1] Where a by-law gives the stockholders the right to examine the books, this extends the common-law right and may be enforced by *mandamus.*[2]

§ 519. *Orders to corporation to allow inspection — Subpœna duces tecum — Bill of discovery.*—An inspection of corporate records is often desired by a stockholder in connection with an action which is pending in the courts, and it has been the practice of the courts to grant applications for this purpose.[3] The order to

L. R. 37 Ch. D. 669 (1888). A company which by statute is bound to allow an inspection of the register must allow a party to take copies of the same, and an injunction lies in case of refusal. Nelson *v.* Anglo-American, etc. Co., [1897] 1 Ch. 130. A stockholder has the right to make a copy of corporate records which he is examining. Boord *v.* African, etc. Co., [1898] 1 Ch. 596. A penalty for not allowing inspection of the corporate books does not apply to a liquidator. *Re* Kent, etc. Syndicate, [1898] 1 Q. B. 754. Under the English statute a stockholder may inspect the transfer book and take copies, even though he is acting in the interest of a rival company. Mutter *v.* Eastern, etc. Ry., L. R. 38 Ch. D. 92 (1888). A stockholder suing to set aside a fraudulent contract may have inspection even of privileged matters between the company and its attorney. Gouraud *v.* Edison, etc. Co., 59 L. T. 813 (1888).

1 Matter of Steinway, 159 N. Y. 251 (1899); People *v.* Lake Shore, etc. R. R., 11 Hun, 1 (1877); affirmed *sub nom. Re* Sage, 70 N. Y. 220 (1877). Varney *v.* Baker, 194 Mass. 239 (1907). Even though a statute authorizes a stockholder to examine the stock-books, yet his common-law right to examine any books at times when he will not annoy the officials or interfere with the conduct of the business remains. State *v.* Donnell Mfg. Co., 107 S. W. Rep. 1112 (Mo. 1908).

2 Wyoming Coal, etc. Co. *v.* State, 87 Pac. Rep. 337 (Wyo. 1906).

3 See cases in previous sections of this chapter. The evidence sought must be directly material to the cause. Rex *v.* Hostmen, 2 Stra. 1223 (1745); Rex *v.* Babb, 3 T. R. 579 (1790); Mayor of Southampton *v.* Graves, 8 T. R. 590 (1800), holding that a stranger has no more right to have an inspection here than in a case where he sues a copartnership. See Central Nat. Bank *v.* White, 37 N. Y. Super. Ct. 297 (1874), holding that in New York the inspection is proper if the evidence is material and cannot otherwise be obtained; Clinch *v.* Financial Corp., L. R. 2 Eq. 271 (1866), where a director was compelled to produce. In the federal courts an inspection will not be granted in order to frame a complaint. Paine *v.* Warren, 33 Fed. Rep. 357 (1888).

In a bill alleging fraud on the part of the directors, whereby complainant, a stockholder, has been injured, the latter may obtain such inspection. Walburn *v.* Ingilby, 1 Myl. & K. 61 (1833). See Bassford *v.* Blakesley, 6 Beav. 131 (1842). On a verified petition by a single stockholder stating that a mine owned by the company is being worked at a loss, an inspection of the company's books will be granted. *Re* West Devon, etc. Mine, L. R. 27 Ch. D. 106 (1884). In a suit to hold the directors of a life insurance company personally responsible for large losses alleged to have been caused by moneys improperly paid on policies, an inspection has been allowed, although plaintiff was said to have but a trifling interest in the company and was desirous of injuring it, and had published prejudicial statements in regard to the

allow an inspection may be made at any stage of the action. A stockholder has this right to aid him in suits with strangers, and of course his right herein is more extensive than the rights of the other party to the action. In fact, a person who is not a stock-

matter. Williams *v.* Prince of Wales Ins. Co., 23 Beav. 338 (1857). Where a company was being wound up, an application on behalf of twenty-four out of eight hundred and fifty-six stockholders, who had associated themselves together for an investigation into the company's affairs, was allowed, with permission to employ an accountant to carry on the examination of the books. Joint-stock Discount Co.'s Case, 36 L. J. Ch. 150 (1867). See Emma Silver Min. Co.'s Case, L. R. 10 Ch. App. 194 (1875); People *v.* Lake Shore, etc. R. R., 11 Hun, 1 (1877); affirmed *sub nom. Re* Sage, 70 N. Y. 220 (1877); *Ex parte* Buchan, 36 L. J. (Ch.) 150 (1866). An inspection will not be granted for the purpose of fishing out a defense to a suit. Birmingham, etc. Ry. *v.* White, 1 Q. B. 282 (1841); Imperial Gas Co. *v.* Clarke, 7 Bing. 95 (1830). See Hoyt *v.* American Exch. Bank, 1 Duer, 652 (1853); Shoe & Leather Assoc. *v.* Bailey, 49 N. Y. Super. Ct. 385 (1883). Nor to furnish materials to the other side for a new trial. Pratt *v.* Goswell, 9 C. B. (N. S.) 706 (1861). Nor to ascertain whether petitioner might better accept, with the other stockholders, what was offered her for her holding in an old company, which was being wound up, instead of proceeding with an arbitration. *Re* Glamorganshire Banking Co., L. R. 28 Ch. D. 620 (1884). Nor to establish a justification in an action against the petitioner for libel, imputing insolvency to the company. Metropolitan, etc. Co. *v.* Hawkins, 4 H. & N. 146 (1859). See Finlay *v.* Lindsay, 7 Ir. L. R. (N. S.) 1 (1857); Collins *v.* Yates, 27 L. J. (Exch.) 150 (1858); Opdyke *v.* Marble, 44 Barb. 64 (1864). Nor to examine all the books of the company for fifty years back, because petitioner alleges that he is dissatisfied with the management of the company and with the accounts, besides other grounds. Regina *v.* Grand Canal, 1 Ir. L. R. 337 (1839). Nor where the petition does not specify the particular books asked for, nor the object of the petitioner in making the application to the officers and to the court. Regina *v.* London, etc. Docks Co., 44 L. J. (Q. B.) 4 (1874). See Hunt *v.* Hewitt, 7 Exch. 236 (1852); Pepper *v.* Chambers, 7 Exch. 226 (1852); New England Iron Co., *v.* New York Loan, etc. Co., 55 How. Pr. 351 (1878); Central, etc. R. R., *v.* Twenty-third St., Ry., 53 How. Pr. 45 (1877); Forsyth Comm'rs *v.* Lemly, 85 N. C. 341 (1881); Walker *v.* Granite Bank, 44 Barb. 39 (1865), S. C. 19 Abb. Pr. 111. The court may direct the *manner* of the examination. Williams *v.* Prince of Wales, etc. Co., 23 Beav. 338 (1857).

An appeal may be taken from an order granting a party leave to inspect and examine the books of a corporation, the appellant. Thompson *v.* Erie Ry., 9 Abb. Pr. (N. S.) 212 (1870); Lancashire, etc. Co. *v.* Greatorex, 14 L. T. Rep. 290 (1866); People *v.* Kent County Judge, 38 Mich. 351 (1878); Forsyth Comm'rs *v.* Lemly, 85 N. C. 341 (1881). See Saxby *v.* Easterbrook, L. R. 7 Exch. 207 (1872); Bustros *v.* White, L. R. 1 Q. B. D. 423 (1876); Clyde *v.* Rogers, 24 Hun, 145 (1881); appeal dismissed in s. c., 87 N. Y. 625; McCargo *v.* Crutcher, 27 Ala. 171 (1855); Sage's Case, 70 N. Y. 221 (1877). As to the costs of an inspection, see Hill *v.* Philp, 7 Exch. 232 (1852); Davey *v.* Pemberton, 11 C. B. (N. S.) 628 (1862); Gardner *v.* Dangerfield, 5 Beav. 385 (1842). Stockholders obtaining inspection may be ordered not to dis-

holder has no more right to an inspection of the corporate books than he has to inspect the books of a copartnership. This is the rule, even though he is suing or being sued by a stockholder.[1] The officers of a corporation cannot be compelled to produce its books, in a suit in which the corporation is not a party, even though the books may disclose facts material to the issues.[2] The state in ascertaining the value of stock in order to fix an inheritance tax thereon, cannot compel the corporation to produce its books and papers.[3] But in a suit by the United States government to break up a combination and monopoly of corporations owning bridges and ferries across the Mississippi river at St. Louis, a court of equity may compel traffic associations to produce their books and papers, even though they are not parties to the suit and it is claimed that the books and papers are immaterial and are private books and papers.[4] In a suit against

close the information received. *Ex parte* Buchan, 36 L. J. (Ch.) 150 (1866); Williams *v.* Prince of Wales, etc. Co., 23 Beav. 338 (1857). May examine through an attorney. Williams *v.* Prince of Wales, etc. Co., 23 Beav. 338 (1857). A professional accountant may be employed. Bonnardet *v.* Taylor, 1 J. & H. 383 (1861); 1 Greenl. Ev., § 474. An inspection of the stock-ledger was allowed in People *v.* Pacific Mail S. S. Co., 50 Barb. 280 (1867). So also of the discount book. Cockburn *v.* Union Bank, 13 La. Ann. 289 (1858); People *v.* Throop, 12 Wend. 183 (1834). So also of the by-laws. Harrison *v.* Williams, 3 B. & C. 162 (1824); Reg. *v.* Saddlers' Co., 10 W. R. 87 (1861). See also Walburn *v.* Ingilby, 1 Myl. & K. 61 (1833), where the order was to a third person having charge of the books. "The courts of common law may also make an order for the inspection of writings in the possession of one party to a suit in favor of the other." 1 Greenl. Ev., § 559. An article of the company taking away the right of inspection does not prevent a rule issuing requiring its allowance in pending litigation. Hall *v.* Connell, 3 Y. & C. (Exch.) 707 (1840). The rule stated in the text above applies to joint-stock companies. Woods *v.* De Figaniere, 1 Rob. (N. Y.) 681 (1863). In the federal courts the right is statutory. U. S. Rev. Stat., § 724. In regard to the act of congress authorizing courts to require the production of books and writings, see Victor G. Bloede Co. etc. *v.* Joseph Bancroft, etc. Co., 98 Fed. Rep. 175 (1899). The opinions of counsel in the case of a fraudulent transaction are not privileged. Williams *v.* Quebrada Ry. etc. Co., [1895] 2 Ch. 751.

1 Strangers have no more right to demand inspection of the books of a corporation during litigation in which the corporation is not interested than they have to demand a similar right of any other person. Mayor of Southampton *v.* Graves, 8 T. R. 590 (1800), overruling earlier cases. See also Opdyke *v.* Marble, 44 Barb. 64 (1864); Morgan *v.* Morgan, 16 Abb. Pr. (N. S.) 291 (1874). A corporation will not be compelled to open its records for the purposes of a litigation in which it is not a party. Henry *v.* Travelers' Ins. Co., 35 Fed. Rep. 15 (1888).

2 Southern Ry. *v.* North Car. etc. Com., 104 Fed. Rep. 700 (1900).

3 State *v.* Carpenter, 129 Wis. 180 (1906).

4 United States *v.* Terminal, etc., 148 Fed. Rep. 486 (1906).

stockholders for malicious prosecution, they may be required by *mandamus* to produce certain books of the corporation for the inspection of the plaintiff.[1] Where a foreign corporation commences suit in a state it may be compelled to allow an inspection of its books and papers in accordance with the procedure of the court, but if its books are in use out of the state it may file verified copies of the items specified with the privilege to the defendant to verify the same by comparison with the originals.[2] If a stockholder, and sometimes a third person, is suing or being sued by a corporation, he is entitled to the usual right of giving a notice to produce documents,[3] or to a discovery by an order.[4] In a suit by a shipper for

1 Eddy *v.* Bay Circuit Judge, 114 Mich. 668 (1897).

2 National, etc. Co. *v.* Van Emden, 120 N. Y. App. Div. 746 (1907).

3 See Wait, Insolv. Corp., § 519. See also § 714, *infra.* Where a defendant corporation does not produce its minute book in accordance with the notice to do so, the evidence of its president is admissible that the board of directors had approved of his action in entering into the contract involved in the suit. Strawbridge *v.* Clamond Tel. Co., 195 Pa. St. 118 (1900).

4 Rex *v.* Travannion, 2 Chitty, 366 (1818); Swansea Vale Ry. *v.* Budd, L. R. 2 Eq. 274 (1866); Macintosh *v.* Flint, etc. R. R., 1 Ry. & Corp. L. J. 384 (Mich. 1887), a stockholder's case. An order to allow examination of the corporate records was granted in Kirkpatrick *v.* Pope Mfg. Co., 61 Fed. Rep. 46 (1894), where the defendant company said that it had not violated a contract, but that its successor was liable. A receiver will not be compelled to obtain from hostile parties books and papers in order that he may exhibit them to parties whom he is suing. Schlesinger *v.* Ellinger, 114 N. W. Rep. 825 (Wis. 1908). Where a stockholder files a bill to obtain an accounting, and charges misappropriation, and makes a motion that he be allowed to examine the books, the court will wait until the corporation pleads or answers before granting the motion. Ranger *v.* Champion, etc. Co., 51 Fed. Rep. 61 (1892). Under the Nebraska statute, in a suit instituted by the state to enjoin a foreign corporation from doing business in the state on the ground that it is violating an anti-trust statute, the court may order the defendant to allow the plaintiff to examine the defendant's books and records for the purpose of obtaining evidence in the case. State *v.* Standard Oil Co., 61 Neb. 28 (1900). Under the statutory practice in Rhode Island the court may order the production of the record book of the corporation in court or for an inspection. Arnold *v.* Pawtuxet, etc. Co., 18 R. I. 189 (1893). The affidavit to obtain the order must show that the information sought is essential. Imperial Gas Co. *v.* Clarke, 7 Bing. 95 (1830); Williams *v.* Savage Mfg. Co., 3 Md. Ch. 418, 428 (1851). The officers may be orally examined by the court with reference to where the books are. Lacharme *v.* Quartz Rock, etc. Min. Co., 1 H. & C. 134 (1862). They may be required to make affidavits. Ranger *v.* Great Western Ry., 4 De G. & J. 74 (1859); *Re* Burton, 31 L. J. (Q. B.) 62 (1861). In an action against a corporation the plaintiff is entitled to inspect all the minutes and entries in the company's books having reference to the subject in litigation. Hill *v.* Great Western Ry., 10 C. B. (N. S.) 148 (1861); Harrison *v.* Williams, 3 B. & C. 162

the recovery of damages in the nature of a penalty under the interstate commerce act against a railroad corporation, the latter may be compelled by order to produce at the trial of the cause books and papers specified in the petition.[1] Even though the secretary of a company refuses in the trial of a case to produce the books of the company as ordered by the court, yet an order committing him for contempt of court is illegal if the original order amounted to an unreasonable seizure and search of the company's records, especially where the statutes provided for an inspection of corporate books by a different procedure, and it was not shown that the books would contain the evidence expected.[2] Where corporate books have been destroyed, the officers are not guilty of contempt in not producing them.[3] Reports from officers and employees of a corporation to its executive officer in regard to an accident are privileged communications.[4] In a case involving fraud, however, the letters of officers of a corporation to each other may be put in evidence.[5]

In a suit in equity against a corporation interrogatories may be attached to the bill of complaint and the corporate officers may be compelled to answer them.[6] In certain cases a bill of discovery

(1824); *Re* Burton, 31 L. J. (Q. B.) 62 (1861); Sinclair *v.* Gray, 9 Fla. 71 (1860). See Hill *v.* Manchester, etc. Co., 5 B. & Ad. 866 (1833); Rex *v.* Buckingham, 8 B. & C. 375 (1828); Imperial Gas Co., *v.* Clarke, 7 Bing. 95 (1830). The plaintiff may have inspection of corporate minutes in a suit by a superintendent against the corporation. Hill *v.* Great Western Ry., 10 C. B. (N. S.) 148 (1861). Or in a suit by a claimant of office. *Re* Burton, 31 L. J. (Q. B.) 62 (1861). See also § 714 *infra.* An order will not be granted for the purpose of fishing out a defense. Birmingham, etc. Ry. *v.* White, 1 Q. B. 282 (1841). See also Credit Co. *v.* Webster, 53 L. T. Rep. 419 (1885).

1 International, etc. Co. *v.* Pennsylvania R. R., 152 Fed. Rep. 557 (1907).

2 *Ex parte* Clarke, 126 Cal. 235 (1899). In the case Cassatt *v.* Mitchell, etc. Co., 150 Fed. Rep. 32 (1907), it was held that in an action at law in the federal court against a railroad for damages for discrimination in rates, the officers of the railroad cannot be examined before trial by an order to that effect, and that section 727 of the Revised Statutes of the United States does not confer that power in an action at law. The remedy is a bill in equity for discovery, and it was held that in a suit against a corporation, a corporation is protected against unreasonable searches the same as an individual. The supreme court in Webster, etc. Co. *v.* Cassatt, 207 U. S. 181 (1907), reversed this decision in Pennsylvania, etc. Co. *v.* Cassatt, 150 Fed. Rep. 32, on the ground that the latter court did not have jurisdiction of the appeal.

3 Despeaux *v.* Pennsylvania R. R., 149 Fed. Rep. 798 (1906).

4 *Ex parte* Schoepf, 74 Ohio St. 1 (1906).

5 Weiss *v.* Haight, etc. Co., 148 Fed. Rep. 399 (1906).

6 Where one of the purposes of a bill is to require the production of the records and minutes of the meetings of a corporation, and such records are necessary for the plaintiff to prove his case, the court may order the defendants to produce them under penalty of having their answer

may be filed.[1] A bill of discovery may be filed to discover the names of stockholders, in order to enforce their statutory liabil-

stricken from the files of the court. Ramsdell *v.* National, etc. Co., 104 Fed. Rep. 16 (1900). A stockholder's bill against a corporation and directors may be to remedy certain alleged frauds, and also incidentally to obtain a disclosure and discovery. The stockholder need not resort to a *mandamus*. Weir *v.* Bay State Gas Co., 91 Fed. Rep. 940 (1898). But where the suit is brought by the stockholder against the corporation alone to remedy the frauds of directors and have a receiver appointed and obtain a disclosure, the bill is defective for non-joinder of the guilty parties. Edwards *v.* Bay State Gas Co., 91 Fed. Rep. 942 (1898); Morse *v.* Bay State Gas Co., 91 Fed. Rep. 944 (1898). Where suit is brought against a corporation, and its officers are made parties defendant for purposes of discovery, the latter are not merely nominal parties. Doyle *v.* San Diego, etc. Co., 43 Fed. Rep. 349 (1890). Where an answer under oath is waived, and no discovery is sought in an action against a corporation, the officers are not proper parties defendant. Colonial, etc. Co. *v.* Hutchinson Mortgage Co., 44 Fed. Rep. 219 (1890). A person may be made a party defendant for purposes of discovery only. See Lewis *v.* St. Albans, etc. Works, 50 Vt. 477 (1878). In an action by a person against a corporation for any cause of action, a secretary and bookkeeper may be made a party defendant for the purpose of getting an answer of discovery under oath, which the corporation cannot make. Wych *v.* Meal, 3 P. Wms. 310 (1734); Chase *v.* Vanderbilt, 62 N. Y. 307, 314 (1875); Many *v.* Beekman Iron Co., 9 Paige, 188 (1841); Masters *v.* Rossie, etc. Co. 2 Sandf. Ch. 301 (1845); Brumly *v.* Westchester, etc. Soc., 1 Johns. Ch. 366 (1815); McIntyre *v.* Union College, 6 Paige, 239 (1837); Vermilyea *v.* Fulton Bank, 1 Paige, 37 (1828). But not where the corporation is not a party. Ellsworth *v.* Curtis, 10 Paige, 105 (1843). An officer of the company in answering interrogatories propounded to the company, need not give information which he obtained outside of the service of the company or which he knows as an officer of a predecessor company. Welsbach, etc. Co. *v.* New, etc. Co., [1900] 2 Ch. 1. In equity suits it is the practice to join as codefendants with the corporation such officers as may answer under oath such matters as the complainant desires to know. See § 738, *infra;* Glasscott *v.* Copper-Miners, 11 Sim. 305 (1840); *Re* Barned's Bkg. Co., L. R. 2 Ch. App. 350 (1867); French *v.* First Nat. Bank, 7 Ben. 488 (1874); s. c., 9 Fed. Cas. 786. This rule prevails because the corporation itself cannot be convicted of perjury. McKim *v.* Odom, 3 Bland, Ch. (Md.) 407, 420 (1828); Wych *v.* Meal, 3 P. Wms. 311 (1734); Bevans *v.* Dingman's Choice Turnp., 10 Pa. St. 174 (1849). The corporation itself may be compelled to answer fully. See Gamewell, etc. Co. *v.* New York, 31 Fed. Rep. 312 (1887), citing cases. A corporate officer may be joined with the corporation as a defendant to obtain from him a discovery. Lord Eldon said as to this rule: "It originated with Lord Talbot, who reasoned thus upon it: that you cannot have a satisfactory answer from a corporation, therefore you make the secretary a party and get from him the discovery you cannot be sure of having from them; and it is added that the answer of the secretary may enable you to get better information." Continental Nat. Bank, *v.* Hellman, 66 Fed. Rep. 184 (1895).

1 A cross-bill for discovery lies against a corporation, even though the officers might be called as wit-

ity.[1] A receiver may file a bill in equity against a clerk in the employ of stock-brokers to compel the clerk to disclose who is the real owner of stock standing in his name, in order that the receiver may collect the unpaid part of the subscription price therefor.[2] In New York, as well as in other states, an examination before trial is sometimes

nesses. Indianapolis Gas Co. *v.* City of Indianapolis, 90 Fed. Rep. 196 (1898). Officers may be joined as parties defendant in order that they may answer interrogatories attached to the bill for the purpose of enabling the complainant to know who to examine as witnesses. Such answers need not be made under oath. Gulf, etc. Co. *v.* Crenshaw, 138 Ala. 134 (1903). The proper procedure in equity to compel a party to produce documents is by bill or cross-bill for discovery or by *subpœna duces tecum* and not by an order based on an affidavit. West Pub. Co. *v.* Edward Thompson Co., 151 Fed. Rep. 138. A bill for discovery against the corporation alone is not good. The officers should be joined. Roanoke St. Ry. *v.* Hicks, 96 Va. 510 (1898). A bill in equity at the instance of a stockholder to obtain an inspection of the books in order to ascertain the financial condition of the company does not lie where he does not allege that he has been refused an inspection or the required information. Moreover, his remedy is by *mandamus*. Trimble *v.* American, etc. Co., 61 N. J. Eq. 340 (1901). Where discovery is sought from an officer he should be made a party defendant. Virginia, etc. Co. *v.* Hale, 93 Ala. 542 (1890). A bill lies in equity to compel a corporation to discover, in aid of a suit at law for damages for infringement of patent. Colgate *v.* Compagnie Francaise, 23 Fed. Rep. 82 (1885). See also as to a bill of discovery, McComb *v.* Chicago, etc. R. R., 19 Blatchf. 69 (1881); Costa Rica *v.* Erlanger, L. R. 1 Ch. D. 171 (1875); Glasscott *v.* Copper-Miners, 11 Sim. 305 (1840); Moodalay *v.* Morton, 1 Bro. C. C. 469 (1785); Stettauer *v.* New York, etc. Co., 42 N. J. Eq. 46 (1886); French *v.* First Nat. Bank, 7 Ben. 488 (1874); s. c., 9 Fed. Cas. 786. But a bill of discovery will not lie against one who is merely a witness. Fenton *v.* Hughes, 7 Ves. Jr. 287 (1802); Dummer *v.* Chippenham, 14 Ves. Jr. 245 (1807). As to the difference between a bill of discovery and other bills, see McIntyre *v.* Union College, 6 Paige, 239 (1837); Many *v.* Beekman Iron Co., 9 Paige, 188 (1841). A discovery will not be granted where there is no allegation that information is refused, or that the party cannot examine the books, or that a *mandamus* would be inadequate. Wolfe *v.* Underwood, 96 Ala. 329 (1892).

1 Post *v.* Toledo, etc. R. R., 144 Mass. 341 (1887). A bill in equity for discovery lies at the instance of a judgment creditor of a corporation to ascertain the names and addresses of the stockholders, the object being to enforce the statutory liability, but such bill must allege such liability. Clark *v.* Rhode Island, etc. Works, 24 R. I. 307 (1902).

2 Brown *v.* McDonald, 133 Fed. Rep. 897 (1905). A receiver may by bill of discovery compel a broker to state who is the real owner of stock purchased by the broker, on which stock an assessment has been made. Brown *v.* Magee, 146 Fed. Rep. 765 (1906). A receiver may maintain a bil of discovery against a broker to compel him to divulge the names of the real owners of stock which stands in the name of the broker's clerk, such stock being unpaid. Kurtz *v.* Brown, 152 Fed. Rep. 372 (1906). A broker may be compelled to disclose the name of his customer for whom he purchased stock and put the stock in the name

granted by the court.[1] Sometimes a *subpoena duces tecum,* issued in behalf of a stockholder or of a third person, may serve the pur-

of a clerk. A receiver of the corporation may file a bill of discovery for that purpose in order that an assessment may be levied on the stock for the unpaid subscription price. Brown *v.* Palmer, 157 Fed. Rep. 797 (1907).

1 An order to examine a corporation before trial should run to the corporation and not to the officers individually. An order for the examination of the officers, which is really intended to obtain an inspection of the corporate books and papers, will be vacated, especially where the officers have no personal knowledge of the records and no memory to be refreshed, because an order to inspect books and papers is different from an order for examination before trial. Shumaker *v.* Doubleday, etc. Co., 116 N. Y. App. Div. 302 (1906). When a corporation denies that an employee was authorized to make a contract for it, its officers may be examined before trial but its books and minutes need not be produced unless it is shown that they contain entries relating to that fact. Wood *v.* Mott Iron Works, 114 N. Y. App. Div. 108 (1906). In a stockholder's suit to declare void a cancellation of a lease by the corporation, the corporation may be examined before trial to prove agreements, correspondence, etc., which may be removed from the state. Jacobs *v.* Mexican, etc. Co., Ltd., 112 N. Y. App. Div. 655 (1906). There is no authority in New York, however, for a separate proceeding to examine an officer before trial, this being done by the order for the examination of the corporation specifying the officers to be examined. Jacobs *v.* Mexican, etc. Co., Ltd., 112 N. Y. App. Div. 657 (1906). In a suit by a manager against the corporation for services he may not be granted a commission to investigate the corporate books generally, but may, in order to prepare for trial be entitled to examine the officers before trial and have the books produced on supœna *duces tecum* to enable them to testify. Harbaugh *v.* Middlesex, etc. Co., 110 N. Y. App. Div. 633 (1906). In examining officers before trial they may be required to produce the corporate books to refresh their memories. Bruen *v.* Whitman Co., 106 N. Y. App. Div. 248 (1905). In a suit by a stockholder against the president for misrepresentations inducing the former not to sell his stock, the defendant may be examined before trial on the question of his having received from the corporation $15,000,000 of stock for property worth $800,000, that fact bearing on the misrepresentation which was as to the dividend earning capacity of the company. McDonald *v.* Morse, 96 N. Y. App. Div. 406 (1904). Where in a stockholders' suit against the treasurer to account for property, an order is made for the examination of the treasurer before trial, and for the production of the corporate books to refresh his memory, and the latter does not appeal therefrom, he is guilty of contempt of court if he fails to comply therewith. Pray *v.* Blanchard, 95 N. Y. App. Div. 423 (1904). A stockholder in a foreign corporation bringing suit in New York courts to set aside an alleged fraudulent sale of the property of the company is entitled to an order to allow him to examine the books and papers of the company bearing on the subject, but he must point out the specific books required. Snyder *v.* De Forest, etc. Co., 113 N. Y. App Div. 840 (1906). In the examination in New York of an officer of a foreign corporation, the books of which are in New York, on a subpœna to testify in a suit pending in another state, the officer cannot be compelled to leave the corporate

pose.[1] A *subpoena duces tecum* to appear before a grand jury is sufficient if it refers to books and papers relating to business trans-

books with the commissioner. Matter of Randall, 87 N. Y. App. Div. 245 (1903). Sections 914 and 915 of the New York Code do not authorize the New York courts to require the officers of a corporation to produce its books and papers for the purpose of putting them in evidence in a suit pending in another state, but may authorize their production for use in connection with the testimony of a witness. Matter of Lee, 41 N. Y. Misc. Rep. 642 (1903). In a suit brought by a corporate creditor against many stockholders to collect unpaid subscriptions, the plaintiff is not entitled to an order allowing him to examine persons for the purpose of ascertaining the residence of the defendants in order that they may be served. Union Collection Co. *v.* Superior Court, 149 Cal. 790 (1906). In a suit by a stockholder for a decree adjudging that certain property is held in trust by another corporation for his corporation, he may have an order to examine an officer of the former corporation before trial where such officer is the only person by whom certain facts may be proved, and plaintiff may not be able to compel him to attend the trial. Grant *v.* Greene, 118 N. Y. App. Div. 850 (1907). But such an order cannot be obtained in order to ascertain what officer can be served with summons in the state. Grant *v.* Greene, etc. Co., 118 N. Y. App. Div. 853 (1907). A corporation may appeal from an order for the examination of one of its officers. Sherman *v.* Beacon, etc. Co., 58 Hun, 143 (1890). By examination before trial, plaintiff may ascertain whether defendants are proper defendants, or whether they are a corporation. Sweeney *v.* Sturgis, 24 Hun, 162 (1881). Where persons sued as partners deny the partnership, the plaintiff may have an examination before trial, in order to ascertain what the company is and of whom it consists. Clark *v.* Wilcklow, 75 Hun, 290 (1894). A stockholder who brings a suit against parties who have received from the corporation $3,000,000 of stock for $10,000 worth of patents may examine the defendants before trial, in order to prove what the patents were worth. Insurance Press *v.* Montauk, etc. Co., 70 N. Y. App. Div. 50 (1902). As to the Massachusetts statute allowing an examination of the president before trial, see Gunn *v.* New York, etc. R. R., 171 Mass. 417 (1898). A stockholder who has exchanged his stock for bonds, and who sues the directors for fraud, inducing him to make such exchange, cannot examine them before trial. Butler *v.* Duke, 39 N. Y. Misc. Rep. 235 (1902). So also as to a stockholder who sues the directors for an accounting, on the ground that they are interested in four corporations and had diverted the business. Elmes *v.* Duke, 39 N. Y. Misc. Rep. 244 (1902).

1 New York Code Civ. Proc., §§ 868, 869, 872, 873. See New York, etc. R. R. *v.* Carhart, 36 Hun, 288 (1885); Reichmann *v.* Manhattan Co., 26 Hun, 433 (1882); ch. 536, L. 1880; Fenlon *v.* Dempsey, 50 Hun, 131 (1888); Russell *v.* Manhattan Ry., N. Y. D. Reg., Dec. 8, 1887; People *v.* Mutual, etc. Co., 74 N. Y. 434 (1878); Wainwright *v.* Tiffiny, 13 N. Y. Civ. Pro. 222 (1887). The transfer book may be thus examined. See Fenlon *v.* Dempsey, 50 Hun, 131 (1888). The right of a stockholder to compel a corporation to produce in court the corporate records has been the subject of some controversy. In New York, under the old Code, it was held that a *subpœna duces tecum* would not always lie herein, but that an order to the corporation to allow an inspection was the proper remedy.

acted between certain dates, in this instance nearly two years, between certain parties, and the corporation cannot refuse on the ground that it is not paid for the time, trouble and expense of collecting the documents, where it appears that there is a statute providing for compensation to witnesses.[1] A statute providing for the service of a *subpoena duces tecum* upon the corporation instead of upon the officers who are in charge of the papers is legal.[2] A foreign corporation doing business in the state may be compelled by *subpoena duces tecum* to produce its books and papers, which at the time are out of the state.[3] In the federal court a *subpoena duces tecum* cannot be issued by the clerk of the court in an examination *de bene esse* within the district, but such subpœna can be issued only on order of the court after preliminary proof that the documents called for are in the possession of the witness, and are *prima facie* competent and material evidence in the case. Hence a general *subpoena duces tecum* to produce all minutes of meetings, stock-books, etc., will be

La Farge *v.* La Farge F. Ins. Co., 14 How. Pr. 26 (1857); Central Nat. Bank *v.* White, 37 N Y. Super. Ct. 297 (1874). Under § 872 of the New York Code of Civil Procedure, the court may order the production of books for the use of a witness. If an inspection is desired by the opposite party it is obtained under §§ 803–809. Matter of Sands, 98 N. Y. App. Div. 148 (1904). An inspection of corporate books under the New York practice is obtained under §§ 803–809 of the Code of Civil Procedure and not under subdivision 7 of § 872. Matter of Thompson, 95 N. Y. App. Div. 542 (1904). In a stockholder's suit to hold the directors liable for misfeasance, an inspection of the books will not be granted where the cause is at issue, and the same result can be reached by a *subpœna duces tecum*. Clarke *v.* Eastern, etc. Assoc., 89 Fed. Rep. 779 (1898). In Iowa a corporate servant who is required by a subpœna to produce the corporate books, which show that the corporation has violated the liquor laws, need not do so if the books are not in his possession. But otherwise he is guilty of contempt. U. S. Express Co. *v.* Henderson, 69 Iowa, 40 (1886). The president may be compelled by *subpœna duces tecum* to produce drawings owned by the company in a suit in which it is a party. Johnson, etc. Co. *v.* North Branch Steel Co., 48 Fed. Rep. 195 (1891). Stock-exchange books, as evidence, must be proved by the secretary. Terry *v.* Birmingham Nat. Bank, 93 Ala. 599 (1891); 99 Ala. 566. Where the books of a corporation are within the jurisdiction of the court, their production may be compelled in a litigation in which the corporation itself is a party. State *v.* Allen, 104 La. 301 (1900). In a suit by a corporation to enforce a contract, defendant cannot inquire into its internal affairs and records and papers relative to its organization. Doddridge, etc. Co. *v.* Smith, 154 Fed. Rep. 970 (1907).

1 Consolidated, etc. Co. *v.* Vermont, 207 U. S. 541 (1908), aff'g 66 Atl. Rep. 790.

2 Consolidated, etc. Co. *v.* Vermont, 207 U. S. 541 (1908), aff'g 66 Atl. Rep. 790.

3 Consolidated, etc. Co. *v.* Vermont, 207 U. S. 541 (1908), aff'g 66 Atl. Rep. 790.

refused unless the foregoing requirements are complied with.[1] The secretary and treasurer may identify the cash book, journal and ledger of a corporation, even though he did not make the entries therein. Entries in such books may be shown as admissions on the part of the corporation in the suit between it and a third party.[2] A corporation cannot be compelled to produce its president for examination as a witness.[3]

Most of the states have statutes regulating this subject, and these statutes frequently displace the common-law procedure.[4] A corporation may enjoin the secretary of state from taking its certificate of incorporation out of the state, even though he proposes to prove perjury by the officers in swearing to the certificate.[5] The books of the corporation are evidence in a suit against a stockholder on a call, even though the entries are not proved to be correct by the person actually making them.[6] In a criminal prosecution against a corporate officer the corporate books are not evidence against him unless it is shown that he had something to do with the books or knowledge of their contents, or some connection with the entries.[7] In a suit by a receiver of a national bank to recover back dividends illegally paid, the books of the bank are competent evidence to prove the acts of the corporation and its financial condition, except as to dealings between the corporation and the defendant.[8] Congress has power to enact a statute authorizing a legislative committee or the interstate commerce commission to investigate the

1 Dancel *v.* Goodyear, etc. Co., 128 Fed. Rep. 753 (1904). In a suit by a corporation against an individual for failure to deliver the stock of a competing corporation according to contract, an officer of the latter corporation cannot on a subpœna be compelled to testify or disclose documents relative to trade secrets which are not material to the controversy. Crocker-Wheeler Co. *v.* Bullock, 134 Fed. Rep. 241 (1904).

2 Matter of Randall, 90 N. Y. App. Div. 192 (1904).

3 Central, etc. Co. *v.* Board, etc., 125 Fed. Rep. 463 (1903).

4 In New York the right of inspection by order is regulated by statute. Code Civ. Proc., §§ 803, 809. See Boorman *v.* Atlantic, etc. R. R., 78 N. Y. 599 (1879); Ervin *v.* Oregon Ry. etc. Co., 22 Hun, 566 (1880), holding that where the books are in use, only sworn copies can be required; Johnson *v.* Consolidated, etc. Min. Co., 2 Abb. Pr. (N. S.) 413 (1867); Walker *v.* Granite Bank, 19 Abb. Pr. 111 (1865); s. c., 44 Barb. 39; Thompson *v.* Erie Ry., 9 Abb. Pr. (N. S.) 230 (1870); Fenton *v.* Dempsey, 10 N. Y. St. Rep. 733 (1887); People *v.* U. S. Mercantile Rep. Co., 20 Abb. N. Cas. 192 (1888); Shipherd *v.* Cohen, N. Y. D. Reg., Jan. 26, 1888.

5 Delaware, etc. Co. *v.* Layton, 50 Atl. Rep. 378 (Del. 1901).

6 Sigua, etc. Co. *v.* Brown, 171 N. Y. 488 (1902). See also § 727, *infra*.

7 People *v.* Burnham, 119 N. Y. App. Div. 302 (1907).

8 Hayden *v.* Williams, 96 Fed. Rep. 279 (1899).

affairs of corporations engaged in interstate commerce.[1] A *subpoena duces tecum* commanding the secretary and treasurer of a corporation, which is charged with violating an anti-trust act, to appear and produce practically all the correspondence and documents of the corporation since its organization, in order to enable the district attorney to prove a violation of the statute, is an unreasonable search and seizure of papers, which is prohibited by the fourth amendment of the constitution of the United States.[2] A corporation may be compelled to produce its books and papers for examination by a grand jury, even though it is charged with a criminal violation of a statute, but where there is no act of congress authorizing such examination, a *subpoena duces tecum* requiring it to produce all its books and papers before a grand jury is unreasonable and as indefensible as a search warrant would be if couched in similar terms.[3] An

1 Interstate Com. Commission *v.* Baird, 194 N. S., 25 (1904); Interstate Commerce Commission *v.* Brinson, 154 U. S. 447 (1894); *In re* Chapman, 166 U. S. 661 (1897). Under the acts of congress the interstate commerce commission may compel the officers of an interstate railroad company to divulge its financial operations, including its purchases of stock in other companies, but cannot compel an officer to divulge his own personal purchases of stock. Interstate Com. Com. *v.* Harriman, 157 Fed. Rep. 432 (1908).

2 *In re* Hale, 139 Fed. Rep. 496 (1905); aff'd, 201 U. S. 43. For other decisions to the effect that there is a very decided limit to the powers of the legislative or executive branches of the government to compel the production of the private books and papers of a corporation for inspection, and that there is also a limit, even in judiciary proceedings, see Matter of Application of Pacific Railway Commission, 32 Fed. Rep. 241 (1887); Kilbourn *v.* Thompson, 103 U. S. 168 (1880).

3 Hale *v.* Henkel, 201 U. S. 43 (1906). Officers of a corporation cannot excuse their failure to produce books and papers called for by a *subpœna duces tecum* in a proceeding before the grand jury on the ground that such books and papers are not in their possession or under their control, and they cannot object on the ground that the books and papers are immaterial. Nelson *v.* United States, 201 U. S. 92 (1906). In a proceeding by a state against foreign corporations for violating an anti-trust statute, the state may compel the corporations to produce their stock-books in order that the state may investigate whether one company owns a majority of the capital stock of the competing company. State *v.* Standard Oil Co., 91 S. W. Rep. 1062 (Mo. 1906). Parties sued under the anti-trust act of congress may be compelled to produce books and papers in advance of the trial, under § 724 of the Revised Statutes. American, etc. Co. *v.* United Fruit Co., 153 Fed. Rep. 943 (1907). A manager of a corporation which is charged with a criminal offense may refuse to produce its books, inasmuch as it may incriminate him also. *Ex parte* Chapman, 153 Fed. Rep. 371 (1907). An order for the discovery of documents will not be refused on the ground that it may incriminate, and that it may give evidence of a conspiracy. National Assoc., etc. *v.* Smithies, 95 L. T. Rep. 71 (1906). A statute making it a misdemeanor for stock-brokers not to allow the comptroller of the state to examine their

officer of a railroad corporation may by *subpoena duces tecum* be required to appear before the grand jury and bring certain letters, papers, memoranda and documents in reference to freight claims.[1] By the New York Penal Code it is a criminal offense to destroy any book, paper, record or written instrument that may be required in evidence or investigation, where the destruction is with intent to prevent the same being produced.[2] One who contracts with the authorized agent of a corporation is not a competent witness as to the contract, or the admissions and declarations of the agent, after the latter's death.[3]

books to see whether they have paid a state tax on transfer of stock, is unconstitutional as compelling them to be witnesses in a criminal case against themselves. People *ex rel.* Ferguson *v.* Reardon, 124 N. Y. App. Div. 818 (1908).

1 Santa Fé, etc. R. R. *v.* Davidson, 149 Fed. Rep. 603 (1906). A corporation cannot refuse to produce its books and papers before a grand jury on the ground that they will incriminate it. Such an objection should be taken at the time of producing the books, thus giving the court an opportunity to pass upon the matter. Consolidated, etc. Co. *v.* Vermont, 207 U. S. 541 (1908); aff'g the following case: A statute requiring corporations to produce, upon notice, its books and papers before any grand jury or court or commission, is legal, and the expense thereof need not be paid in advance. The plea of privilege must be made by the witness himself, and not by his attorney. A foreign corporation doing business in the state is also subject to these rules, and it cannot evade them by removing its books and papers from the state, and if it does remove them it may be fined. *In re* Consolidated, etc. Co., 66 Atl. Rep. 790 (Vt. 1907). The grand jury may compel a corporation to produce its minute books for three years and its letter copied books for three or four months. United States *v.* American, etc. Co., 146 Fed. Rep. 557 (1906), holding also that the secretary cannot be punished for contempt for failure to produce corporate books before a grand jury where he had never had possession of the books and they are not subject to his control and he cannot obtain them except secretly or by breach of peace. The proper procedure is a subpœna to the corporation itself.

2 Penal Code, § 110. See 25 and 26 Vict., c. 89, § 166.

3 Central Bank, etc. *v.* Thayer, 184 Mo. 61 (1904). See also § 11, *supra.*

CHAPTER XXXI.

LIENS OF THE CORPORATION ON STOCK FOR THE STOCKHOLDER'S DEBTS TO THE CORPORATION.

§§ 520, 521. *No lien at common law.*—Corporations, both in this country and in England, frequently possess and exercise a lien on a stockholder's stock for debts due from that stockholder to the corporation. In this chapter it is proposed to consider the origin of the lien; the extent to which it may be exercised and enforced; the waiver of it by the corporation; and its effect generally upon the transfer of shares.

It is clear that at common law a corporation has no lien upon the shares of its stockholders for debts due from them to the company.[1] The policy of the common law has always been to discoun-

[1] Herrick *v.* Humphrey, etc. Co., 103 N. W. Rep. 685 (Neb. 1905); Central, etc. *v.* Smith, 95 Pac. Rep. 307 (Col. 1908); Gemmell *v.* Davis, 75 Md. 546 (1892); Massachusetts Iron Co. *v.* Hooper, 61 Mass. 183 (1851); Bates *v.* New York Ins. Co., 3 Johns. Cas. 238 (1802); Steamship Dock Co. *v.* Heron, 52 Pa. St. 280 (1866); Merchants' Bank *v.* Shouse, 102 Pa. St. 488 (1883); Fitzhugh *v.* Bank of Shepherdsville, 3 T. B. Mon. (Ky.) 126 (1825); Williams *v.* Lowe, 4 Neb. 382, 398 (1876); Dana *v.* Brown, 1 J. J. Marsh. (Ky.) 304 (1829); Hart *v.* State Bank, 2 Dev. Eq. (N. C.) 111 (1831); Farmers', etc. Bank *v.* Wasson, 48 Iowa, 336 (1878); People *v.* Crockett, 9 Cal. 112 (1858); Sargent *v.* Franklin Ins. Co., 25 Mass. 90 (1829); Neale *v.* Janney, 2 Cranch, C. C. 188 (1819); s. c., 17 Fed. Cas. 1266; McMurrich *v.* Bond Head Harbor Co., 9 U. C. Q. B. 333 (1852); Clise Inv. Co. *v.* Washington Sav. Bank, 18 Wash. 8 (1897). *Cf.* Weston's Case, L. R. 4 Ch. 20 (1868). See also Gibson *v.* Hudson's Bay Co., MS. Rep. Mich. T. 12 Geo. I. (1726); 7 Vin. Abr. (2d Lond. ed.) 125; Pinkett *v.* Wright, 2 Hare, 120 (1842); Byrne *v.* Union Bank, 9 Rob. (La.) 433 (1845); Hussey *v.* Manufacturers', etc. Bank, 27 Mass. 415 (1830); Bryon *v.* Carter, 22 La. Ann. 98 (1870); Bank of Attica *v.* Manufacturers', etc.

tenance secret liens, inasmuch as they hamper trade and restrict the safe and speedy transfer of property.[1] It is upon this ground that the courts refuse to enforce a lien upon stock when such lien is not created by charter or by by-law. A stockholder has a right to sell his stock and have it transferred on the corporate books, although there are unpaid calls due on the stock at the time of transfer, and for refusal to transfer he may sue for conversion.[2] A trustee issuing certificates to represent an interest in a reorganized property has no lien on a certificate for costs in a litigation concerning it.[3]

§ 522. *A lien may be created by statute, by charter, or possibly by by-law or contract.*—Such a lien as this in favor of the corporation may be created by statute[4] or by charter,[5] and the weight of authority holds that it may be created by by-law.

With respect to the right of a corporation to enact a by-law creating such a lien, it is held in many jurisdictions that such a by-law is valid and binding upon all persons who buy or transfer the shares.[6] There is nevertheless strong authority for the rule

Bank, 20 N. Y. 501 (1859); Driscoll *v.* West Bradley, etc. Co., 59 N. Y. 96 (1874).

1 Quoted and approved in Boyd *v.* Redd, 120 N. C. 335 (1897).

2 Craig *v.* Hesperia, etc. Co., 113 Cal. 7 (1896).

3 Cassagne *v.* Marvin, 143 N. Y. 292 (1894).

4 Pittsburgh, etc. R. R. *v.* Clarke, 29 Pa. St. 146 (1857); First Nat. Bank *v.* Hartford, etc. Ins. Co., 45 Conn. 22 (1877); Presbyterian Cong. *v.* Carlisle Bank, 5 Pa. St. 345 (1847); Rogers *v.* Huntingdon Bank, 12 Serg. & R. (Pa.) 77 (1824); National Bank *v.* Watsontown Bank, 105 U. S. 217 (1881). An amendment to a banking act whereby a lien is given to banks on stock of its stockholders for debts due the bank from them does not apply to stock already issued. Southern, etc. Co. *v.* Fidelity, etc. Co., 105 Ga. 487 (1898). A statute giving a bank a lien on its stock for debts due to the bank from the stockholder is not nullified by another statutory provision prohibiting the bank from loaning money on its stock. Battey *v.* Eureka Bank, 62 Kan. 384 (1901). The repeal of a statute giving a corporation a lien on stock does not affect a lien which has already accrued. Wright, etc. Co. *v.* Hixon, 105 Wis. 153 (1889).

5 Union Bank *v.* Laird, 2 Wheat. 390 (1817); Stebbins *v.* Phœnix F. Ins. Co., 3 Paige, 350 (1832); Reese *v.* Bank of Commerce, 14 Md. 271 (1859); Brent *v.* Bank of Washington, 10 Pet. 596 (1836); German Security Bank *v.* Jefferson, 10 Bush (Ky.), 326 (1874); Arnold *v.* Suffolk Bank, 27 Barb. 424 (1857); Leggett *v.* Bank of Sing Sing, 24 N. Y. 283 (1862); Bank of Utica *v.* Smalley, 2 Cow. 770 (1824); Farmers' Bank *v.* Iglehart 6 Gill (Md.), 50 (1847); Bohmer *v.* City Bank, 77 Va. 445 (1883); Hodges *v.* Planters' Bank, 7 Gill & J. (Md.) 306 (1835); Sabin *v.* Bank of Woodstock, 21 Vt. 353 (1849); Cross *v.* Phenix Bank, 1 R. I. 39 (1840); St. Louis, etc. Ins. Co. *v.* Goodfellow, 9 Mo. 149 (1845); Mechanics' Bank *v.* Merchants' Bank, 45 Mo. 513 (1870).

6 Knight *v.* Old Nat. Bank, 3 Cliff. 429 (1871); s. c., 14 Fed. Cas. 772; McDowell *v.* Bank of Wilmington, 1 Harr. (Del.) 27 (1832); Bank of Holly Springs *v.* Pinson, 58 Miss. 421

that such a by-law cannot create a lien on the stock so as to bind a *bona fide* purchaser, or other person into whose hands the stock may come, to whom actual knowledge of the by-law cannot be imputed. It has been so held in New York,[1] Louisiana,[2] Massachusetts,[3] Ala-

(1880); Spurlock *v.* Pacific R. R., 61 Mo. 319 (1875); *Re* Bachman, 12 Nat. Bankr. Reg. 223 (1876); s. c., 2 Fed. Cas. 310; People *v.* Crockett, 9 Cal. 112 (1858); Pendergast *v.* Bank of Stockton, 2 Sawyer, 108 (1871); s. c., 19 Fed. Cas. 135; Lockwood *v.* Mechanics' Nat. Bank, 9 R. I. 308 (1869); Cunningham *v.* Alabama, etc. Co., 4 Ala. (N. S.) 652 (1843); Geyer *v.* Western Ins. Co., 3 Pittsb. 41 (1867); *Re* Dunkerson, 4 Biss. 227 (1868); s. c., 8 Fed. Cas. 48; Young *v.* Vough, 23 N. J. Eq. 325 (1873); Brent *v.* Bank of Washington, 10 Pet. 596, 615 (1836); Child *v.* Hudson's Bay Co., 2 P. Wms. 207 (1723); Planters', etc. Co. *v.* Selma Sav. Bank, 63 Ala. 585 (1879); Birmingham Trust, etc. Co. *v.* East Lake Land Co., 101 Ala. 304 (1893). *Cf.* Heart *v.* State Bank, 2 Dev. Eq. (N. C.) 111 (1831); Farmers', etc. Bank *v.* Wasson, 48 Iowa, 336, 340 (1878). In Tuttle *v.* Walton, 1 Ga. 43 (1846), it was said that as between the corporators themselves such a by-law will be held valid. A by-law creating a lien in behalf of the corporation on stock is valid as against a stockholder and any one who purchases his stock with notice that such by-law exists. John, etc. Co. *v.* Woodside, 87 Md. 146 (1898). In the case of Costello *v.* Portsmouth, etc. Co. 69 N. H. 405 (1899), the court upheld a by-law of a brewing company which gave the corporation a lien on the stock of its stockholders for any debts due from them to the corporation, and also gave the corporation a right to appropriate such stock at its par value in liquidation of such debts when overdue three months. The corporation actually did so appropriate the stock of one of its stockholders in that manner and afterwards sold the stock to a third party, and the court upheld the transaction. Under the English statutes a by-law may provide that the company shall have a lien on the stockholders' stock for debts due from them to the company. Allen *v.* Gold Reefs, etc. Limited, [1900] 1 Ch. 656, rev'g [1899] 2 Ch. 40.

1 Driscoll *v.* West Bradley, etc. Co., 59 N. Y. 96 (1874); Bank of Attica *v.* Manufacturers', etc. Bank, 20 N. Y. 501 (1859); Rosenback *v.* Salt Springs Nat. Bank, 53 Barb. 495 (1868); Conklin *v.* Second Nat. Bank, 53 Barb. 512, note (1868); s. c., aff'd, 45 N. Y. 655 (1871). In the case last cited it was held that not even where the certificate of stock contained a provision that the stock was not transferable until all the liabilities of the stockholder to the bank were paid did the bank acquire a lien upon the shares for the subsequent indebtedness of the stockholder. And all the New York decisions proceed upon the broad ground that the policy of the law is to protect a *bona fide* vendee of shares of stock against secret or equitable claims thereto. *Cf.* Leggett *v.* Bank of Sing Sing, 24 N. Y. 283 (1862); McCready *v.* Rumsey, 6 Duer, 574 (1857); Arnold *v.* Suffolk Bank, 27 Barb. 424 (1857). A by-law preventing the transfer or voting upon stock while dues remain unpaid is invalid, even though the stockholder agreed to be bound by such by-laws. Kinnan *v.* Sullivan, etc., 26 App. Div. 213 (1898).

2 Byron *v.* Carter, 22 La. Ann. 98 (1870); Pitot *v.* Johnson, 33 La. Ann. 1286 (1881). *Cf.* New Orleans, etc. Assoc. *v.* Wiltz, 10 Fed. Rep. 330 (1881).

3 In Nesmith *v.* Washington Bank, 23 Mass. 324 (1828), the court doubted whether a by-law could un-

bama,[1] Pennsylvania,[2] California,[3] Missouri,[4] Mississippi,[5] and, it seems, in some other states.[6]

The question sometimes arises whether or not the corporation has authority to enact a by-law creating a lien upon its stock in favor of the corporation for debts due it by the stockholders, where the charter or statute contains unusual words in defining the powers of the corporation. It has been held that, where the directors are authorized to make "regulations" as to transfers, they may make a by-law creating a lien.[7] So various other phrases have been held sufficient to confer this power.[8] Where, in addition to the articles

der any circumstances create a lien on stock as against the creditors of the stockholder, but did not decide the point. In Sargent *v.* Franklin Ins. Co., 25 Mass. 90 (1829), there is a somewhat decided ground taken against the validity of any by-law which tends to limit the free transfer of stocks. In Plymouth Bank *v.* Bank of Norfolk, 27 Mass. 454 (1830), Chief Justice Shaw seems to doubt the validity of a by-law giving a bank a lien on its own stock.

1 Planters', etc. Mut. Ins. Co. *v.* Selma Sav. Bank, 63 Ala. 585 (1879).

2 Steamship Dock Co. *v.* Heron, 52 Pa. St. 280 (1866); Merchants' Bank *v.* Shouse, 102 Pa. St. 488 (1883).

3 Anglo-Californian Bank *v.* Grangers' Bank, 63 Cal. 359 (1883). By by-law the corporation may obtain a lien on stock for the unpaid subscription price. People's, etc. Bank *v.* Sadler, 1 Cal. App. 189 (1905).

4 A by-law giving the corporation a lien on stock is not good as against a *bona fide* purchaser of the certificate who had no notice of the by-law. Brinkerhoff-Farris, etc. Co. *v.* Home Lumber Co., 118 Mo. 447 (1893). So, also, as to a pledgee. Bank of Atchison County *v.* Durfee, 118 Mo. 431 (1893).

5 Bank of Holly Springs *v.* Pinson, 58 Miss. 421 (1880).

6 Carroll *v.* Mullanphy Sav. Bank, 8 Mo. App. 249 (1880); Evansville Nat. Bank *v.* Metropolitan Nat. Bank, 2 Biss. 527 (1871); s. c., 8 Fed. Cas. 891; Lee *v.* Citizens' Nat. Bank, 2 Cin. Super. Ct. (Ohio), 298 (1872). *Cf.* Neale *v.* Janney, 2 Cranch, C. C. 188 (1819); s. c., 17 Fed. Cas. 1266. A lien of the corporation on stock is prevented by a statutory provision that the company should not loan money on the security of its own stock. Nicollet Nat. Bank *v.* City Bank, 38 Minn. 85 (1887). As to national banks, see § 533, *infra.*

7 Cunningham *v.* Alabama, etc. Co., 4 Ala. (N. S.) 652 (1843); Spurlock *v.* Pacific R. R., 61 Mo. 319 (1875); Pendergast *v.* Bank of Stockton, 2 Sawyer, 108 (1871); s. c., 19 Fed. Cas. 135. *Cf.* Tuttle *v.* Walton, 1 Ga. 43 (1846).

8 Bryon *v.* Carter, 22 La. Ann. 98 (1870); Brent *v.* Bank of Washington, 10 Pet. 596, 613 (1836); Pendergast *v.* Bank of Stockton, 2 Sawyer, 108 (1871); s. c., 19 Fed. Cas. 135. Except when such power is expressly given to the directors it can only be exercised by vote of the stockholders. Carroll *v.* Mullanphy Sav. Bank, 8 Mo. App. 249 (1880). A charter power given to the directors of a corporation "to make all by-laws not inconsistent with any existing law of the state for the management of its property, the regulation of its affairs, and the transfer of its stock," has been held in Missouri to include the power in question. Mechanics' Bank *v.* Merchants' Bank, 45 Mo. 513 (1870). But in New York the same language used in the general statute was held not to include it. Driscoll *v.* West Bradley, etc. Co., 59 N. Y. 96 (1874). See also

of incorporation, the statute provides for articles of association, the corporation may in the latter provide for a lien on the stock.[1] But a lien created by articles of association of a bank, being the same as by-laws, is not good as against a *bona fide* pledgee of the certificate of stock where the certificate does not refer to such articles of association nor to the lien.[2] Inasmuch as by the laws of England an English corporation may amend its by-laws so as to give it a lien on stock which will be prior to any existing unregistered pledge or assignment of the certificates of stock, an American pledgee or holder of such certificates of stock is bound by such by-law.[3]

Upon the whole it may be said that the question whether a corporation may, by by-law, create a lien in its own favor upon the shares of its stockholders for debts due by them to the corporation is not settled. The weight of authority in this country is against the validity of the by-law, and such would seem to be a result most in accord with public policy.

In New Hampshire such liens upon stock are forbidden by statute.[4] The right to create a lien by contract is considered elsewhere.[5]

§ 523. *Notice of the lien.*—When a lien is expressly given to the corporation by its charter or by statute, all persons purchasing the stock are affected by the statute and must take notice of it.[6] A

St. Louis, etc. Ins. Co. *v.* Goodfellow, 9 Mo. 149 (1845); Vansands *v.* Middlesex County Bank, 26 Conn. 144 (1857); Bank of Attica *v.* Manufacturers' Bank, 20 N. Y. 501 (1859). For a discussion of this question as applied to national banks, see § 533, *infra.* A statute that the transfer of stock need not be recorded on the corporate books except as against the claims of the corporation does not give the corporation a lien on the stock. Buena Vista, etc. Bank *v.* Grier, 114 Ga. 398 (1901).

1 Mohawk Nat. Bank *v.* Schenectady Bank, 78 Hun, 90 (1894); aff'd, 151 N. Y. 665. Where the statute allows the incorporators to include special provisions in their articles of incorporation, and a lien right is inserted, and the certificate of stock on its face refers to the articles of association, a purchaser of a certificate buys subject to such lien. Gibbs *v.* Long Island Bank, 83 Hun, 92 (1894); aff'd, 151 N. Y. 657. The articles of incorporation filed under the general act may contain a provision that the corporation shall have a lien on stock for debts due from the holder thereof to the corporation. Dempster Mfg. Co. *v.* Downs, 126 Iowa, 80 (1904).

2 Lyman *v.* State Bank, etc., 81 N. Y. App. Div. 367 (1903); aff'd, 179 N. Y. 577. See also § 524, *infra.*

3 Hudson, etc. Co. *v.* Warner & Co., 99 Fed. Rep. 187 (1900).

4 Hill *v.* Pine River Bank, 45 N. H. 300, 309 (1864).

5 See § 523, *infra.*

6 Bishop *v.* Globe Co., 135 Mass. 132 (1883); Dorr *v.* Life Ins. etc. Co., 71 Minn. 38 (1898); Citizens', etc. Bank *v.* Kalamazoo, etc. Bank, 111 Mich. 313 (1896); Birmingham Trust, etc. Co. *v.* East Lake Land Co., 101 Ala. 304 (1893); Union Bank *v.* Laird, 2 Wheat. 390 (1817); Bohmer *v.* City Bank, 77 Va. 445 (1883); Downer *v.* Zanesville Bank, Wright (Ohio), 477 (1833); Grant *v.* Mechanics' Bank, 15 Serg. & R. (Pa.) 140 (1826); St.

statutory lien need not be set out in the certificate of stock in order to give notice to the transferee.[1]

§§ 524, 525. A lien created by by-law binds only those who take the stock with notice of the by-law. This is because by-laws do not of themselves impart or convey notice.[2] A transferee of a certificate of stock is not bound to take notice of a by-law giving a corporation a lien on the stock for debts due from the registered owner to the corporation, even though the certificate of stock stated on its face that it was subject to the by-laws.[3] So, too, a by-law enacted subsequently to a transfer, although the transfer has not been

Louis, etc. Co. *v.* Goodfellow, 9 Mo. 149 (1845); Bank of Utica *v.* Smalley, 2 Cow. 770 (1824); Rogers *v.* Huntingdon Bank, 12 Serg. & R. (Pa.) 77 (1824); Sewall *v.* Lancaster Bank, 17 Serg. & R. (Pa.) 285 (1828). *Cf.* Stebbins *v.* Phenix F. Ins. Co., 3 Paige, 350 (1832); Newberry *v.* Detroit, etc. R. R., 17 Mich. 141 (1868); Titcomb *v.* Union M. & F. Ins. Co., 8 Mass. 326 (1811); West Branch Bank *v.* Armstrong, 40 Pa. St. 278 (1861); Mechanics' Bank *v.* Merchants' Bank, 45 Mo. 513 (1870); Tuttle *v.* Walton, 1 Ga. 43 (1846); Dorr *v.* Life Ins., etc. Co., 71 Minn. 38 (1898).

1 National Bank *v.* Rochester Tumbler Co., 172 Pa. St. 614 (1896); McCready *v.* Rumsey, 6 Duer, 574 (1857); Reese *v.* Bank of Commerce, 14 Md. 271 (1859); First Nat. Bank *v.* Hartford, etc. Ins. Co., 45 Conn. 22 (1877). A lien on stock created by statute gives the corporation a prior right in the stock as against a subsequent pledgee and purchaser at the pledgee's sale, even though the certificate of stock gives no intimation of a lien. Hammond *v.* Hastings, 134 U. S. 401 (1890). A purchaser or pledgee of stock is bound to take notice of a statutory lien which the corporation has on such stock. Wright, etc. Co. *v.* Hixon, 105 Wis. 153 (1899). A pledgee of stock is bound to take notice of a statute giving the corporation a lien upon the stock. Curtice *v.* Crawford, etc. Bank, 110 Fed. Rep. 830 (1901).

2 Driscoll *v.* West Bradley, etc. Co., 59 N. Y. 96, 109 (1874); Bank of Holly Springs *v.* Pinson, 58 Miss. 421, 435 (1880); Anglo-Californian Bank *v.* Grangers' Bank, 63 Cal. 359 (1883). See also People *v.* Miller, 39 Hun, 557 (1886); aff'd, 114 N. Y. 636, concerning the validity and effect of by-laws regulating the sale and transfer of seats or membership in the commercial exchanges, and the enforcement of the liens created thereupon by such by-laws in favor of other members of the corporation. Where the by-law under which the lien is claimed directs that notice of the lien should be given in the certificate of stock, this provision must be regarded as meaning that the lien should not be asserted against a person not having notice by the certificate. And the issuance of certificates not containing this notice is a waiver of the lien contemplated by such by-law. Bank of Holly Springs *v.* Pinson, 58 Miss. 421 (1880).

3 Des Moines, etc. Bank *v.* Warren, etc. Bank, 97 Iowa, 204 (1896). A *bona fide* pledgee of a certificate of stock is not bound to know that the corporation has a by-law giving it a lien on the stock for the debts of the stockholder of record. Just *v.* State Sav. Bank, 132 Mich. 600 (1903). A pledgee or transferee of a certificate of stock is not bound to take notice of a by-law giving the corporation a lien on the stock unless the by-law appears on the face of the certificate. Bank of Culloden *v.* Bank of Forsyth, 120 Ga. 575 (1904). See also § 522, *supra.*

recorded on the corporate books, cannot affect the rights of the parties as to that transfer.[1] Where, however, a prospectus, offering for sale trustee's transferable certificates, states that such certificates represent stock deposited with the trustee, the stock being in an English corporation, the trustee is personally liable if it turns out that the English corporation had a prior lien on the stock to the full extent of its value. The trustee was bound to take notice of the lien created by the by-laws of the English corporation.[2] By-laws creating liens on stock have been held valid and enforceable as against assignees in bankruptcy or in insolvency.[3] A lien created by by-law is binding upon a purchaser of the stock with notice of such by-law, and when taken in pledge for an antecedent debt without any agreement to postpone collection, the pledgee is bound to take notice of the by-law.[4]

A clause in a charter declaring that debts due from the stockholders must be paid before a transfer will be allowed is sufficient to create a lien on the stock without other action on the part of the corporation.[5] So, also, a power conferred by the charter upon the directors to refuse a transfer so long as the stockholder who wishes to transfer is indebted to the corporation, supports the lien.[6]

A lien may be created by special agreement among the stockholders.[7] And even a mere usage of a corporation not to transfer

1 People *v.* Crockett, 9 Cal. 112 (1858).

2 The rule of *caveat emptor* has been relaxed so as to create an implied warranty of title on the part of the seller. Even though the trustee acted as agent, yet, the principal not being disclosed, the trustee is liable. McClure *v.* Central Trust Co., 165 N. Y. 108 (1900).

3 Morgan *v.* Bank of North America, 8 Serg. & R. (Pa.) 73 (1822); s. c., 11 Am. Dec. 575; Vansands *v.* Middlesex County Bank, 26 Conn. 144 (1857); *Re* Bigelow, 1 Nat. Bankr. Reg. 632, 667 (1868); s. c., 3 Fed. Cas. 341, 343.

4 Bronson, etc. Co. *v.* Rheubottom, 122 Mich. 608 (1900). A lien created by by-law has precedence over a judgment against the stockholder, especially where notice of the lien was given at the execution sale. Owens *v.* Atlanta, etc. Co., 122 Ga. 521 (1905).

5 Farmers' Bank Case, 2 Bland. Ch. (Md.) 394 (1830); Kenton Ins. Co. *v.* Bowman, 84 Ky. 430 (1886).

6 Arnold *v.* Suffolk Bank, 27 Barb. 424 (1857).

7 Vansands *v.* Middlesex County Bank, 26 Conn. 144 (1857). The stockholders may assent to a lien in behalf of the corporation on stock for debts due to the corporation from the stockholder, and the method of foreclosing it may also be so prescribed. The statute of limitations does not run against it. Reading Trust Co. *v.* Reading Iron Works, 137 Pa. St. 282 (1890). The corporation cannot create a lien on stock by a by-law; but where the surety of the debt secured by the stock as collateral pays the debt, his equities are not superior to the corporation, and he cannot claim the certificate free from the lien, he having aided in passing the by-law. Bank of Atchison County *v.* Durfee, 118 Mo. 431 (1893).

stock while the owner is indebted to the corporation is sufficient to create a lien on stock, as between the corporation and its stockholders, and it will bind a stockholder who borrows money with a knowledge of it.[1] An unwarranted claim of lien by a corporation, and consequent refusal to register a transfer until the debt as to which the lien is asserted is paid, is a conversion of the stock, and the transferrer may have his action against the corporation therefor.[2]

In Ohio it is held that where the certificates of stock issued by a bank contain a provision on their face that the bank shall have a lien on the stock for all debts due to it from the registered owner, such lien is valid and applies as well to a debt contracted after the certificate was sold but before it was presented for transfer on the books of the bank. The lien exists even though neither the statutes nor the by-laws nor the resolutions of the board of directors provided for such lien. It is sufficient that such certificate of stock was the one used by the corporation.[3] And the same rule has been upheld in Pennsylvania[4] and in California, Connecticut and elsewhere.[5] A national bank, however, cannot claim a lien on stock

1 Morgan *v.* Bank of North America, 8 Serg. & R. (Pa.) 73, 88 (1822); s. c., 11 Am. Dec. 575. *Cf.* Vansands *v.* Middlesex Bank, 26 Conn. 144 (1857). Where the certificates of stock contain on their face a statement that a corporation has a lien on the stock for debts due from the registered owner, and for many years all the stockholders acquiesced therein, such a lien may be upheld, although there is no charter provision or by-law authorizing the lien. So held where a stockholder brought an action for himself and other stockholders complaining of various misfeasances and malfeasances, including the charge that such an illegal claim of lien existed. Reynolds *v.* Bank of Mt. Vernon, 6 N. Y. App. Div. 62 (1896); aff'd, 158 N. Y. 740 (1899). So in Bryon *v.* Carter, 22 La. Ann. 98 (1870), it is held that a by-law creating a lien, while it may be valid as between the parties if it be brought to their knowledge, is not binding on the judgment creditors of the stockholders.

2 Bank of America *v.* McNeil, 10 Bush (Ky.), 54 (1873). *Cf.* Dickinson *v.* Central Nat. Bank, 129 Mass. 279 (1880); Case *v.* Bank, 100 U. S. 446 (1879); Skinner *v.* City of London M. Ins. Corp., L. R. 14 Q. B. D. 882 (1885), holding also that only nominal damages could be recovered where the terms of the transfer were secret.

3 Stafford *v.* Produce, etc. Co., 61 Ohio St. 160 (1899).

4 Where the certificate of stock itself provides that the stock is liable to the company for indebtedness of the registered stockholder to the company, this constitutes a contract which will be upheld and enforced by the courts, and dividends on the stock may be applied towards such indebtedness. *In re* Hovey's Estate, 198 Pa. St. 385 (1901).

5 By inserting in the certificate of stock a statement that the corporation has a lien on it for debts due to the corporation, a purchaser takes subject thereto. It is a contract lien. Jennings *v.* Bank of California, 79 Cal. 323 (1889). In Vansands *v.* Middlesex County Bank, 26 Conn. 144 (1857), it is held that a statement on the face of the certificate of stock

for a stockholder's debt, even though notice of such lien is printed on the face of the certificates of stock.[1]

§ 526. *The lien, when established, covers all the stockholder's shares and dividends.*—A valid lien in favor of the corporation, when regularly established, attaches to all the stock and dividends of the indebted stockholder. Thus, it attaches to all the stock the stockholder owns, although the debt be for calls due and unpaid upon only a part of them.[2] It may, moreover, hold the whole amount of the stockholder's stock, although the amount of the debt be less than the value of the stock. It cannot be compelled to transfer so much of the stock as is in excess of the amount of the debt.[3] The lien attaches not only to the stock itself, but to dividends declared on the stock.[4] It is accordingly held that a corporation may lawfully retain dividends, and apply them to the payment of a debt due to

that it is issued subject to all debts due from the owners to the corporation will bind a transferee as a qualification or restriction of the transferrer's title, and that, too, although no charter provision or by-law authorizes such a lien on the stock. So, also, Jennings *v.* Bank of California, 79 Cal. 323 (1889). A by-law of a corporation, organized to own and maintain a hunting park, may authorize assessments on the stock to pay any annual deficiency, and such by-law is binding on stockholders who accept the certificate of stock, which on its face refers to the by-law. The by-law is valid as a contract, even though it is not valid as a by-law. Blue Mountain, etc. Assoc. *v.* Borrowe, 71 N. H. 69 (1901). A lien created by a by-law when printed on the face of the certificate of stock is legal as a contract. Morrison, etc. Bank *v.* Kerdolff, 75 Mo. App. 297 (1898).

1 Buffalo, etc. Co. *v.* Third, etc. Bank, 162 N. Y. 163 (1900); aff'd, 193 U. S. 581. Conklin *v.* Second Nat. Bank, 45 N. Y. 655 (1871).

2 Stebbins *v.* Phœnix F. Ins. Co., 3 Paige, 350 (1832). *Cf.* Brent *v.* Bank of Washington, 2 Cranch, C. C. 517 (1824); s. c., 4 Fed. Cas. 61. In Virginia, however, it seems that there can be no lien on wholly paid-up stock to secure the payment of an unpaid subscription to other stock. Shenandoah Valley R. R. *v.* Griffith, 76 Va. 913 (1882). *Cf.* Va. Code, 1887, §§ 1127, 1128, 1130; Petersburg Sav. etc. Co. *v.* Lumsden, 75 Va. 327 (1881). And in England a lien on stock for unpaid calls is a lien only on those particular shares upon which the call is made and not on other shares. Hubbersty *v.* Manchester, etc. Ry., L. R. 2 Q. B. 471 (1867).

3 Sewall *v.* Lancaster Bank, 17 Serg. & R. (Pa.) 285 (1828); Pierson *v.* Bank of Washington, 3 Cranch, C. C. 363 (1828); s. c., 19 Fed. Cas. 671.

4 Thus, it attaches to the dividends, even though only "shares and stock" be specifically named in the statute or charter as subject to the lien (Hague *v.* Dandeson, 2 Exch. 741—1848), and though, in the absence of express provision, it is held that no such lien impliedly exists. Sargent *v.* Franklin Ins. Co., 25 Mass. 90 (1829); Bates *v.* New York Ins. Co., 3 Johns. Cas. 238 (1802). So, in Hagar *v.* Union Nat. Bank, 63 Me. 509 (1874), it was held that the terms of the act of 1864 which are inconsistent with the existence of a stock lien do not preclude a lien on dividends. A lien on the stock attaches also to dividends. Dempster Mfg. Co. *v.* Downs, 126 Iowa, 80 (1904).

it from the stockholder, since in an action by the stockholder to enforce payment of his dividends the corporation may plead the debt by way of set-off.[1] But dividends declared after the death of the stockholder are not subject to a lien for his debts.[2] The lien attaches to the shares even after the liquidation or dissolution of the company.[3] It attaches not only to valid stock, but to spurious stock obtained by forgery.[4]

§ 527. *The lien protects the corporation as to all the debts due to it from the stockholder.*—It is a general rule that a lien upon stock is a lien for all debts of the stockholder due to the corporation;[5] and it is not necessary that the debt be due and payable at the time when the lien is sought to be enforced. It covers debts which are not due as well as those that are due, and all indebtedness to the corporation, whether payable presently or at a future time.[6] The lien will continue for the benefit of the corporation, although

1 Hagar *v.* Union Nat. Bank, 63 Me. 509 (1874); Sargent *v.* Franklin Ins. Co., 25 Mass. 90 (1829); Bates *v.* New York Ins. Co., 3 Johns. Cas. 238 (1802). *Cf.* Merchants' Bank *v.* Shouse, 102 Pa. St. 488 (1883); Brent *v.* Bank of Washington, 2 Cranch, C. C. 517 (1824); s. c., 4 Fed. Cas. 61. See also § 544, *infra.*

2 Brent *v.* Bank of Washington, 2 Cranch, C. C. 517 (1824); s. c., 4 Fed. Cas. 61; Merchants' Bank *v.* Shouse, 102 Pa. St. 488 (1883).

3 *Re* General Exchange Bank, L. R. 6 Ch. App. 818 (1871).

4 Mount Holly Paper Co.'s Appeal, 99 Pa. St. 513 (1882).

5 Union Bank *v.* Laird, 2 Wheat. 390 (1817); Mobile Mut. Ins. Co. *v.* Cullom, 49 Ala. 558 (1873); Cunningham *v.* Alabama, etc. Co., 4 Ala. (N. S.) 652 (1843); Rogers *v.* Huntingdon Bank, 12 Serg. & R. (Pa.) 77 (1824); *Ex parte* Stringer, L. R. 9 Q. B. D. 436 (1882); *Re* Peebles, 2 Hughes, 394 (1875); s. c., 19 Fed. Cas. 94; Planters', etc. Co. *v.* Selma Sav. Bank, 63 Ala. 585 (1879). *Quære*, whether the lien attaches for funds embezzled by the stockholder. Hotchkiss, etc. Co. *v.* Union Nat. Bank, 68 Fed. Rep. 76 (1895).

6 Pittsburgh, etc. R. R. *v.* Clarke, 29 Pa. St. 146 (1857); *Re* Bachman, 12 Nat. Bankr. Reg. 223 (1876); s. c., 2 Fed. Cas. 310; Downer *v.* Zanesville Bank, Wright (Ohio), 477 (1833); Brent *v.* Bank of Washington, 10 Pet. 596 (1836); Rogers *v.* Huntingdon Bank, 12 Serg. & R. (Pa.) 77 (1824); Sewall *v.* Lancaster Bank, 17 Serg. & R. (Pa.) 285 (1828); McCready *v.* Rumsey, 6 Duer, 574 (1857); St. Louis, etc. Co. *v.* Goodfellow, 9 Mo. 149 (1845); Cunningham *v.* Alabama, etc. Co., 4 Ala. (N. S.) 652 (1843); Leggett *v.* Bank of Sing Sing, 24 N. Y. 283 (1862). *Cf. Re* Stockton, etc. Co., L. R. 2 Ch. D. 101 (1875). In Grant *v.* Mechanics' Bank, 15 Serg. & R. (Pa.) 140 (1826), it was held that a bank organized under the Pennsylvania law of March 21, 1814, might lawfully refuse to permit the transfer of the stock of a stockholder who was the drawer of a bill discounted by the bank, but not payable at the time the transfer was demanded—both the stockholder and his indorser having, since the discount of the paper, become insolvent. So, also, Downer *v.* Zanesville Bank, Wright (Ohio), 477 (1833). But where the lien is expressly made a security for debts "actually due and payable," it will be held to cover only debts due and

the debt be barred by the statute of limitations.[1] The lien attaches whether the stockholder's debt to the corporation accrued before or after he became a stockholder.[2] A lien created by statute applies to debts due from the stockholder to the corporation prior to the passage of the statute.[3] It also secures debts for which the stockholder is liable only as indorser or surety,[4] and debts due from a partnership in which the stockholder is a partner.[5] So, also, it secures the corporation for unpaid calls upon the original subscription.[6] But the lien does not attach until a call is made.[7] The fact

payable. Reese *v.* Bank of Commerce, 14 Md. 271 (1859). *Cf.* Downer *v.* Zanesville Bank, Wright (Ohio), 477 (1833).

1 Farmers' Bank *v.* Iglehart, 6 Gill (Md.), 50 (1847); Geyer *v.* Western Ins. Co., 3 Pittsb. (Pa.) 41 (1867); Brent *v.* Bank of Washington, 10 Pet. 596, 617 (1836). See also § 530, *infra.*

2 Schmidt *v.* Hennepin, etc. Co., 35 Minn. 511 (1886).

3 Birmingham Trust, etc. Co. *v.* East Lake Land Co., 101 Ala. 304 (1893).

4 McLean *v.* Lafayette Bank, 3 McLean, 587 (1846); s. c., 16 Fed. Cas. 264; Leggett *v.* Bank of Sing Sing, 24 N. Y. 283 (1862); Union Bank *v.* Laird, 2 Wheat. 390 (1817); McDowell *v.* Bank of Wilmington, 1 Harr. (Del.) 27 (1832); Bank *v.* Bonnie, 102 Ky. 343 (1897); Brent *v.* Bank of Washington, 10 Pet. 596, 615 (1836); St. Louis, etc. Ins. Co. *v.* Goodfellow, 9 Mo. 149 (1845). *Cf.* Miles *v.* New Zealand, etc. Co., L. R. 32 Ch. D. 266 (1886); West Branch Bank *v.* Armstrong, 40 Pa. St. 278 (1861). A corporation, on discounting a bill or note, may take security from one of the parties, and also hold the stock of another party as security for the same loan. Union Bank *v.* Laird, 2 Wheat. 390 (1817). *Cf.* Conant *v.* Seneca County Bank, 1 Ohio St. 298 (1853); Helm *v.* Swiggett, 12 Ind. 194 (1859); Dunlop *v.* Dunlop, L. R. 21 Ch. D. 583 (1882).

5 Citizens', etc. Bank *v.* Kalamazoo, etc. Bank, 111 Mich. 313 (1896); *Re* Bigelow, 2 Ben. 469 (1868); s. c., 3 Fed. Cas. 341; Geyer *v.* Western Ins. Co., 3 Pittsb. (Pa.) 41 (1867); Arnold *v.* Suffolk Bank, 27 Barb. 424 (1857); Planters', etc. Ins. Co. *v.* Selma Sav. Bank, 63 Ala. 585 (1879).

6 Spurlock *v.* Pacific R. R., 61 Mo. 319 (1875); McCready *v.* Rumsey, 6 Duer, 574 (1857); Regina *v.* Wing, 33 Eng. L. & Eq. 80 (1855); *Re* Hoylake Ry., L. R. 9 Ch. 257 (1874); Companies Clauses Consolidation Act, 1845 (8 & 9 Vict., Ch. 16, § 16); Shaw *v.* Rowley, 16 M. & W. 810 (1847); *Ex parte* Tooke, 6 Eng. Ry. & Can. Cas. 1 (1849). *Cf.* Newry, etc. Ry. *v.* Edmunds, 2 Exch. 118 (1848); Ambergate, etc. Ry. *v.* Mitchell, 4 Exch. 540 (1849); Great North. etc. Ry. *v.* Biddulph, 7 M. & W. 243 (1840); Pittsburgh, etc. R. R. *v.* Clarke, 29 Pa. St. 146 (1857); Rogers *v.* Huntingdon Bank, 12 Serg. & R. (Pa.) 77 (1824); Petersburg Sav. etc. Co. *v.* Lumsden, 75 Va. 327 (1881). The lien secures general debts as well as unpaid calls. National Bank, etc. *v.* Rochester Tumbler Co., 172 Pa. St. 614 (1896).

7 Hall *v.* U. S. Ins. Co., 5 Gill (Md.) 484 (1847). *Cf. Re* Bachman, 12 Nat. Bankr. Reg. 223 (1876); s. c., 2 Fed. Cas. 310; Pittsburg, etc. R. R. *v.* Clarke, 29 Pa. St. 146 (1857). A director transferring his shares before the call avoids the lien, although he knew the call was to be made. The call is made when the date of payment is fixed, and not by a mere general resolution. *Re* Cawley, etc. Co., L. R. 42 Ch. D. 209 (1889). The lien attaches when a call is made, and

that the corporation has other security does not prevent it from enforcing its charter lien on the stock.[1] The lien also attaches to the stock of a depositor who has overdrawn his account.[2] Where a corporation has a lien on stock for debts of the stockholder, an embezzlement by the stockholder as an officer is such a debt.[3] Where by charter the amount which a bank may loan to a single person shall not exceed ten per cent. of its capital stock, a lien which it has by charter on stock is not good for the excess of a loan over ten per cent.[4]

§ 528. *Right of lien as against miscellaneous parties.*—There is no lien on the stock as to debts of an intervening unrecorded owner of the stock.[5] Where, however, the corporation is notified of the sale and transfer of the certificates of stock, without a return of the certificates to the corporation and the taking out new certificates in the name of the purchaser, and the corporation notes the fact in its certificate book, the corporation has a lien on the stock for a debt due from the purchaser, and not even a *bona fide* purchaser from him can avoid such lien.[6] A lien of a corporation on stock for debts due it from its stockholders does not attach to stock purchased by another corporation, the latter having no power to purchase.[7] The lien attaches to trust stock for debts due from a trustee who holds stock in trust, but in his own name, and without any indication of the trust.[8] Where a *cestui que trust* owes the corporation a debt, the lien attaches to his stock though held for him in the name of a trustee.[9] And stock standing on the corporate books in the name of a fictitious person is subject to a lien for the indebtedness of the real owner.[10] The corporation, in transfer-

not when it becomes due. Queen *v.* Londonderry, etc. Ry., 13 Q. B. 998 (1849).

1 German Nat. Bank *v.* Kentucky T. Co., 40 S. W. Rep. 458 (Ky. 1897); Dunlop *v.* Dunlop, L. R. 21 Ch. D. 583 (1882).

2 Reese *v.* Bank of Commerce, 14 Md. 271 (1859).

3 Commonwealth *v.* Standard, etc. Co., 201 Pa. St. 103 (1902).

4 People's Bank *v.* Exchange Bank, 116 Ga. 820 (1902).

5 Helm *v.* Swiggett, 12 Ind. 194 (1859).

6 Bank of Commerce *v.* Bank of Newport, 63 Fed. Rep. 898 (1894).

7 Lanier Lumber Co. *v.* Rees, 103 Ala. 622 (1894).

8 New London, etc. Bank *v.* Brocklebank, L. R. 21 Ch. D. 302 (1882); Young *v.* Vough, 23 N. J. Eq. 325 (1873); Burns *v.* Lawrie, 2 Sc. Ct. of Sess. Cas. (2d ser.) 1348 (1840), otherwise cited, 2 Dunlop, 1348.

9 Stebbins *v.* Phœnix F. Ins. Co., 3 Paige, 350 (1832).

10 Stebbins *v.* Phœnix F. Ins. Co., 3 Paige, 350 (1832), where the president of a corporation with fraudulent intent procured shares to be recorded in a fictitious name, and, having himself become indebted to the corporation, procured an assignment of the shares to another creditor, who sought to have the transfer recorded. *Held*, that the lien still attached for the debts of the original holder.

ring stock to the trustee in bankruptcy of a stockholder, has no right to write on the face of the certificate that it is subject to a lien belonging to the corporation, even though such lien exists, all other certificates of stock not having any such writing on them.[1] An executor is entitled to have stock belonging to the estate transferred into his own name as executor, and the corporation is liable in damages for refusal to make such transfer, even though the corporation has a lien on the stock for a debt owed it by the decedent.[2] A pledgee cannot insist on a transfer of the stock to himself on the corporate books where the corporation has a lien on the stock, even though such lien is subject to the pledge.[3]

§ 529. *The lien can be enforced for the benefit of the corporation only.*—The right of a corporation to a lien on the stock of its stockholders as security for the payment of their debts to the corporation is a right to be enforced only by the corporation and exclusively for its own benefit. Accordingly, it is held that the corporation cannot become the assignee of the claim of some third person against one of its stockholders in order to enforce payment of that claim for the benefit of the third person by a recourse to the corporate lien on the stockholder's stock.[4] Neither can the corporation be compelled, for the benefit of sureties as to a part of the stockholder's indebtedness, to apply the proceeds of the sale of the stock to the liquidation of that part of their claim which is secured.[5] The lien does not extend to claims against the stockholder

1 *Re* W. Key, etc., [1902] 1 Ch. 467.

2 Under the statutes of California this rule applies to an alien corporation doing business in that state, the statutes of the state requiring such corporations to make transfers in that state. It applies even though the statutes of Great Britain forbid transfers of stock "without administration upon such property under the laws of England and Great Britain." London, etc. Bank *v.* Aronstein, 117 Fed. Rep. 601 (1902).

3 White River, etc. Bank *v.* Capital, etc. Co., 77 Vt. 123 (1904).

4 A bank having a lien by statute for any debt held by it against a stockholder cannot purchase notes of the stockholder for the express purpose of acquiring such lien, the bank at the time of the purchase knowing that the stock had been pledged by the stockholder to another creditor. Bank *v.* Bonnie, 102 Ky. 343 (1897); White's Bank *v.* Toledo, etc. Ins. Co., 12 Ohio St. 601 (1861). To the point that this lien is one exclusively for the benefit of the corporation, see Bank of Utica *v.* Smalley, 2 Cow. 770 (1824).

5 Cross *v.* Phenix Bank, 1 R. I. 39 (1840). But see Kuhns *v.* Westmoreland Bank, 2 Watts (Pa.), 136 (1833), where it is said that "the principle that a surety is entitled to the benefit of all the creditor's securities is of such universal application that it would require strong evidence of legislative intention to make the present case an exception to it." *Cf.* also Klopp *v.* Lebanon Bank, 46 Pa. St. 88 (1863); Petersburg Sav. etc. Co. *v.* Lumsden, 75 Va. 327, 340 (1881).

on paper made by the stockholder and purchased by the corporation.[1] The lien, however, is for the benefit of the corporation, and it may apply the proceeds of the sale of the stock in such a way as best to subserve its own interest.[2]

§ 530. *Methods of enforcing the lien.*—When a corporation has a lien upon the stock of those of its stockholders who are indebted to it, it may refuse to allow a transfer of the stock until the debt is paid or secured to its satisfaction.[3] And the corporation may insist upon its lien and hold the stock even against a *bona fide* purchaser, inasmuch as purchasers of stock are bound to take notice of legal liens.[4]

The corporation may proceed by an attachment of the stock.[5] So, also, upon non-payment of the debt, the corporation may file a bill in a court of chancery and have the stock sold in the usual way, as in other cases of property held under a lien.[6] In Michigan, however, it is held that a suit in equity will not lie to enforce

1 Boyd *v.* Redd, 120 N. C. 335 (1897).

2 Planters', etc. Ins. Co. *v.* Selma Sav. Bank, 63 Ala. 585 (1879); Mount Holly Paper Co.'s Appeal, 99 Pa. St. 513 (1882); Anglo-Californian Bank *v.* Grangers' Bank, 63 Cal. 359 (1883); Bishop *v.* Globe Co., 135 Mass. 132 (1883).

3 Reese *v.* Bank of Commerce, 14 Md. 271 (1859); First Nat. Bank *v.* Hartford, etc. Ins. Co., 45 Conn. 22 (1877); Vansands *v.* Middlesex County Bank, 26 Conn. 144 (1857); Farmers' Bank *v.* Iglehart, 6 Gill (Md.), 50 (1847); McCready *v.* Rumsey, 6 Duer, 574 (1857); Tuttle *v.* Walton, 1 Ga. 43 (1846); Sewall *v.* Lancaster Bank, 17 Serg. & R. (Pa.) 285 (1828); Rogers *v.* Huntingdon Bank, 12 Serg. & R. (Pa.) 77 (1824); Grant *v.* Mechanics' Bank, 15 Serg. & R. (Pa.) 140 (1826). *Cf.* Sabin *v.* Bank of Woodstock, 21 Vt. 353 (1849); West Branch Bank *v.* Armstrong, 40 Pa. St. 278 (1861). In Bishop *v.* Globe Co., 135 Mass. 132 (1883), the rule is declared that if by the law of the state under which a corporation is organized the corporation has a lien on the stock of any stockholder for a debt due from him to the corporation, the lien is a good defense to an action in another state against the corporation by a person to whom the stockholder has transferred his stock, but in whose name, by reason of the lien, the corporation has refused to register the transfer. In Farmers' Bank's Case, 2 Bland, Ch. (Md.), 394 (1830), and Brent *v.* Bank of Washington, 10 Pet. 596 (1836), bills were filed by the owners of the stock to compel a transfer, and the corporation defended on the ground of its lien.

4 See § 523, *supra.*

5 Sabin *v.* Bank of Woodstock, 21 Vt. 353 (1849).

6 A lien of a corporation may be enforced by a suit in equity. Wright, etc. Co. *v.* Hixon, 105 Wis. 153 (1899); *Re* Morrison, 10 Nat. Bankr. Reg. 105 (1873); s. c., 17 Fed. Cas. 831. Under the California code a corporation may by suit foreclose a lien which it has on its stock. Mechanics', etc. Assoc. *v.* King, 83 Cal. 440 (1890). To enforce a lien upon stock under the Alabama statute no action on the part of the board of directors is necessary. Elliott *v.* Sibley, 101 Ala. 344 (1893). A suit to enforce a statutory lien of a bank on shares of its own capital stock

a statutory lien which a corporation has on stock of its stockholders for debts due from them to it.[1] It was on very much the same theory as this that the New England and Pennsylvania courts originally held that a chancery court had no inherent jurisdiction to foreclose a mortgage lien—decisions which for half a century embarrassed those states until the legislature created the jurisdiction which ought never to have been denied.[2] In a suit to foreclose a lien the transferrer of the stock is not a necessary party.[3] A lien may be enforced, even though the debt is barred by the statute of limitations.[4] A decree authorizing the sale of stock for the payment of the debt need not give the stockholder the right of redemption. An absolute and valid title may pass to the purchaser immediately upon the sale.[5] A valid lien in favor of a bank upon shares of stock in the bank belonging to the estate of a deceased person does not yield to a prior claim against the estate in favor of the government.[6] Where the stockholder has died, and his estate is being distributed, the portion going to the corporation, by reason of its lien, will not be decreased by the amount of such dividends.[7] In order to put the corporation in the wrong for a refusal to transfer where it claims more than is due, the stockholder must tender what he admits to be due.[8] The fact that a stockholder claims that the corporation owes him more money than he owes it

held by one of its debtors was sustained in McIlroy, etc. Co. *v.* Dickson, 66 Ark. 327 (1899).

1 Aldine Mfg. Co. *v.* Phillips, 118 Mich. 162 (1898).

2 See §§ 823, 824, 834, *infra.*

3 Citizens', etc. Bank *v.* Kalamazoo, etc. Bank, 111 Mich. 313 (1896).

4 Commonwealth *v.* Standard, etc. Co., 201 Pa. St. 103 (1902). See also § 527, *supra.*

5 Reese *v.* Bank of Commerce, 14 Md. 271, 284 (1859). In one case the lien was held to be equivalent to a pledge; and it was held that, after giving due notice to the delinquent stockholder, the corporation might sell at public auction without filing a bill to foreclose. Farmers' Bank's Case, 2 Bland, Ch. (Md.) 394 (1830). In this case it is also held that, where the corporation neglects or refuses to sell the stock of a deceased stockholder who is in arrears, the administrator may file a bill and obtain an order of sale directed to the corporation.

6 Brent *v.* Bank of Washington, 10 Pet. 596 (1836). A judgment creditor's execution lien on bank stock is subject to the lien of the corporation itself by statute on the stock for debts due to it from the judgment debtor, and a further statutory provison that the enforcement of the corporation's lien shall not affect attachment or execution liens goes merely to the remedy and does not affect the priority. Springfield, etc. Co. *v.* Bank of Batesville, 68 Ark. 234 (1900).

7 *In re* Hovey's Estate, 198 Pa. St. 385 (1901). See also § 473, *supra.*

8 Pierson *v.* Bank of Washington, 3 Cranch, C. C. 363 (1828); s. c., 19 Fed. Cas. 671. In German Security Bank *v.* Jefferson, 10 Bush (Ky.), 326 (1874), it was held that, where the stock sold under the lien realized a sum insufficient to satisfy the corporate debt, the unpaid balance of the

is not sufficient to sustain a bill in equity to enjoin the corporation from selling the stock in order to pay the amount due the corporation. Some other ground of equitable jurisdiction must be set forth.[1] Where a corporation has other security also, a court of equity may compel it to resort to that first.[2] A corporation is liable in damages for selling the stock of a stockholder for non-payment of dues, where such sale was irregular and illegal.[3] Where by statute bank stock may be sold for non-payment of assessments levied upon it to restore the capital stock, the money for which it is sold belongs to the stockholder and not to the bank.[4] The pledgee may maintain a bill to foreclose the pledge where the corporation claims a lien prior to the pledge.[5]

§ 531. *The corporation may waive its lien.*—A corporation which has a lien upon its stockholders' stock for debts due to it from them need not necessarily depend upon or insist upon its lien for the collection of the debt. It may collect the debt as though there was no lien.[6] Hence it is that the lien of a corporation on stock

claim of the corporation could not be paid until there had been a proportionate payment of the claims of other creditors of the stockholder out of his general assets. *Cf. Re* Peebles, 2 Hughes, 394 (1875); s. c., 19 Fed. Cas. 94, and §§ 473, 476, *supra.*

1 Elliott *v.* Sibley, 101 Ala. 344 (1893). This case holds, also, that in a suit in equity by a stockholder to enjoin a sale of his stock by the corporation for a debt due the corporation, the corporation is a necessary party defendant, and that the complainant must aver a readiness to pay whatever may be found due.

2 Covington, etc. Bank *v.* Commercial Bank, 65 Fed. Rep. 547 (1895). Where the company has a lien on stock, and the stockholder sells a part, the purchaser may require the company to first have recourse to the unsold part to collect its debt. A subsequent execution levied on the unsold part does not deprive the purchaser of the other part of his rights stated above. Gray *v.* Stone, 69 L. T. Rep. 282 (1893).

3 The sale here was contrary to the requirements of the by-laws. The corporation bought the stock itself at such sale. The fact that a surplus realized at the sale was sent to the stockholder by check, and was received by him, did not bar his remedy, he being in ignorance of the illegality. Allen *v.* American Building, etc. Assoc., 49 Minn. 544 (1892).

4 Chicago T. & T. Co. *v.* State Bank, 86 Fed. Rep. 863 (1898). In Tennessee it has been held that where stock is only partly paid, and the corporation issues a certificate reciting on its face how much is still due, and the holder pledges it, and no transfer to the pledgee is made on the corporate books, the corporation can have a sale of the stock for non-payment of the balance remaining due, but such proportion of the proceeds will be paid to the pledgee as the amount already paid on the stock bears to the par value of the stock. Ingles, etc. Co. *v.* Knoxville, etc. Co., 53 S. W. Rep. 1111 (Tenn. 1899).

5 White River, etc. Bank *v.* Capital, etc. Co., 77 Vt. 123 (1904).

6 A subscriber for stock cannot avoid liability to the corporation by setting up that the corporation has a lien on the stock therefor and may enforce it. Lankershim, etc. Co. *v.*

may be asserted and enforced, or, in the discretion of the corporation, it may be waived.[1] Where the company files a claim for unpaid calls without claiming a lien on the stock, it thereby waives such lien and cannot amend its claim.[2]

Where the corporation has other security it is not obliged to resort to the lien.[3] Cases may arise, however, where the intervening rights of other creditors of the stockholder render it inequitable for the corporation to waive its lien on the stock.[4]

Accordingly, where a note discounted for a stockholder was protested for non-payment, it was held that the bank might proceed directly against the indorser without resorting to its lien.[5] The corporation, by waiving its lien, does not discharge a surety, unless the surety has given the corporation express notice not to waive the lien.[6] But where a corporation has a lien on stock and at the same time owes a stockholder a certain debt which is guaranteed by a third person, and the stockholder causes the corporation to waive the lien without the consent of the guarantor, the guarantor is thereby discharged.[7] The corporation will not be held to have waived its lien upon the stock of its debtor merely because it has taken other or additional security for the debts;[8] nor because it assents to a general assignment by the stockholder for the benefit

Herberger, 82 Cal. 600 (1890). Even though by the statutes under which an English corporation is organized the company has a lien on the stock for unpaid assessments and may forfeit the stock for non-payment, yet this does not prevent a suit to collect the assessment. Nashua, etc. Bank *v.* Anglo-American, etc. Co., 189 U. S. 221 (1903). See also § 124, *supra.* Where the statute provides that stock shall be taxed, and that the corporation shall pay the tax and have a lien therefor on the stock, the stockholder is not personally liable to the corporation which has paid such tax. Mercantile, etc. Co. *v.* Mellon, 196 Pa. St. 176 (1900).

1 National Bank *v.* Watsontown Bank, 105 U. S. 217 (1881); Hodges *v.* Planters' Bank, 7 Gill & J. (Md.) 306 (1835); Hall *v.* U. S. Ins. Co., 5 Gill (Md.), 484 (1847); *Re* Hoylake Ry., L. R. 9 Ch. 257, 259 (1874). But see Conant *v.* Seneca County Bank, 1 Ohio St. 298 (1853); *Re* Bigelow, 1 Nat. Bankr. Reg. 667 (1868); s. c., 3 Fed. Cas. 341. A waiver is the intentional relinquishment of a known right. It is not to be inferred and imputed to a corporation in the absence of proof of it, and a mere failure to assert the lien is not equivalent to a relinquishment or waiver of it. First Nat. Bank *v.* Hartford, etc. Ins. Co., 45 Conn. 22, 44 (1877).

2 *Re* Rowe, [1904] 2 K. B. 489.

3 Dunlop *v.* Dunlop, L. R. 21 Ch. D. 583 (1882).

4 *Re* Bachman, 12 Nat. Bankr. Reg. 223 (1876); s. c., 2 Fed. Cas. 310.

5 Cross *v.* Phenix Bank, 1 R. I. 39 (1840).

6 Perrine *v.* Fireman's Ins. Co., 22 Ala. 575 (1853).

7 Robertson *v.* Sully, 157 N. Y. 624 (1899).

8 Union Bank *v.* Laird, 2 Wheat. 390 (1817).

of creditors.[1] But of course if a corporation, having a statutory lien on stock, agrees to take other security in place thereof, it thereby waives its lien.[2] The corporation may allow the transfer of a portion of a stockholder's stock without waiving its lien on the rest.[3] The fact that the corporation transfers other stock belonging to the same stockholder is no waiver of its lien on stock as against a pledgee of some of the stock, the debt being greater than the value of all the stock.[4] A waiver of the lien for a limited time is fatal, provided the stock is transferred during that time.[5]

A waiver which will bind the corporation may, in the absence of something to qualify the power, be made by the cashier of a bank, acting by virtue of an express or implied authority, for the board of directors;[6] or the secretary of an insurance company;[7] or the general manager or properly-qualified general agent of the corporation, especially if that is a general custom of the company.[8] Accordingly, where one buys stock on the faith of a representation of the corporate officers that the stock is unincumbered, he is entitled to the stock free from any corporate lien.[9]

Where the corporate officers allow a transfer to be registered, and a new certificate to be issued, there is a waiver of the corporate lien as to the debts of the transferrer.[10] Where the corpora-

1 Dobbins *v.* Walton, 37 Ga. 614 (1868).

2 St. Paul Nat. Bank *v.* Life Ins. etc. Co., 71 Minn. 123 (1898).

3 First Nat. Bank of Hartford *v.* Hartford, etc. Ins. Co., 45 Conn. 22 (1877). But *cf.* Presbyterian Cong. *v.* Carlisle Bank, 5 Pa. St. 345 (1847).

4 Commonwealth *v.* Standard, etc. Co., 201 Pa. St. 103 (1902).

5 Thus, if within such time the stock is pledged for a debt, the right of the corporation, after the expiration of the time to acquire its charter lien, is subordinate to the right of the pledge until the debt is paid or the pledge is released. Bank of America *v.* McNeil, 10 Bush (Ky.), 54 (1873).

6 National Bank *v.* Watsontown Bank, 105 U. S. 217 (1881). So, also, the refusal of the cashier to permit a transfer is the act of the bank, for which it may be charged. Case *v.* Bank, 100 U. S. 446 (1879). Where the cashier of a bank takes part in the pledging of stock by one of the stockholders, the bank cannot subsequently claim a lien on the stock for debts incurred by the stockholder after such pledge. Birmingham Trust, etc. Co. *v.* Louisiana Nat. Bank, 99 Ala. 379 (1893).

7 Chambersburg Ins. Co. *v.* Smith, 11 Pa. St. 120 (1849). *Cf.* Kenton Ins. Co. *v.* Bowman, 84 Ky. 430 (1886).

8 See Bishop *v.* Globe Co., 135 Mass. 132 (1883); Young *v.* Vough, 23 N. J. Eq. 325 (1873).

9 Moore *v.* Bank of Commerce, 52 Mo. 377 (1873).

10 Hill *v.* Pine River Bank, 45 N. H. 300 (1864); Higgs *v.* Northern Assam Tea Co., L. R. 4 Exch. 387 (1869); *Re* Northern Assam Tea Co., L. R. 10 Eq. 458 (1870). After transfer on the books the transferrer is no longer liable for the subscription price, and the transferee is liable even though the corporation has a lien on the stock by statute, the transfer having been allowed by the officers of the cor-

tion sells a claim it has against a stockholder it thereby loses its lien.[1] The lien is not waived by a by-law that stockholders must offer their stock to the bank before selling elsewhere, and that after ten days they may sell elsewhere.[2] Where a party about to take stock in pledge inquires of the corporation as to its value, and as to whether there was any lien upon the stock, and no lien is claimed, and he then takes the stock in pledge, and causes an indorsement thereof to be made on the stub of the stock-book of the corporation, the corporation cannot thereafter claim a lien as against him; and, moreover, a subsequent transfer of the stock by the pledgor to the corporation as security for a debt due from him to it does not take precedence over the first pledge, the certificates themselves having been transferred to the first pledgee, but not transferred on the books.[3] The fact that the debt of the corporation has existed several years and has not been enforced does not affect the company's statutory lien upon stock of its creditor.[4]

§ 532. *The lien as affected by transfers and notice.*—A purchaser of stock is bound to take notice of the statute giving a lien upon the stock.[5] Nevertheless, upon a transfer of stock, the title thereto passes absolutely as between transferrer and transferee, even though the corporation, in the assertion of a lien upon the stock for the indebtedness of the transferee, refuses to register the transfer until a certain debt is paid or secured.[6] But of course the assignee or

poration. Rochester, etc. Co. *v.* Raymond, 158 N. Y. 576 (1899). So, also, a by-law requiring the consent of the board of directors to a transfer by one indebted to the corporation is held to be repealed where a custom of disregarding it has been shown, it appearing also that the secretary had been allowed to exercise his own discretion about such transfers without consulting the directors. In such a case the consent of the secretary to the transfer is a waiver of the lien. Chambersburg Ins. Co. *v.* Smith, 11 Pa. St. 120 (1849). Where the corporation has allowed the stockholder to transfer his stock to his wife, it cannot, as against a *bona fide* pledgee from the wife, claim that the transfer was colorable, and that the husband was still the real owner and that the corporation has a lien on the stock for the husband's debts. Just *v.* State Sav. Bank, 132 Mich. 600 (1903).

1 Ralston *v.* Bank of California, 112 Cal. 208 (1896).

2 Citizens', etc. Bank *v.* Kalamazoo, etc. Bank, 111 Mich. 313 (1896).

3 Des Moines, etc. Co. *v.* Des Moines, etc. Bank, 97 Iowa, 668 (1896). Where the cashier of a bank tells a purchaser of stock that the bank has no lien upon the stock, a statutory lien of the bank on the stock is waived as to him. Oakland C. S. Bank *v.* State Bank, 113 Mich. 284 (1897).

4 Wright, etc. Co. *v.* Hixon, 105 Wis. 153 (1899).

5 See § 523, *supra*.

6 National Bank *v.* Watsontown Bank, 105 U. S. 217 (1881); Johnston *v.* Laflin, 103 U. S. 800 (1880); Fitzhugh *v.* Bank of Shepherdsville, 3 T. B. Mon. (Ky.) 126 (1825); St. Louis, etc. Ins. Co. *v.* Goodfellow, 9 Mo. 149 (1845); Commercial Bank *v.* Kortright, 22 Wend. 348 (1839); s. c., *sub nom.* Kortright *v.* Buffalo Commercial

transferee, or whoever succeeds to the rights of the stockholder in the stock, takes it subject to the lien of the corporation.[1] And when the stock is sold by the corporation to pay the debts of the transferrer, the transferee is entitled to the surplus, if any there be, which remains after the claim of the corporation is satisfied.[2]

The corporation cannot, after it has been regularly notified of the transfer, assert a lien upon the stock to secure an indebtedness of the transferrer contracted subsequently to the notice.[3] A mere notice to the bank is, in such a case, sufficient to protect the transferee. It is immaterial that the transfer was not registered.[4] Where

Bank, 20 Wend. 91 (1838); Bank of Utica *v.* Smalley, 2 Cow. 770 (1824); McNeil *v.* Tenth Nat. Bank, 46 N. Y. 325 (1871); People *v.* Miller, 39 Hun, 557, 563 (1886); aff'd, 114 N. Y. 636. *Cf.* Dunn *v.* Commercial Bank, 11 Barb. 580 (1852); Merchants' Bank *v.* Livingston, 74 N. Y. 223 (1878); Pittsburgh, etc. R. R. *v.* Clarke, 29 Pa. St. 146 (1857); Sargent *v.* Essex Marine Ry., 26 Mass. 202 (1829); Carroll *v.* Mullanphy Sav. Bank, 8 Mo. App. 249 (1880). Corporations having a statutory lien on stock for debts nevertheless must allow transfer to one who takes subject to the corporate lien for part of the unpaid subscription. Herdegen *v.* Cotzhausen, 70 Wis. 589 (1888). A corporate lien for a salary paid to a stockholder, on his agreement to repay any amount in excess of dividends on his stock, has precedence as against a pledgee of the stock. Russell, etc. Co. *v.* Hammond, etc. Co., 130 Mich. 7 (1902).

1 Mobile Mut. Ins. Co. *v.* Cullom, 49 Ala. 558 (1873); New Orleans Nat. Banking Assoc. *v.* Wiltz, 10 Fed. Rep. 330 (1881).

2 Tuttle *v.* Walton, 1 Ga. 43 (1846); Foster *v.* Potter, 37 Mo. 525 (1866); West Branch Bank *v.* Armstrong, 40 Pa. St. 278 (1861); Weston *v.* Bear River, etc. Co., 5 Cal. 186 (1855); s. c., 6 Cal. 425.

3 Conant *v.* Seneca County Bank, 1 Ohio St. 298 (1853); Nesmith *v.* Washington Bank, 23 Mass. 324 (1828). The same rule applies where the stock is pledged. Bradford Banking Co. *v.* Briggs, L. R. 12 App. Cas. 29 (1886). But where the stockholder transfers his stock, and subsequently, without notifying the corporation of the transfer, borrows money from the corporation in regular course of business, the corporation may refuse to register the transfer and may insist upon the lien. Platt *v.* Birmingham Axle Co., 41 Conn. 255 (1874). Where it is the custom to have the corporation, upon request, certify that it has no lien, such a request operates as notice to the corporation. Covington, etc. Bank *v.* Commercial Bank, 65 Fed. Rep. 547 (1895). This case holds also that notice to the corporation by a loaner of money to the stockholder does not inure to the benefit of a purchaser who knew nothing thereof. After a pledge of the certificate and notice to the corporation, a subsequent debt of the corporation is not protected by the company's lien as against such pledge. Just *v.* State Sav. Bank, 132 Mich. 600 (1903). A statutory lien does not take precedence over a pledge, notice of which had been given to the corporation before the debt was incurred, even though the transfer was not registered on the corporate books, but the lien attaches to the equity. White River, etc. Bank *v.* Capital, etc. Co., 77 Vt. 123 (1904).

4 Bank of America *v.* McNeil, 10 Bush (Ky.) 54 (1873). See also §§ 258, 382, 383, 490, 523, *supra*. A debt

the directors of a corporation know that a stockholder of record has transferred his stock, the corporation cannot claim a lien for debts incurred subsequently.[1] But where there is neither a register of the transfer nor notice of it served upon the corporation, the stock may properly be subjected to a corporate lien for the indebtedness of the transferrer incurred subsequently to the transfer.[2] A pledgee who is duly registered on the corporate books as a stockholder, but to whom no certificate has been issued, is nevertheless protected against liens upon his stock for the indebtedness of the

incurred after notice to the corporation of a transfer of stock by the stockholder is not protected by the lien, but knowledge acquired by the president in another capacity is not such a notice. People's Bank *v.* Exchange Bank, 116 Ga. 820 (1902).

1 Prince, etc. Co. *v.* St. Paul, etc. Co., 68 Minn. 121 (1897). A lien of a bank on stock for a debt due from a stockholder to the bank is subject to a pledge of the stock where such pledge was made before the debt was incured, and the bank incurred the debt with knowledge of the pledge. Knowledge of the facts by the president is notice to the bank. Curtice *v.* Crawford, etc. Bank, 118 Fed. Rep. 390 (1902).

2 Faulkner *v.* Bank of Topeka, 94 Pac. Rep. 153 (Kan. 1908). Platt *v.* Birmingham Axle Co., 41 Conn. 255 (1874); Jennings *v.* Bank of California, 79 Cal. 323 (1889); Gemmell *v.* Davis, 75 Md. 546 (1892). Even though the stockholder has transferred his certificate, yet if the corporation has no knowledge of the fact, it may acquire a lien thereafter, and prior to the time of its having knowledge, the transfer not having been made within sixty days as required by statute, and even though such stockholder is its cashier, it is not chargeable with notice on account of that fact. Pueblo, etc. Bank *v.* Richardson, 89 Pac. Rep. 799 (Colo. 1907). Where the statute gives a lien for debts due, the lien applies as against a transfer of the certificate made before the debt became due, but presented to the corporation for transfer after the debt became due. Michigan, etc. Co. *v.* State Bank, 111 Mich. 306 (1896). As to the rule in England, see Miles *v.* New Zealand, etc. Co., L. R. 32 Ch. D. 266 (1886); Dunlop *v.* Dunlop, L. R. 21 Ch. D. 583 (1882); Société Générale *v.* Tramways Union Co., L. R. 14 Q. B. D. 424 (1884); New London, etc. Bank *v.* Brocklebank, L. R. 21 Ch. D. 302 (1882). In England, however, unrecorded transferees of stock have few, if any, rights as against the corporation. It is held in Ohio that where the certificates of stock issued by a bank contain a provision on their face that the bank shall have a lien on the stock for all debts due to it from the registered owner, such lien is valid and applies as well to a debt contracted after the certificate was sold but before it was presented for transfer on the books of the bank. The lien exists even though neither the statutes nor the by-laws, nor the resolution of the board of directors provided for such lien. It is sufficient that such certificate of stock was the one used by the corporation. Stafford *v.* Produce, etc. Co., 61 Ohio St. 160 (1899). See also § 522, *supra*. Until the corporation has notice of a sale or a pledge of the certificate of stock it may continue to loan money to the stockholder and have a lien therefor. People's Bank *v.* Exchange Bank, 116 Ga. 820 (1902).

pledgor.[1] A corporate lien will not attach to stock for the debts of a legatee unless the legatee accepts the stock.[2]

Where one pays a debt as surety for a stockholder, he is entitled to be subrogated to the rights of the corporation by way of lien on the stockholder's stock.[3] And where the transferee pays the transferrer's debt to the corporation in order to obtain a registry of the transfer, he of course may have his action to recover back from his transferrer the amount so paid.[4]

Where the company has a lien upon the stock of a stockholder, the latter may compel the company to assign their lien to a third person who will advance the money, and to whom the shares are at the same time transferred.[5]

§ 533. *Liens on national-bank stock.*—National banks were formerly held to have power to enact by-laws creating a lien on stock in the bank for debts owed by its owner to the bank.[6] But the supreme court of the United States, when the question came before it, refused to enforce such a by-law, and decided that its enactment was not within the spirit of those provisions of the National Banking Act of 1864 which confer power upon the management of a national bank to regulate the business of the bank and to conduct its affairs.[7] In the present state of the law, therefore, no national bank can, by any by-law, create any lien upon shares of stock in the bank to secure the payment of any indebtedness which the owner of the stock may contract to the bank.[8] A national bank can-

1 Cecil Nat. Bank *v.* Watsontown Bank, 105 U. S. 217 (1881).

2 Farmers' Bank *v.* Iglehart, 6 Gill (Md.) 50 (1847).

3 Young *v.* Vough, 23 N. J. Eq. 325 (1873); Hodges *v.* Planters' Bank, 7 Gill & J. (Md.) 306, 310 (1835); West Branch Bank *v.* Armstrong, 40 Pa. St. 278 (1861); Klopp *v.* Lebanon Bank, 46 Pa. St. 88 (1863). *Cf.* Higgs *v.* Northern Assam Tea Co., L. R. 4 Exch. 387 (1869); *Re* Northern Assam Tea Co., L. R. 10 Eq. 458 (1870); National Exch. Bank *v.* Silliman, 65 N. Y. 475 (1875).

4 Bates *v.* New York Ins. Co., 3 Johns. Cas. 238 (1802). See also § 262, *supra*.

5 Everitt *v.* Automatic, etc. Co., [1892] 3 Ch. 506.

6 The leading case was Knight *v.* Old Nat. Bank, 3 Cliff. 429 (1871); s. c., 14 Fed. Cas. 772, upholding the lien. To the same effect, see Lockwood *v.* Mechanics' Nat. Bank, 9 R. I. 308 (1869); *Re* Dunkerson, 4 Biss. 227 (1868); s. c., 8 Fed. Cas. 48; Young *v.* Vough, 23 N. J. Eq. 325 (1873).

7 Bullard *v.* Bank, 18 Wall. 589 (1873). See also Bank *v.* Lanier, 11 Wall. 369 (1870); Case *v.* Bank, 100 U. S. 446 (1879). Bridges *v.* National Bank, 185 N. Y., 146 (1906). One reason for denying this power to national banks is that they are prohibited from loaning money to stockholders on the security of their stock.

8 Delaware, etc. R. R. *v.* Oxford Iron Co., 38 N. J. Eq. 340 (1884); Meyers *v.* Valley Nat. Bank, 18 Nat. Bankr. Reg. 34 (1879); s. c., 17 Fed. Cas. 250; Hagar *v.* Union Nat. Bank, 63 Me. 509 (1874); New Orleans Nat. Bank *v.* Wiltz, 10 Fed. Rep. 330 (1881); Goodbar *v.* City Nat. Bank, 78

not claim a lien on stock for a stockholder's debt, even though notice of such lien is printed on the face of the certificates of stock.[1]

Tex. 461 (1890); Second Nat. Bank *v.* National State Bank, 10 Bush (Ky.), 367 (1874); Lee *v.* Citizens' Nat. Bank, 2 Cin. Super. Ct. (Ohio), 298, 306 (1872); Evansville Nat. Bank *v.* Metropolitan Nat. Bank, 2 Biss. 527 (1871); s. c., 8 Fed. Cas. 891. In the case last cited, which upon appeal was affirmed by the supreme court of the United States, it was held that such a by-law was in its operation the same thing as though a loan were made by the bank upon the security of the stock—a transaction forbidden by the thirty-fifth section of the National Banking Act. Conklin *v.* Second Nat. Bank, 45 N. Y. 655 (1871). *Cf.* Xenia Nat. Bank *v.* Stewart, 107 U. S. 676 (1882); Rosenback *v.* Salt Springs Nat. Bank, 53 Barb. 495 (1868). A bank, however, may attach the stock of one of its stockholders for debts due from him to it. Hagar *v.* Union Nat. Bank, 63 Me. 509 (1874).

1 Buffalo, etc. Co. *v.* Third, etc. Bank, 162 N. Y. 163 (1900); aff'd, 193 U. S. 581.

CHAPTER XXXII.

DIVIDENDS.

§ 534. *Definition of a dividend and the four kinds of dividends.*— A dividend is a corporate profit set aside, declared, and ordered by the directors to be paid to the stockholders on demand or at a fixed time.[1] Until the dividend is declared these corporate profits belong to the corporation, not to the stockholders, and are liable for corporate indebtedness.[2] But the board of directors of a bank

1 Quoted and approved in McLaren *v.* Crescent, etc. Co., 117 Mo. App. 40 (1906). Lockhart *v.* Van Alstyne, 31 Mich. 76 (1875); Chafee *v.* Rutland R. R., 55 Vt. 110, 129 (1882); Hyatt *v.* Allen, 56 N. Y. 553 (1874). "The term 'dividend,' in its technical as well as in its ordinary acceptation, means that portion of its profits which the corporation, by its directory, sets apart for ratable division among its shareholders." Mobile, etc. R. R. *v.* Tennessee, 153 U. S. 486, 496 (1894).

2 Quoted and approved in DeKoven *v.* Alsop, 205 Ill. 309 (1903). Until a dividend is actually declared the earnings belong to the corporation. Robertson *v.* Brulatour, 188 N. Y. 301 (1907). Goodwin *v.* Hardy, 57 Me. 143, 145 (1869); Rand *v.* Hubbell, 115 Mass. 461, 474 (1874); Minot *v.* Paine, 99 Mass. 101 (1868); Hyatt *v.* Allen, 56 N. Y. 553 (1874); Mickles *v.* Rochester City, etc. Bank, 11 Paige, 118 (1844), holding that stockholders are neither tenants in common nor copartners of corporate property. A stockholder cannot sue for his share

has no power to pledge its future profits, unless the stockholders assent thereto.[1]

A corporation may, in general, make four different kinds of dividends: namely, a dividend payable in cash, in stock, in bonds or scrip, or in property.

Dividends are declared by the directors and not by the stockholders.[2] A division of profits without the formality of declaring a dividend is equivalent to a dividend.[3] A division of the profits

of the profits until a dividend has been declared. Corgan *v.* George, etc. Co., 67 Atl. Rep. 655 (Penn. 1907).

1 Brown *v.* Bradford, 103 Iowa, 378 (1897). A percentage of the net profits going to an employee for his services is a part of the expenses of the business, and not a part of the accumulated profits. Bennett *v.* Millville Imp. Co., 67 N. J. L. 320 (1902). A contract with an insurance agent whereby he has an interest in all policies placed by him is not an interference with the discretion of future boards of directors. Schrimplin *v.* Farmers', etc. Assoc., 123 Iowa, 102 (1904). The agreement of a corporation to pay an employee half of its profits does not create a partnership. Belch *v.* Big Store Co., 89 Pac. Rep. 174 (Wash. 1907). A corporation by the action of its board of directors and consent of all its stockholders may agree that a certain percentage of its profits shall be paid annually to a person for services already rendered by him. In a suit by him to enforce such agreement, and asking an injunction against any sales of stock, except with notice of such agreement, stockholders are necessary parties defendant. Such an agreement is not an exclusion of future boards of directors from the management of the company. Dupignac *v.* Bernstrom, 76 N. Y. App. Div. 105 (1902). *Cf.* § 678, *infra.*

2 See § 545, *infra.*

3 "A division of profits without the formality of declaring a dividend is the equivalent of declaring a dividend." Hartley *v.* Pioneer Iron Works, 181 N. Y. 73 (1905). Rorke *v.* Thomas, 56 N. Y. 559 (1874); Reading Trust Co. *v.* Reading Ironworks, 137 Pa. St. 282 (1890); McKusick *v.* Seymour, etc. Co., 48 Minn. 172 (1892). See also § 572*a*, *infra.* Where there are but a few stockholders in a corporation and without any formal corporate action they turn a part of the capital into preferred stock and thereafter divide the profits among themselves without declaring technical dividends with the knowledge and consent of all the stockholders, no one of them nor the corporation itself can subsequently complain and defeat a suit by one of them for the amount so credited to him on the books, corporate creditors not being injured. Breslin *v.* Fries-Breslin Co., 70 N. J. L. 274 (1904). The court said: "In the present case we apply this doctrine to the non-observance of legal forms respecting the creation of preferred stock, the abandonment by preferred stockholders of voting powers, the resignation of directors, the reduction of the number of directors from six to three, and the apportionment of dividends as between the stockholders entitled thereto. In respect to these matters the jury was fully justified in finding that unanimous consent of the stockholders of the defendant company had been given, and had been acted on in good faith by the plaintiff and others concerned during a course of years, and that plaintiff could not be restored to the *status quo ante*, were the assent of his fellow stockholders and of the company to be now withdrawn."

is a dividend even though not called such and not considered such by the directors and stockholders.[1] It is legal for a corporation to distribute its profits by the payment of salaries, provided all the stockholders assent thereto.[2] A stockholder cannot prove by parol

Where the directors turn over the assets to a stockholder this is the same as a declaration and payment of a dividend, and if it renders the company insolvent the directors are liable under the Massachusetts statute. Pennsylvania Iron Works *v.* Mackenzie, 190 Mass. 61 (1906). A resolution will be construed as equivalent to a dividend where any other construction would amount to an illegal preference among the stockholders. Redhead *v.* Iowa Nat. Bank, 127 Iowa, 572 (1905). A dividend paid by the treasurer without authority of the board of directors may be recovered back, even though there were only about three stockholders and they all participated. The corporation having passed into other hands, a suit may be maintained. Cheat Valley R. R. *v.* Humes, 211 Pa. St. 287 (1905). A dividend may be legal, even though not formally declared, it being paid by common consent, and hence cannot be recovered back on that ground after being actually paid. Berryman *v.* Bankers' etc. Co., 117 N. Y. App. Div. 730 (1907). Where a fixed per cent. is paid annually to stockholders instead of dividends and charged to them, and the stock held in pledge for the same, such a payment to the life tenant does not create a valid lien on the stock as against the remainderman. Reading Trust Co. *v.* Reading Ironworks, 137 Pa. St. 282 (1890). The stockholders may agree among themselves informally to distribute a certain sum as dividends without going through the form of corporate action. No formal declaration is necessary, either by the stockholders or board of directors, and a distribution of profits by a unanimous consent without corporate action is legal. Groh's Sons *v.* Groh, 80 N. Y. App. Div. 85 (1903); rev'd on another point in 177 N. Y. 8.

1 Commonwealth *v.* Pittsburg, etc. Ry., 74 Pa. St. 83, 90 (1873), holding that a stock dividend was not such a dividend as entered into a rate of taxation. Lehigh Crane Iron Co. *v.* Commonwealth, 55 Pa. St. 448 (1867), where the capital stock was $100,000, but dividends were declared on an assumed capital of $1,000,000, the property being worth the latter figure by reason of profits invested in it. The same device was resorted to in Citizens', etc. Ry. *v.* Philadelphia, 49 Pa. St. 251 (1865). "Dividends declared," as used in an employee's contract of payment for services, the rate of payment being according to such "dividend," were construed to mean profits, even though not distributed by dividends, the intent being clear. Acceptance of part payment is no bar to an action to collect. Scase *v.* Gillette-Herzog Mfg. Co., 55 Minn. 349 (1893). Where large salaries are paid, instead of declaring dividends, the object being "concealment and delusion," the court will not hold that such "salaries" are a part of the manufacturing expense of a defendant guilty of infringing a patent. Rubber Co. *v.* Goodyear, 9 Wall. 788 (1869); Seabury *v.* Am Ende, 152 U. S. 561 (1894). A stockholder cannot maintain a suit for a dividend which the stockholders informally agreed should be declared, but which never was declared. American Wire Nail Co. *v.* Gedge, 96 Ky. 513 (1895).

2 Fitchett *v.* Murphy, 46 N. Y. App. Div. 181 (1899). Where all the stockholders are officers, and, instead of dividends, the corporation distributes its profits by large salaries, there is danger that upon the death of one of them others may continue the pay-

that a dividend was declared, the records not showing the same. His remedy is by proceedings to correct the corporate record.[1]

Numerous cases on the definition of the word "dividend" have arisen in connection with the taxation of corporations.[2] Corporations have inherent power to declare and pay dividends, even though they have no capital stock.[3]

§ 535. *Scrip dividends, property dividends, and bond dividends.* —A scrip dividend is a dividend of certificates giving the holder certain rights which are specified in the certificate itself. These dividends are usually declared when the company has profits which are not in the shape of money, but are in other forms of property, and the company wishes to anticipate the time when the property may be sold for cash, and the cash distributed by a money dividend.[4] The certificate sometimes entitles the holder to a sum of money payable with interest at a certain time after date, or at the option of the company, or when the company shall have accumulated sufficient surplus to pay the certificates in full. Sometimes the certificates are certificates of indebtedness, and are made con-

ment of such salaries to themselves, even though they are executors of the deceased officer's estate. Matter of Schaefer, 65 N. Y. App. Div. 378 (1901); aff'd, 171 N. Y. 686.

1 Dennis *v.* Joslin Mfg. Co., 19 R. I. 666 (1896).

2 A tax upon the receipts of a railroad is not a tax upon dividends. Comm'rs, etc. *v.* Buckner, 48 Fed. Rep. 533 (1891). Profits applied to betterments are not "dividends earned" within the meaning of a statute imposing taxation. State *v.* Comptroller, 54 N. J. L. 135 (1891). Where all the shares are reduced in par value from $50 to $38, and the $12 difference is paid to the stockholders in cash, this is a reduction of capital stock, and not a dividend, and cannot be taxed as a dividend. Commonwealth *v.* Central Transp. Co., 145 Pa. St. 89 (1891). Where a tax is levied on dividends the officers cannot defend on the ground that the dividend was illegal. Central Nat. Bank *v.* U. S., 137 U. S. 355 (1890). In Commonwealth *v.* Pittsburg, etc. Ry., 74 Pa. St. 83 (1873), a lessor company having twelve per cent. dividends guaranteed on its stock declared a stock dividend so that the guarantee should be seven per cent. on the stock thus increased. The court held that such a dividend did not subject the company to a tax based on dividends. In Louisiana taxes are assessed on franchises, the value of which is ascertained from the earning capacity of the corporation. Crescent City R. Co. *v.* New Orleans, 44 La. Ann. 1057 (1892); New Orleans, etc. R. Co. *v.* New Orleans, 44 La. Ann. 1053 (1892); New Orleans, etc. R. Co. *v.* New Orleans, 44 La. Ann. 1055 (1892).

3 In McKean *v.* Biddle, 181 Pa. St. 361 (1897), where a mutual insurance company for one hundred and thirty-two years had not paid dividends, but had accumulated a surplus of over four million dollars, the court held that the company might resume the payment of dividends. The court also held that every corporation has the inherent right to declare dividends.

4 Quoted and approved in *re* Robinson's Trust, 67 Ala. Ref. 775 (Penn. 1907).

vertible, at the option of the holder, into bonds or stock;[1] and sometimes the certificate entitles the holder to exchange the certificate for lands of the corporation to an amount equivalent in value to the face value of the certificate; or to receive from the corpora-

1 Quoted and approved in *re* Robinson's Trust, 67 Atl. Rep. 775 (Penn. 1907). Chaffee *v.* Rutland R. R. 55 Vt. 110 (1882); State *v.* Baltimore, etc. R. R., 6 Gill (Md.), 363 (1848). In Rogers *v.* New York, etc. Land Co., 134 N. Y. 197 (1892), land had been sold to the company for a certain amount of preferred stock, and also a certain amount of "land scrip," such scrip entitling the holder to exchange them for land so conveyed at a price to be thereafter determined. The company had the right to pay off the scrip and retire it. The company sold part of the land, and then proceeded to make a scrip dividend of the scrip so taken up by it. A dissenting scripholder brought suit to undo the transaction on the ground that the scrip taken up by the company should be canceled. The court sustained his action, and held that from the original contract it was clear that the land was received as a trust fund to ultimately pay off the scrip. Reversing Rogers *v.* Phelps, 9 N. Y. Supp. 886 (1890). In Brown *v.* Lehigh, etc. Co., 49 Pa. St. 270 (1865), a dividend of scrip had been declared, the scrip being as follows:

"No. —. SCRIP. Shares.

"This is to certify that —— ——, —— heirs or assigns, will be entitled, upon the surrender of this certificate, to —— shares in the capital stock of the Lehigh Coal and Navigation Company so soon as the present funded debt of the company has been paid off, or adequate provision made for its discharge when due and payment demanded; and will also be entitled to a *pro rata* share of any future distribution of scrip; but not to any cash dividend until this certificate has been converted into stock, as above provided.

"Or this certificate may at any time, at the option of the holder thereof, be converted into stock upon payment by said holder, either in cash or in the six per cent. loans of the company, of the par value of said stock, and the surrender of this certificate.

"This certificate is transferable only at the office of the company.

"Witness," etc.

Several years after the issue, the mortgage being paid off, the scripholders claimed that they were entitled to back dividends equal to past dividends paid on the stock. The court held, however, that the terms of the contract did not give any such right, and that dividends commenced only from the time the scrip was converted into stock.

The holder of a certificate of indebtedness convertible into stock cannot claim an interest in a stock dividend until he has converted the scrip into stock. Miller *v.* Illinois Central R. R., 24 Barb. 312 (1857); Brundage *v.* Brundage, 65 Barb. 397 (1873); aff'd, 60 N. Y. 544 (1875), holding that assignable "interest certificates" representing earnings spent for improvements, and payable out of future earnings with dividends, or convertible into stock at the company's option, did not pass with a bequest of a life interest in certain shares of the stock. See also, in general, Butler *v.* Glen Cove, etc. Co., 18 Hun, 47 (1879). Also § 283, *supra*. *Cf.* Bailey *v.* Citizens' Gas Light Co., 27 N. J. Eq. 196 (1876). The court in this case, speaking of a dividend of interest-bearing securities, said: "That the company had no lawful authority for issuing the certificates cannot be doubted." In Merz *v.* Interior Conduit, etc., 87 Hun, 430 (1895), the issue of bonds to pay certificates of indebtedness which had been issued as a dividend was enjoined. The dissenting opinion in this case seems the better view. A scrip entitling a person named to bonds may be assigned, even though by its terms it can be assigned only

tion any other benefit or advantage which the corporation may lawfully confer.[1] Sometimes the certificate so far partakes of the character of a certificate of stock as to entitle the holder to dividends.[2] Where the corporation, having a large surplus, issues such

with the assent of the corporation issuing the same. Hubbard *v.* Manhattan Trust Co., 87 Fed. Rep. 51 (1898).

1 Where a scrip dividend is issued representing the surplus, such scrip is collectible within a reasonable time, even though by its terms it is payable at the pleasure of the company, and especially is it collectible where some of the holders of the scrip dividend have been paid and others not. Billingham *v.* Gleason Mfg. Co., 101 N. Y. App. Div. 476 (1905); aff'd, 185 N. Y. 571.

2 Bailey *v.* Railroad Co., 22 Wall. 604 (1874). *Cf.* Brundage *v.* Brundage, 60 N. Y. 544 (1875).

The character of the scrip in this case is shown by the resolution authorizing it, as follows:

"Whereas, this company has hitherto expended of its earnings for the purpose of constructing and equipping its road, and in the purchase of real estate and other properties with a view to an increase of its traffic, moneys equal in amount to eighty per cent. of the capital stock of the company; and whereas, the several stockholders of the company are entitled to evidence of such expenditure, and to reimbursement of the same at some convenient future period:

"Now, therefore, resolved, that a certificate signed by the president and treasurer of this company be issued to the stockholders severally, declaring that such stockholder is entitled to eighty per cent. of the amount of capital stock held by him, payable ratably with the other certificates issued under this resolution, at the option of the company, out of its future earnings, with dividends thereon, at the same rates and times as dividends shall be paid on shares of the capital stock of the company, and that such certificates may be, at the option of the company, convertible into stock of the company, whenever the company shall be authorized to increase its capital stock to an amount sufficient for such conversion."

This was the famous scrip dividend made by the New York Central R. R. Co. under the management of Commodore Vanderbilt.

The form of the certificate was as follows:

"THE NEW YORK CENTRAL RAILROAD COMPANY.

"No. —. Interest Certificate.

"Under a resolution of the board of directors of this company, passed December 19th, 1868, of which the above is a copy, the New York Central Railroad Company hereby certifies that A. B., being the holder of — shares of the capital stock of said company, is entitled to —— dollars, payable ratably with the other certificates issued under said resolution, at the pleasure of the company, out of its future earnings, with dividends thereon, at the same rates and times as dividends shall be paid upon the shares of the capital stock of said company.

"This certificate may be transferred on the books of the company on the surrender of this certificate.

"In witness whereof, the said company has caused this certificate to be signed by its president and treasurer, this 19th day of December, 1868.

"——— ———, "President."

"——— ———, "Treasurer."

At the foot of each certificate there was a form of transfer in blank:

"For a valuable consideration, I, A. B., do hereby sell, assign, and transfer all interest in the above certificate to C. D., and do hereby irrevocably appoint E. F. attorney, to execute a transfer thereof on the books of the railroad company therein mentioned."

See Bailey *v.* Railroad Co., 22 Wall. 604, 608 (1874). This dividend was declared although the company by its charter was limited to ten per cent. dividends.

A dividend of scrip—*i. e.*, a paper entitling the holder to dividends equal to dividends thereafter declared on

certificates, they are held not to transfer the title to that surplus from the corporation to the holders of the certificates.[1] In general the issue of scrip dividends may be entirely lawful, and they are upheld by the courts. But when they are declared in fraud of the rights of third parties they may be set aside.[2] The public service commission of New York in 1908 held that under the New York statute of 1907 a New York railroad company could not issue a dividend of interest-bearing warrants or notes.

Scrip may be practically the same thing as shares of stock, except that it has no voting power. It is issued sometimes because the company cannot issue any more capital stock, the whole capital stock being already out; sometimes to avoid taxes, and sometimes to increase the transferable shares without giving to the new shares a voting power.[3] If the interest or dividends are payable only from the profits, the issue of the scrip is legal whenever a stock dividend would be legal, that is whenever the property of the company is equal in value to the capital stock plus the scrip dividend.

A property dividend is where property is divided instead of that property being sold for cash and the cash then used to pay a divi-

the capital stock—is practically a stock dividend, except that the scrip cannot vote, and provision is generally made for taking it up in some manner. Such a dividend was involved in Gordon *v.* Richmond, etc. R. R., 78 Va. 501 (1884). Quoted and approved in *re* Robinson's Trust, 67 Atl. Rep. 775 (Penn. 1907).

1 People *v.* Board of Assessors, 76 N. Y. 202 (1879), affirming s. c., 16 Hun, 196. In this case it was held that the issue of these certificates could not operate to relieve the corporation from their obligations to pay their tax upon the surplus, because the surplus remained in the hands of the company, and as such was liable to assessment and taxation. See also Bailey *v.* Railroad Co., 22 Wall. 604 (1874). See also Gordon *v.* Richmond, etc. R. R., 78 Va. 501 (1884).

2 While negotiations were pending between two gas companies for their consolidation by one company buying the stock of the other, upon a certain basis of capital and indebtedness, one of them, without the knowledge of the other, passed a resolution declaring a scrip dividend of ten per cent. on its capital stock, thus increasing its indebtedness by that amount. The certificates were accordingly issued; but after the consolidation, upon a bill filed for that purpose, the scrip was declared void. Bailey *v.* Citizens' Gas Light Co., 27 N. J. Eq. 196 (1876).

3 Where one street railway company takes a lease of the street railways of three other companies on an agreement whereby the stock of the latter companies is deposited with a trustee, and the lessee issues "stock trust certificates" therefor, being its obligation to pay a fixed rate of interest per year, with an option on its part to pay the principal sum or not at its option at a specified time, the stock being security therefor to be sold by the trustee in case the principal and interest are not paid, this form of financing does not create a debt, and hence such certificates are not subject to taxation as a bond and mortgage, the transaction being really a guaranteed dividend or rental. Commonwealth *v.* Union, etc. Co., 192 Pa. St. 507 (1899).

dend.[1] A property dividend occurs where a corporation sells all its property to another corporation and takes in payment therefor the stock and the bonds of the purchasing corporation and then makes a distribution of the same among its stockholders. It has been held that any one of its stockholders may object and insist on payment for his stock in cash.[2] This, however, is practically a dissolution of the company and a distribution of its assets, a subject which is considered elsewhere.[3]

A dividend or distribution of the company's bonds among its stockholders is legal, if the capital stock is not thereby impaired.[4] Unless some statute prohibits it, or some one objects, a corporation may declare a dividend out of its capital stock, subject to the common-law liability for so doing.[5]

1 An amendment to the charter may prescribe that unnecessary corporate real estate shall be divided among or partitioned between the stockholders. Merchant *v.* Western Land Assoc., 56 Minn. 327 (1894). Where a company has in its treasury stock in another company, and distributes it among its stockholders, this is a dividend. Allegheny *v.* Pittsburg, etc. Ry., 179 Pa. St. 414 (1897). Where corporate land is deeded by way of dividend or distribution among stockholders, there is no warranty of title. Olsen *v.* Homestead, etc. Co., 87 Tex. 368 (1894).

2 See § 671, *infra.*

3 See § 548, *infra.*

4 See § 766, *infra.* Where a joint-stock association having $12,000,000 surplus invested in securities issues its bonds to the amount of $12,000,000 to its stockholders as a dividend in place of distributing such securities or the proceeds thereof, the interest on the bonds to be paid only from the income from the securities after paying the debts, such bonds do not belong to a life tenant, but belong to the remaindermen. D'Ooge *v.* Leeds, 176 Mass. 558 (1900), the court saying: "If this company had been a corporation, and had wished to make a dividend of preferred stock to its shareholders, it would have done it in just this way. There has been no dividend of any money or property among the shareholders. There has been merely a change of the form of the ownership in the property by dividing it into two classes, and by making a different provision in regard to dividends for each class, and by giving one class a preference over the other in its right to the assets on final liquidation. Not a dollar's worth of the property of the company is taken out of the business, or changed in its relation to the business. . . . It is plain that the action of the company was like making a dividend of preferred stock. It was a more formal capitalization of earnings which previously had been capitalized in substance and effect." Where an express company, being an unincorporated stock association, has $12,000,000 surplus and invests it in outside securities, and then deposits the securities with a trust company in New York, and then makes a bond dividend, the bonds to be payable only out of such securities, and the creditors of the company to have recourse to such securities, a tax cannot be levied thereon in Kentucky. Coulter *v.* Weir, 127 Fed. Rep. 897 (1904), modified in 128 Fed. Rep. 1019.

5 A statutory liability for dividends paid out of the capital stock abrogates all common-law liability, and if

In the absence of a special provision to the contrary, dividends will be presumed to be payable in cash, and in lawful or current money.[1] But where the dividend is paid in depreciated currency, a stockholder cannot insist that he shall be paid any more than what the depreciated currency is worth in regular currency.[2]

§ 536. *Stock dividends.*—A stock dividend, as the name imports, is a dividend of the stock of the corporation. Such a dividend is lawful when an amount of money or property equivalent in value to the full par value of the stock distributed as a dividend has been accumulated and is permanently added to the capital stock of the corporation.[3] Corporations frequently make a dividend of this character when improvements of the corporate property or extensions of the business have been made out of the profits earned. It is also made when the corporate plant has increased in value, and it seems better to issue new stock to represent the excess of value than to sell the increase and declare a cash dividend. In this country these dividends are frequently made, and are sustained by the courts.[4]

such statute does not prohibit such dividends they may be declared and paid subject to such liability. People *v.* Barker, 141 N. Y. 251 (1894). See also §§ 546, 548, 671, *infra.* A stockholder may enjoin the company from issuing $50,000 of bonds to the stockholders as a bonus, the same being in violation of the constitution, there being no proof of undivided profits to that amount. American, etc. Co. *v.* Crane, 142 Ala. 620 (1905).

1 Ehle *v.* Chittenango Bank, 24 N. Y. 548 (1862).

2 Back dividends may be recovered on stock which has been illegally confiscated; but where the dividends to other stockholders were paid in Confederate currency, the back dividends paid after the war to a northern stockholder should be a sum equal in value to the Confederate currency when the dividends were declared. Keppel *v.* Petersburg R. R., Chase's Dec. 167 (1868); s. c., 14 Fed. Cas. 357; Scott *v.* Central R. R., etc. Co., 52 Barb. 45 (1868). In this case two of the three judges held that though the dividends were declared without specifying how they should be paid, yet where they were paid as a matter of fact in depreciated Confederate currency, a northern stockholder could not, after the war, claim the same dividends payable in United States currency.

3 Quoted and approved in Alsop *v.* De Koven, 107 Ill. App. Rep. 190, 209 (1903); aff'd, 205 Ill. 309.

4 Quoted and approved in De Koven *v.* Alsop, 205 Ill. 309 (1903); Williams *v.* Western Union Tel. Co., 93 N. Y. 162, 188 *et seq.* (1883); Dock *v.* Schlichter, etc. Co., 167 Pa. St. 370 (1895); Farwell *v.* Great Western Tel. Co., 161 Ill. 522 (1896), a dictum; City of Ohio *v.* Cleveland, etc. R. R., 6 Ohio St. 489 (1856); Howell *v.* Chicago, etc. Ry., 51 Barb. 378 (1868); Clarkson *v.* Clarkson, 18 Barb. 646 (1855); Simpson *v.* Moore, 30 Barb. 637 (1859); Gordon *v.* Richmond, etc. R. R., 78 Va. 501, 521 (1884); Minot *v.* Paine, 99 Mass. 101 (1868); Boston, etc. R. R. *v.* Commonwealth, 100 Mass. 399 (1868); Daland *v.* Williams, 101 Mass. 571 (1869); Rand *v.* Hubbell, 115 Mass. 461, 474 (1874); Gibbons *v.* Mahon, 4 Mackey, 130 (1885); aff'd, 136 U. S. 549; Jones *v.* Morrison, 31 Minn. 140 (1883); Earp's Appeal, 28 Pa. St. 368 (1857);

Even though a stock dividend is declared without a proper basis therefor, yet the stockholders receiving the same are not liable thereon

Wiltbank's Appeal, 64 Pa. St. 256 (1870); Commonwealth *v.* Pittsburgh, etc. R. R., 74 Pa. St. 83 (1873); Brown *v.* Lehigh Coal, etc. Co., 49 Pa. St. 270 (1865); Commonwealth *v.* Cleveland, etc. R. R., 29 Pa. St. 370 (1857); Parker *v.* Mason, 8 R. I. 427 (1867); State *v.* Baltimore, etc. R. R., 6 Gill (Md.), 363 (1848). A stock dividend was involved in Great Western, etc. Co. *v.* Harris, 128 Fed. Rep. 321 (1903); aff'd, 198 U. S. 561. The court in this last case said such a dividend was not a withdrawal of the assets of the corporation, and the court adopted the language of the brief as follows: "After the issue they (the stockholders) owned the same thing. They gained nothing and the corporation parted with nothing by the issue of additional stock. It merely placed in the hands of the stockholders an instrument whereby they could conveniently detract from the value of the shares of stock which they formerly held, in order to vest new and equal rights in the persons to whom they might transfer the new shares. Whatever of value passed to the purchasers of those shares was withdrawn, not from the assets of the company, but from the antecedent equity or interest which was vested in the stockholders making the sale. Taking the stock transaction by itself, it did not affect the company in any way. It merely diminished the relative interest in the corporation of those stockholders who engaged in it." Harris *v.* San Francisco Sugar, etc. Co., 41 Cal. 393 (1871), holds that one who is entitled to and receives a stock dividend cannot claim also a part of the cash profits which are used for improvements, even though a contract calls for cash. See also § 51, *supra*, and ch. XXXIII, *infra*. In the case Chester *v.* Buffalo, etc. Mfg. Co., 183 N. Y. 425 (1906), there was involved incidentally a five hundred per cent. stock dividend. A stock dividend provided for in a certificate of stock passes to the transferee of the stock. Louisville, etc. R. R. *v.* Hart County, 116 Ky. 186 (1903). A stock dividend need not be delivered forthwith to a stockholder who paid for his original stock by a note to the corporation secured by the original certificate of stock. Alford *v.* Laurel Imp. Co., 86 Miss. 375 (1905). As to the taxation of stock dividends, see § 572*a*, *infra*. In England a stock dividend has been declared to be *ultra vires* so far as dissenting stockholders are concerned. It cannot be forced upon a stockholder. Hoole *v.* Great Western Ry., L. R. 3 Ch. 262 (1867). *In re* Eastern, etc. Co., 68 L. T. Rep. 321 (1893), a stock dividend was involved, but its legality was not passed upon. Where a consolidation of three corporations is made by increasing the capital stock of one and issuing the increased stock to the stockholders of all three corporations in the proportion agreed upon, this is not a stock dividend, even though the aggregate capital stock was $400,000, but by the consolidation is $1,000,000. Allegheny *v.* Federal, etc. Ry., 179 Pa. St. 424 (1897). Where a company leases its property to another company at a nominal rental, and the stockholders of the first company transfer their stock to the second company in exchange for stock of the latter, no dividend is involved, and a tax on dividends of the first corporation does not attach. Allegheny *v.* Pittsburgh, etc. R. R., 179 Pa. St. 414 (1897). In the case of Rose *v.* Barclay, 191 Pa. St. 594 (1899), the validity of a stock dividend whereby a gas company having $300,000 capital stock distributed $300,000 additional capital stock among its stockholders as a stock dividend to represent the enhanced

to corporate creditors except to subsequent creditors.[1] The declaration of a stock dividend is within the discretion of the directors the same as a money dividend, and the courts will not interfere.[2] The stockholders, having voted to declare such a dividend, may, at any time before the certificates are issued, reconsider the matter and revoke the dividend.[3] Preferred stockholders may be entitled to share in the distribution of stock by a stock dividend according to the terms of their preferred stock.[4] In some of the states a stock dividend is prohibited by statute or constitutional provision.[5] This, however, does not prevent a cash dividend and the issue of new stock for cash at the same time.[6] Stock dividends have frequently

value of the property was not questioned. A stock dividend is to be counted as a part of the capital stock to sustain a debt of the corporation under a charter which limits the debts to one-half of the capital stock. Cunningham *v.* German, etc. Bank, 101 Fed. Rep. 977 (1900). A stock dividend was sustained in Cole *v.* Adams, 19 Tex. Civ. App. 507 (1898), to the extent that such dividend represented profits which had been used in the property, but not to the extent that such dividends represented a rise in the value of the property of the company. In the case of Shaw *v.* Gilbert, 111 Wis. 165 (1901), where a so-called "dividend stock" had been issued, it was assumed, under the circumstances of the issue, that the stockholders receiving the same were liable thereon to corporate creditors with interest from the date of issue. Where the life tenant refuses to pay for increased capital stock which is issued at fifty cents on a dollar, the remaining fifty cents being a stock dividend, and the trustee takes the stock for himself, and ten years have elapsed since the life tenant claimed the stock, the statute of limitations is a bar to his suit to compel the trustee to account for the stock. Matter of Smith, 66 N. Y. App. Div. 340 (1901); aff'd, 179 N. Y. 563.

1 Anglo-American, etc. Co. *v.* Lombard, 132 Fed. Rep. 721 (1904).

2 Schell *v.* Alston Mfg. Co., 149 Fed. Rep. 439 (1906). It is discretionary with the directors as to whether they will declare a stock or a cash dividend. Howell *v.* Chicago, etc. Ry., 51 Barb. 378 (1868).

3 Terry *v.* Eagle Lock Co., 47 Conn. 141 (1879). After cancellation there is no statutory liability on such stock. Hollingshead *v.* Woodward, 35 Hun, 410 (1885); aff'd, 107 N. Y. 96 (1887). A stock dividend after declaration cannot be revoked, except possibly for some extraordinary cause. Dock *v.* Schlichter, etc. Co., 167 Pa. St. 370 (1895). *Cf.* § 541, *infra.*

4 Gordon *v.* Richmond, etc. R. R., 78 Va. 501 (1884). See also ch. XVI, *supra.*

5 See §§ 51, 287, *supra.* In Massachusetts, by statute, telegraph, telephone, gas, electric light, steam railroad, street railway, aqueduct and water companies are prohibited from declaring stock dividends or scrip dividends, or dividends of cash derived from the sale of stock or scrip. Laws 1894, p. 374, ch. 350.

6 In Massachusetts a stock dividend is practically declared by a large cash dividend and simultaneously the issue of new stock at par. Jones *v.* Brown, 171 Mass. 318 (1898). Even though a cash dividend is paid on the same date that new stock is offered, and the cash dividend is equal to the amount to be paid for the new stock, this is not a stock dividend, and hence such cash dividend belongs to

given rise to difficult questions as to whether the life tenant or remainderman is entitled to them, where the original stock is held in trust.[1]

§ 537. *Interest-bearing stock.*—It has already been shown that a corporation may issue stock and may make a contract with the subscriber that the company will pay interest upon the sums paid in by the subscriber.[2] Such a contract is legal, however, only when the interest is to be paid from the net profits of the enterprise, and not from the capital stock. Unless net profits have been earned the stipulated interest cannot legally be paid. Consequently there is little difference between interest-bearing stock and preferred stock.

§ 538. *To whom the corporation is to pay the dividend.*—The question as to whom a dividend shall be paid after it has been regularly declared is one which sometimes involves the corporation in considerable difficulty. It is not always easy to decide which one of two or more claimants is entitled to the dividend.

The general rule is that the corporation may pay the dividend to the person in whose name the stock stands registered upon the corporate stock book at the time the dividend is declared.[3] It may do

a life tenant and not to the remaindermen. Lyman *v.* Pratt, 183 Mass. 58 (1903). Where the corporation declares a large cash dividend and at the same time offers increased stock to the stockholders for subscription at par, this is not a stock dividend, even though the aggregate amount of the cash dividend equals the par value of the new stock so offered. Holbrook *v.* Holbrook, 66 Atl. Rep. 124 (N. H. 1907). Even though a large cash dividend is exactly equivalent to the amount of new stock which is offered to the stockholders for subscription, yet the transaction is not considered as a stock dividend, there being no obligation on the part of the stockholders to take the new stock. Hyde *v.* Holmes, 84 N. E. Rep. 318 (Mass. 1908).

1 See ch. XXXIII, *infra.* A stock dividend is presumed to be income, but may be shown to represent the enhanced value of the property of the company, and then it does not represent profits, but does represent capital. Kalbach *v.* Clark, 133 Iowa 215 (1907). While as a rule stock dividends are capital, and not income, yet where the company owns its own stock, which it has acquired in liquidation of a debt owing to it and declares a dividend on such stock, it belongs to the life tenant. Green *v.* Bissell, 65 Atl. Rep. 1056 (Conn. 1907). A legacy of one million dollars book value of stock carries a stock dividend thereafter declared from stock then in the treasury. Pabst *v.* Goodrich, 113 N. W. Rep. 398 (Wis. 1907).

2 See ch. XVI, *supra.*

3 Brisbane *v.* Delaware, etc. R. R. 94 N. Y. 204 (1883), affirming 25 Hun, 438 (1881); Donnally *v.* Hearndon, 41 W. Va. 519 (1895); Jones *v.* Terre Haute, etc. R. R., 29 Barb. 353 (1859); affirmed, 57 N. Y. 196; Northrop *v.* Newtown, etc. Co., 3 Conn. 544 (1821). See also Manning *v.* Quicksilver Min. Co., 24 Hun, 360 (1881), Jermain *v.* Lake Shore, etc. Ry. 91 N. Y. 483 (1883), in regard to the assignment of dividends. The guaranty accumulations of an insurance company conducted both on the mutual and stock principle belong to the stockholders

so without inquiring whether he has transferred the stock, and without requiring the production of the certificate.[1] In fact, it is a well-settled rule that the corporation is protected in paying dividends to a recorded stockholder, although he may have transferred his stock, no notice of the transfer having been given to the company.[2] But after notice of a transfer the corporation must pay the dividend to the transferee, although no registry has been made.[3] As between two claimants of the dividend, one being the *cestui que trust* and the other a *bona fide* transferee, the corporation may interplead.[4]

and not to the policy-holders. Traders', etc. Ins. Co. *v.* Brown, 142 Mass. 403 (1886). As to dividends on a tontine insurance policy, see Pierce *v.* Equitable Life Ass. Soc., 145 Mass. 56 (1887). In a few instances there have been attached to certificates of stock what are called "dividend warrants," the object being to enable such warrants to be cut off like coupons and sold and collected like coupons. A form of such warrants is as follows:

THE SOUTHERN PACIFIC COMPANY.
Dividend Warrants.

The bearer is entitled to the first dividend on one hundred shares of the capital stock of this company represented by certificate No. —, on or after the date upon which said dividend shall be made payable. Payable in the city of New York and elsewhere, as may be designated by said company. ——— ———, Secretary.

1 Brisbane *v.* Delaware, etc. R. R., 94 N. Y. 204 (1883), aff'g 25 Hun, 438; Cleveland, etc. R. R. *v.* Robbins, 35 Ohio St. 483 (1880).

2 Bank of Commerce's Appeal, 73 Pa. St. 59 (1873), where a distribution of assets was made; Bell *v.* Lafferty, 1 Pa. Supr. Ct. 454 (1881), where the assignee of a dividend without a certificate obtained payment, and the court held the company not liable to an unrecorded pledgee; Bank of Utica *v.* Smalley, 2 Cow. 770 (1824); Smith *v.* American Coal Co., 7 Lans. 317 (1873); Cleveland, etc. R. R. *v.* Robbins, 35 Ohio St. 483 (1880), the corporation not having been notified.

3 See same cases as in preceding note. The corporation is liable to a transferee for dividends declared after a registry has been requested and improperly refused. Robinson *v.* New Berne Nat. Bank, 95 N. Y. 637 (1884). Where the transferee and holder of the certificate notifies the corporation of his purchase after a dividend has been declared, but before it is paid, he is entitled to the dividend, and may sue the corporation for it. Timberlake *v.* Shippers' Compress Co., 72 Miss. 323 (1894). A bill in equity lies to compel a corporation which has declared a stock dividend to stockholders of record July 1st to deliver such stock dividend to a purchaser on July 6th whose purchase included such dividend. Rose *v.* Barclay, 191 Pa. St. 594 (1899). Where after a dividend has been declared, but before it is paid, the corporation is notified of a transfer of stock, the books not being closed, it is liable to the purchaser of the stock if it pays the dividend to the vendor, even though the latter appears on the books as being a stockholder. Steel *v.* Island City, etc. Co., 47 Ore. 293 (1906).

4 Salisbury Mills *v.* Townsend, 109 Mass. 115 (1871); Cross *v.* Eureka, etc. Co., 73 Cal. 302 (1887), a case between pledgor and pledgee. See also § 387, *supra*, and § 543, *infra*. *Cf.* Stone *v.* Reed, 152 Mass. 179 (1890), where a corporate creditor sued the treasurer for distributing property among stockholders. Where stock stands in the name of a person as

The right to dividends does not, however, depend upon the issue of the certificate, and the owner of shares may claim his dividends though no certificate has ever been issued by the corporation.[1] Stock purchased by the corporation itself and then reissued is entitled to all dividends subsequently declared and this result cannot be avoided by the dividend being declared as payable to stockholders at a preceding date.[2] The corporation is protected if it pay dividends to the administrator without notice of a transfer by him.[3] Under the statutes of California, even though stock is distributed by executors in accordance with a decree of distribution, and the distributees sell the stock and it is transferred on the books of the company, nevertheless, if the decree is reversed on appeal, the transfers are void and the company is liable for dividends paid in the meantime to such purchasers. In a suit by the executors to recover such dividends the purchasers need not be made parties.[4] Where stock in a bank stands in the name of a person for sixty-five years without the identity of the stockholder being known and without dividends being claimed by him, although the bank annually advertised the unclaimed dividends, clear proof of the identity of such stockholder must be given by his alleged descendants who do not produce the certificate of stock.[5] The question of whether the pledgor or pledgee of stock is entitled to the dividends is considered elsewhere.[6]

With respect to the dividends on the stock of a married woman, the corporation must pay them to the husband or not, according to

trustee, and another person claims that the trustee is holding it for him as pledgee, and both parties claim the dividend, the corporation may interplead. Page, etc. Co. *v.* Prince & Co., 67 Atl. Rep. 401 (N. H. 1907). A corporation cannot interplead as between stockholders for the purpose of determining the ownership of stock, there having been no claim made upon it in regard to registry or in regard to dividends. It must be shown also that the company has not acted in a partisan manner as between the different claimants. Hinckley *v.* Pfister, 83 Wis. 64 (1892). The corporation interpleaded between claimants to a dividend on stock in Amberson *v.* Johnson, 127 Ala. 490 (1900). Where a stockholder assigns the future dividends, and afterwards sells his stock, the corporation may interplead to ascertain to whom to pay the dividends. Price *v.* Morning, etc. Co., 83 Mo. App. 470 (1899).

1 South Dakota *v.* North Carolina, 192 U. S. 286 (1904). Ellis *v.* Essex Merrimack Bridge, 19 Mass. 243 (1824).

2 Hartley *v.* Pioneer Iron Works, 181 N. Y. 73 (1905).

3 Brisbane *v.* Delaware, etc. R. R., 94 N. Y. 204 (1883). The heirs of a stockholder must, in order to entitle themselves to dividends, procure a transfer of their ancestor's shares into their own names on the corporate books, where the certificates have been pledged and the company notified. State *v.* New Orleans, etc. R. R., 30 La. Ann. 308 (1878).

4 Ashton *v.* Zelia Min. Co., 134 Cal. 408 (1901). See also § 330, *supra.*

5 Moss *v.* Manhattan Co., 48 N. Y. App. Div. 561 (1900).

6 See § 468, *supra.*

the law of the domicile of the corporation, and not according to the law of the domicile of the married woman.[1] The husband, by collecting dividends on his wife's shares, does not thereby reduce the stock to possession.[2] Even though by law the husband is entitled to dividends on the wife's stock and he becomes bankrupt, yet dividends paid after his discharge cannot be collected by his trustees in bankruptcy.[3]

Even though the corporation closes its transfer book several days before a dividend is declared, nevertheless those are entitled to the dividend who apply for registry on or before the day of the declaration of the dividend.[4]

If the holder of a certificate of stock has applied for transfer and been refused, he may sue for the dividend before bringing a suit in equity to obtain a transfer of his stock.[5] A dividend may of course be assigned.[6]

§ 539. *To whom the dividend belongs.*—As between the vendor and vendee of shares of stock, it is a settled rule that the vendee is entitled to all the dividends on the stock which are declared after the sale of the stock. Even though the transfer has not been recorded, the transferee has a right to the dividends as against the transferrer.[7] The law, moreover, refuses to investigate the question when the dividend was earned. In contemplation of law the net profits are earned at the instant the dividend is declared. This rule is just, inasmuch as the accrued profits and expected dividends enter into the value and price at which the stock is sold.[8]

1 Graham *v.* First Nat. Bank of Norfolk, 84 N. Y. 393 (1881), affirming s. c., 20 Hun, 326. As to the rule in California, see Dow *v.* Gould, etc. Co., 31 Cal. 629 (1867).

2 Burr *v.* Sherwood, 3 Bradf. (N. Y. Surr.) 85 (1854). *Cf.* Harcum *v.* Hudnall, 14 Gratt. (Va.) 369, 382 (1858); Searing *v.* Searing, 9 Paige, 283 (1841). A receipt of dividends by the husband only reduces the dividends into possession and not the stock. See § 319, *supra.*

3 Bryan *v.* Sturgis Nat. Bank, 90 S. W. Rep. 704 (Tex. 1905).

4 Jones *v.* Terre Haute, etc. R. R., 57 N. Y. 196, 205 (1874); Robinson *v.* New Berne Nat. Bank, 95 N. Y. 637 (1884). Frequently, however, the charter or statutes provide otherwise.

5 Hill *v.* Atoka, etc. Co., 21 S. W. Rep. 508 (Mo. 1893); See subsequent decision in 124 Mo. 153; Robinson *v.* New Berne Nat. Bank, 95 N. Y. 637 (1884). But not if the transferee has treated the refusal to transfer as a conversion. Hughes *v.* Vermont Copper Min. Co., 71 N. Y. 207 (1878). Where the purchaser of the certificate of stock applies for transfer on the corporate books, which is refused, he can hold the corporation liable for dividends subsequently paid on such stock. Blooming Grove, etc. Co. *v.* First Nat. Bank, etc., 56 S. W. Rep. 552 (Tex. 1900).

6 Steel *v.* Island City, etc., 47 Ore. 293 (1906). See also § 539, *infra.*

7 Quoted and approved in Corgan *v.* George, etc. Co., 67 Atl. Rep. 655 (Penn. 1907).

8 Quoted and approved in Corgan *v.*

A transfer of stock passes, of course, all dividends declared subsequently to the transfer, although the dividend was earned before the transfer was made.[1]

George, etc. Co., 67 Atl. Rep. 655 (Penn. 1907). Jermain *v.* Lake Shore, etc. R. R., 91 N. Y. 483 (1883); March *v.* Eastern R. R., 43 N. H. 515, 520 (1862); s. c., 40 N. H. 548; Ryan *v.* Leavenworth, etc. Ry., 21 Kan. 365, 403 (1879); Foote *v.* Worthington, 39 Mass. 299 (1839); Jones *v.* Terre Haute, etc. R. R., 57 N. Y. 196 (1874); Currie *v.* White, 45 N. Y. 822 (1871); Brundage *v.* Brundage, 65 Barb. 397, 408 (1873); affirmed, 60 N. Y. 544; Goodwin *v.* Hardy, 57 Me. 143 (1869); Hill *v.* Newichawanick Co., 8 Hun, 459 (1876); aff'd, 71 N. Y. 593 (1877); Bates *v.* Mackinley, 31 L. J. (Ch.) 389 (1862); King *v.* Follett, 3 Vt. 385 (1831); Abercrombie *v.* Riddle, 3 Md. Ch. 320 (1850). See also ch. XXXIII, *infra*. *Cf.* Kane *v.* Bloodgood, 7 Johns. Ch. 90 (1823). A person who guarantees to another a dividend, and is obliged to pay it himself, cannot claim a subsequent dividend by way of reimbursement. Parks *v.* Automatic, etc. Co., 14 Daly, 424 (1888); s. c., 14 N. Y. St. Rep. 710. A dividend declared after the certificates have been sold belongs to the transferee as against the transferrer. Gemmell *v.* Davis, 75 Md. 546 (1892), approving the text herein. A transfer of stock does not carry a dividend already declared and due. Redhead *v* Iowa Nat. Bank, 127 Iowa 572 (1905). Where a stockholder assigns by contract the stock and all dividends to another, he must pay to the latter any subsequent dividends which he receives. Cook *v.* Monroe, 45 Neb. 349 (1895). A purchaser of stock is entitled to subsequently declared dividends from the vendor irrespective of whether a transfer has been made on the books. Farmers', etc. Bank *v.* Mosher, 63 Neb. 130 (1901). Even though a transfer has not been recorded, yet the transferee is entitled to the dividends as against the transferrer, and may recover this from him. Houser *v.* Richardson, 90 Mo. App. 134 (1901). Where stock is sold at auction on August 1st and a deposit paid, the balance to be paid August 29th, a dividend declared on August 24th belongs to the purchaser. Black *v.* Homersham, L. R. 4 Exch. D. 24 (1878). Where a company purchases shares of its own stock and subsequently uses it to declare a stock dividend, a stockholder who sold part of his stock in the interim is entitled to the dividend on only such stock as he owned when the dividend was declared. Coleman *v.* Columbia Oil Co., 51 Pa. St. 74 (1865). Where defendant purchased stock for the plaintiff and accounted therefor, but refused to account for dividends received while he held the stock, the defendant is guilty of conversion. Shaughnessy *v.* Chase, 7 N. Y. St. Rep. 293 (1887). Although the purchaser of stock is entitled to a dividend declared after the contract of sale is made, even though the contract has not yet been carried out, yet the purchaser cannot insist on the vendor's giving an order on the corporation for such dividends. The purchaser should collect without such order. He rescinds the sale by insisting on such order. Phinizy *v.* Murray, 83 Ga. 747 (1889). An alleged vendee's suit for a dividend is *res judicata* as to a suit for the stock. Shepard *v.* Stockham, 45 Kan. 244 (1891). Where an agent to sell was to have all that he sold for above a certain price, a sum in excess thereof belongs to him, although it was for dividends not yet declared. Blakeslee *v.* Ervin, 40 Neb. 130 (1894).

[1] Kane *v.* Bloodgood, 7 Johns. Ch. 90 (1823), by Chancellor Kent; Goodwin *v.* Hardy, 57 Me. 143 (1869);

A dividend is something distinct and separable from the fund upon which it is declared, and it may be the subject of assignment by a stockholder before it is received from or declared by the corporation.[1]

A pledgee is entitled to dividends on the stock held in pledge, but must account for them when the pledge is redeemed.[2]

Where on the reduction of the capital stock the surplus resulting therefrom is disposed of by charging off certain bad debts which are then placed to a fund for the benefit of the stockholders, it belongs to the stockholders then of record and not to their transferees, unless specifically transferred.[3]

When a dividend is made payable on a day subsequent to the day on which it is formally declared, it belongs to the stockholder who owns the shares on the day the dividend is declared, and not to the owner at the time it is payable,[4] unless, of course, the resolution declaring the dividend makes it payable to stockholders of record of a later date.[5]

March *v.* Eastern R. R., 43 N. H. 515 (1862); s. c., 40 N. H. 548; Phelps *v.* Farmers', etc. Bank, 26 Conn. 269 (1857); Brundage *v.* Brundage, 1 Thomp. & C. 82; aff'd, 60 N. Y. 544 (1875); Jones *v.* Terre Haute, etc. R. R., 57 N. Y. 196 (1874); Currie *v.* White, 45 N. Y. 822 (1871). And a purchaser of stock at a tax sale, if the proceedings are legal and regular, is entitled to a certificate and to dividends subsequently declared. Smith *v.* Northampton Bank, 58 Mass. 1 (1849).

1 Marten *v.* Gibbon, 33 L. T. Rep. 561 (1875). *Cf.* Jermain *v.* Lake Shore, etc. R. R., 91 N. Y. 483 (1883). Bargains in prospective dividends are transactions which, by rule 61 of the Stock Exchange, the committee will not recognize or enforce. The contract is, however, one which is not contrary to law, and it is good between the parties. Marten *v.* Gibbon, 33 L. T. Rep. 561 (1875). *Cf.* §§ 536, 538, *supra.*

2 See § 468, *supra.*

3 Cogswell *v.* Second Nat. Bank, 78 Conn. 75; aff'd, *sub nom.* Jerome *v.* Cogswell, 204 U. S. 1 (1907).

4 Wheeler *v.* Northwestern Sleigh Co., 39 Fed. Rep. 347 (1889); Wright *v.* Tuckett, 1 Johns. & H. 266 (1860); De Gendre *v.* Kent, L. R. 4 Eq. 283 (1867); Hill *v.* Newichawanick Co., 71 N. Y. 593 (1877), affirming s. c., 8 Hun, 459; 48 How. Pr. 427 (1874); Spear *v.* Hart, 3 Rob. (N. Y.) 420 (1865); Tepfer *v.* Ideal, etc. Co., 58 N. Y. Misc. Rep. 396 (1908); Bright *v.* Lord, 51 Ind. 272 (1875), where an option had been given. *Cf.* Hopper *v.* Sage, 112 N. Y. 530 (1889); Manning *v.* Quicksilver Min. Co., 24 Hun, 360 (1881); Boardman *v.* Lake Shore, etc. R. R., 84 N. Y. 157, 178 (1881); *Re* Kernochan, 104 N. Y. 618 (1887); Clive *v.* Clive, Kay, 600 (1854). *Contra,* Burroughs *v.* North Carolina R. R., 67 N. C. 376 (1872). A dividend belongs to those who own the stock when it is declared, it by its terms being payable to those who were members on that day. Zinn *v.* Germantown, etc. Co., 111 N. W. Rep. 1107 (Wis. 1907). The transfer of stock does not transfer past stock dividends which have been declared, even though the stock dividend has not been actually delivered. City of Ohio *v.* Cleveland, etc. R. R., 6 Ohio St. 489 (1856). See also ch. XVI, *supra.*

5 A sale of stock July 6th, "includ-

Where stock is bought deliverable at the seller's option, the dividends declared between the day of the purchase and the delivery belong to the purchaser.[1] But a contract to sell on demand entitles the vendor to dividends declared before the demand is made.[2] Nevertheless any agreement between vendor and vendee, modifying or changing the above rules, will be upheld. Dividends are a proper subject for a contract, and a valid contract may be made in reference to them.[3] The vendor may provide by contract that he should

ing all dividends due or to become due thereon," carries a stock dividend declared June 5th and payable to stockholders of record July 1st, and the sale is not fraudulent although the seller did not know of such stock dividend and the buyer did know. Rose *v.* Barclay, 191 Pa. St. 594 (1899).

1 Currie *v.* White, 45 N. Y. 822 (1871); Black *v.* Homersham, L. R. 4 Exch. D. 24 (1878). Under a contract of a person to buy certain stock within a certain time if the other party desired to sell (a "put"), the first person reserving all dividends "declared during the time," a dividend declared before but payable during the time of the option belongs to the seller. Hopper *v.* Sage, 112 N. Y. 530 (1889). *Contra*, Harris *v.* Stevens, 7 N. H. 454 (1835).

2 Bright *v.* Lord, 51 Ind. 272 (1875). A promoter who has merely an option to purchase stock which he then sells to a new corporation is merely an agent of the vendor and a dividend declared on the stock of the new corporation before the option is exercised belongs to the vendor. Rowe *v.* White, 112 N. Y. App. Div. 688 (1906); aff'd, 189 N. Y. 523.

3 Cook *v.* Monroe, 45 Neb. 349 (1895); Brewster *v.* Lathrop, 15 Cal. 21 (1860); Hyatt *v.* Allen, 56 N. Y. 553 (1874); Union Screw Co. *v.* American Screw Co., 11 R. I. 569 (1877); affirmed, 13 R. I. 673 (1882), in which it was held that where performance of a contract between two corporations for the purchase of the stock of one of them on a certain day was by agreement postponed to a later day, a dividend declared in the interval belonged to the purchaser. Where the vendor of stock reserves "one-half of whatever price the same should be sold for, when sold, over and above that sum," he is not entitled to an account of dividends, or other income received by the vendee from or on account of the stock. Jones *v.* Kent, 80 N. Y. 585 (1880). Where there are but two stockholders in a corporation one may contract with the other that certain profits shall belong to the latter. Giveen *v.* Gans, 91 N. Y. App. Div. 37 (1904); aff'd, 181 N. Y. 538. A person who sells stock reserving a dividend that may be declared at a certain date cannot claim a stock dividend which is declared at the specified date. He can only claim the cash dividend. Kaufman *v.* Charlottesville Woolen Mills, 93 Va. 673 (1896). A contract by which the "surplus fund" on stock in a corporation up to a certain time shall belong to a certain party was construed in Thompson *v.* Hudgins, 116 Ala. 93 (1897). Where an employee is paid according to the percentage of dividends, it is for the jury to say whether dividends on an increased capital stock are the proper gauge of such salary. Bradburn *v.* Solvay Process Co., 18 N. Y. App. Div. 542 (1897). In the case of Bigbee, etc. Co. *v.* Moore, 121 Ala. 379 (1899), the court sustained a by-law whereby stockholders in a steamboat company each put a boat into the service of the company and each was to draw dividends on his stock only so long

have the dividends in lieu of interest on the purchase price until such purchase price is paid.[1]

A legatee of shares takes the stock as it was at the time of the testator's death. All dividends declared previous to that event go to the administrator.[2] A gift of stock on condition that the dividends should all go to the owner and that he should vote it is a gift of a remainder with a life interest in the donor.[3]

The question of whether a dividend is apportionable is considered elsewhere.[4]

A person who claims to be the owner of stock cannot establish his rights in a court by suing the party in possession of the stock for the dividends declared and paid.[5] Where a claimant of stock has instituted suit against the stockholder of record and also the corporation to obtain the stock, it is the duty of the corporation not to pay any further dividends to the stockholder of record until the suit is decided, and it is liable if it does pay.[6]

as his boat remained fit for service, such dividend to cease upon the boat becoming unfit for service, until it was repaired by the owner. In the case of Rivers *v.* Oak, etc. Co., 52 La. Ann. 762 (1899), the court upheld an oral agreement that the vendor of stock should be entitled to his proportion of the profits of the company for the ensuing year.

1 Hancock *v.* Clark, 68 Vt. 302 (1896).

2 Quoted and approved in Missouri, etc. *v.* McCune, 112 Mo. App. 332 (1905); Brundage *v.* Brundage, 60 N. Y. 544 (1875); *Re* Kernochan, 104 N. Y. 618 (1887), where it was payable after the testator's death. *Cf.* Johnson *v.* Bridgewater Iron Mfg. Co., 80 Mass. 274 (1859); § 301, *supra.* The profits and surplus funds of a corporation, whenever they may have accrued, are, until separated from the capital by the declaring of a dividend, a part of the stock itself, and will pass under that name in a transfer or bequest. Phelps *v.* Farmers', etc. Bank, 26 Conn. 269 (1857). *Cf.* Clapp *v.* Astor, 2 Edw. Ch. 379 (1834). In regard to the rights of a life tenant of stock as against a remainderman, see ch. XXXIII, *infra.*

3 Matter of Brandreth, 169 N. Y. 437 (1902). A stockholder may transfer his certificate to his children, who at the same time may give him an irrevocable power to vote the stock during his life and to receive and keep the dividends on the stock. Such an agreement is enforceable, even though the stock is transferred into the name of the children, the certificates, however, not being actually delivered to them. Matter of Brandreth, 58 N. Y. App. Div. 575 (1901); rev'd on another point in 169 N. Y. 437. A gift of stock, the donee to have the possession and management of the same, but the donor to have the income during his life, makes the donee trustee, until the death of the donor, and hence such gift is taxable under the New York statutes as a transfer to take effect on his death. Matter of Cornell, 170 N. Y. 423 (1902).

4 See § 558, *infra.*

5 Peckham *v.* Van Wagenen, 83 N. Y. 40 (1880). Conversion lies for an unauthorized sale of stock and also for dividends received thereon. Shaughnessy *v.* Chase, 7 N. Y. St. Rep. 293 (1887).

6 McCord *v.* Nabours, 109 S. W. Rep. 913 (Tex. 1908).

It seems that a stockholder may lease his stock. He may for a certain sum assign to another all dividends during the specified time and give to the lessee the right to vote the stock during that time.[1]

§ 540. *Dividends must be equal and without preferences.*—Dividends among stockholders of the same class must be always *pro rata,* equal, and without preference. If the company has issued preferred stock, the holders thereof constitute a class by themselves, and stockholders of that class will be entitled, as a class, to dividends in preference to holders of the common stock. But as between stockholders of the same class there can be no discrimination, and profits set aside for dividends must be evenly divided among the stockholders according to the amount of stock each one owns.[2] Accordingly there can be no lawful discrimination in the division of dividends, although the subscription price of part of the stock is due and unpaid;[3] or because the contract work has not

1 Zachry *v.* Nolan, 66 Fed. Rep. 467 (1895). In the case State *v.* Probate Court, etc. County, 113 N. W. Rep. 888 (Minn. 1907), a stockholder transferred title to his children and the children then leased to him the use of the stock during his life and the transaction was upheld by the court.

2 Cratty *v.* Peoria, etc. Ass'n, 219 Ill. 516 (1906). Luling *v.* Atlantic Mut. Ins. Co., 50 Barb. 520 (1868), rev'g 45 Barb. 510 (1865), where part were paid in gold; Jones *v.* Terre Haute, etc. R. R., 57 N. Y. 196 (1874), aff'g 29 Barb. 353 (1859); Morgan *v.* Great Eastern Ry., 1 Hem. & M. 560 (1863); Ryder *v.* Alton, etc. R. R., 13 Ill. 516 (1851), a case of preferred stock; State *v.* Baltimore, etc. R. R., 6 Gill (Md.), 363 (1848), where some were paid in cash and others were offered part cash and part stock; Atlantic, etc. Tel. Co. *v.* Commonwealth, 3 Brewst. (Pa.) 366 (1870), where a tax was levied on the assumption of an equal dividend to all; Hale *v.* Republican River Bridge Co., 8 Kan. 466 (1871), where by mistake a stockholder got more land scrip than was his share; Jackson *v.* Newark Plank Road Co., 31 N. J. L. 277 (1865). *Cf.* Chase *v.* Vanderbilt, 62 N. Y. 307 (1875). A holder of a receipt under a reorganization, entitling him to preferred stock in the new company, is entitled to dividends declared before he obtains the certificates. Elsworth *v.* New York, etc. R. R., 19 Week. Dig. 211; aff'd, 98 N. Y. 648 (1885). See also Coey *v.* Belfast, etc. Ry., Ir. Rep. 2 C. L. 112 (1866); Harrison *v.* Mexican Ry., L. R. 19 Eq. 358 (1875), preferred stock cases. As to preferred stock, see ch. XVI, *supra.* Although dividends are guaranteed to a certain date, and are paid, the stock is entitled to participate in all subsequent dividends. Parks *v.* Automatic, etc. Co., 14 N. Y. St. Rep. 710 (1888); s. c., 14 Daly 424. If a stockholder by accepting the benefits assents to a change in the privileges which pertain to his stock, he cannot afterwards object thereto. Compton *v.* The Chelsea, 59 Hun, 624 (1891); aff'd, 128 N. Y. 537.

3 Oakbank Oil Co. *v.* Crum, L. R. 8 App. Cas. 65 (1882). Where a subscription for stock is paid up, the stockholder is entitled to his stock and past dividends, even though for thirty years he has slept upon his rights. Kobogum *v.* Jackson Iron Co., 76 Mich. 498 (1889); Bedford County

been done;[1] nor on the ground that no certificates of stock have been issued;[2] nor on the ground that the stockholder has no legal right to purchase the stock;[3] nor can there be a discrimination between the large and small stockholders of a company as to the manner of payment of dividends.[4] Stock purchased by the corporation itself and then reissued is entitled to all dividends subsequently declared and this result cannot be avoided by the dividend being

v. Nashville, etc. Ry., 14 Lea (Tenn.), 525 (1884). It has been held in Maryland that a subscriber to the increased capital stock of a company is not entitled to a certificate until he has paid for the stock in full, and such subscriber is not entitled to the rights of a stockholder until he has paid in full. The court stated that such stockholders are not entitled to dividends equally with other stockholders. The basis of the decision was the difference between original stock and increased stock. The court refused to compel the corporation to issue a certificate. Baltimore, etc. Ry. *v.* Hambleton, 77 Md. 341 (1893).

1 Although stock is issued to contractors before they are entitled to it, yet they are entitled to the dividends on such stock unless there was some agreement to the contrary. Central R. R., etc. Co. *v.* Papot, 59 Ga. 342 (1877); s. c., *sub nom.* Southwestern R. R. *v.* Papot, 67 Ga. 675, 690 (1881).

2 Even though no certificates of stock are issued the subscriber is a stockholder and entitled to dividends. South Dakota *v.* North Carolina, 192 U. S. 286 (1904), the court saying (p. 309): "There was no formal issue of certificates by the company to the state, but that was a matter of arrangement between the parties to the subscription. The state's right as a stockholder was not abridged by lack of the certificates, and in fact it has been receiving dividends on the stock exactly as though certificates had been issued."

3 Where one corporation subscribes for stock in another corporation and pays for such stock, and dividends are declared by the latter, it cannot refuse to pay the dividends to the former on the ground that the former had no power to subscribe for the stock. Bigbee, etc. Co. *v.* Moore, 121 Ala. 379 (1899).

4 Accordingly where a dividend was declared, viz., to all stockholders owning less than fifty shares, cash, but to all of fifty shares and over, part cash and part in interest-bearing bonds of the corporation, the discrimination was held invalid and unlawful. State *v.* Baltimore, etc. R. R., 6 Gill (Md.), 363 (1848); Jones *v.* Terre Haute, etc. R. R., 57 N. Y. 196 (1874). So also where a part of the authorized capital stock remained untaken, and a resolution of the directors was carried into effect, by which the untaken portion of the stock was issued to those shareholders not in arrears upon shares previously taken, to the exclusion, as to the new shares, of those in arrears upon the original issue, it was held an invalid discrimination and an unlawful imposition of a penalty upon those in arrears. Reese *v.* Montgomery County Bank, 31 Pa. St. 78 (1855). Where a scrip dividend is issued representing the surplus, such scrip is collectible within a reasonable time, even though by its terms it is payable at the pleasure of the company, and especially is it collectible where some of the holders of the scrip dividend have been paid and others not. Billingham *v.* Gleason Mfg. Co., 101 N. Y. App. Div. 476 (1905); aff'd, 185 N. Y. 571.

declared as payable to stockholders at a preceding date.[1] It has been held in Connecticut that after paying a dividend to a part of the stockholders the corporation cannot refuse to pay the rest upon the ground that by so doing the capital stock will be impaired,[2] or that all the surplus earnings have been either paid out as dividends or invested in permanent improvements.[3] Under the New York statutes a contrary rule prevails as to dividends paid from the capital stock.[4]

A bill in equity may be maintained by a stockholder to prevent an unequal or unfair distribution of the profits of the company,[5] and for an injunction to restrain a dividend when stock has been fraudulently overissued, until a true list of the holders of genuine stock can be obtained.[6]

§ 541. *A dividend declared and specifically set apart as a distinct fund belongs absolutely to the stockholders.*—When a dividend out of the earnings of a company has been regularly declared and is due, it becomes immediately the individual property of the stockholder. There is at once a severance, for the use and benefit of the members of the corporation, of so much of the accumulated earnings as are declared; and the dividend thereafter exists as a separate fund, distinct from the capital stock or surplus profits. It then becomes the absolute property of the stockholders.[7]

1 Hartley *v.* Pioneer Iron Works, 181 N. Y. 73 (1905).

2 Stoddard *v.* Shetucket Foundry Co., 34 Conn. 542 (1868). The validity of a dividend cannot be called into question by a bank in a suit to collect taxes on such dividend. Central Nat. Bank *v.* U. S., 137 U. S. 355 (1890).

3 Beers *v.* Bridgeport Spring Co., 42 Conn. 17 (1875).

4 A stockholder cannot collect a dividend which, if paid, will be paid out of capital, even though other stockholders have been paid such dividend. Berryman *v.* Bankers', etc. Co., 117 N. Y. App. Div. 730 (1907). A dividend by a bank cannot be collected by the stockholder where the bank has not set aside ten per cent. of its net profits for a surplus fund, as required by statute. Lapsley *v.* Merch. Bank, 105 Mo. App. 98 (1904).

5 The minority may bring the officers to an accounting for an unfair distribution of the bonds, etc., owned by a construction company. Meyers *v.* Scott, 2 N. Y. Supp. 753 (1888). Or the stockholder may sue at law for an equal dividend. See § 542, *infra.*

6 Underwood *v.* New York, etc. R. R., 17 How. Pr. 537 (1859), a case growing out of the Schuyler frauds in New York. See also § 297, *supra.*

7 Van Dyck *v.* McQuade, 86 N. Y. 38 (1881); Jermain *v.* Lake Shore, etc. R. R., 91 N. Y. 483 (1883); Keppel *v.* Petersburg R. R., Chase's Dec. 167 (1868); s. c., 14 Fed. Cas. 357; King *v.* Paterson, etc. R. R., 29 N. J. L. 82, 504 (1860); Hill *v.* Newichawanick Co., 71 N. Y. 593 (1877), affirming s. c., 8 Hun, 459 (1876); Brundage *v.* Brundage, 60 N. Y. 544 (1875), affirming s. c., 65 Barb. 397 (1873); Spear *v.* Hart, 3 Rob. (N. Y.) 420 (1865); Manning *v.* Quicksilver Min. Co., 24 Hun, 360 (1881); Jermain *v.* Lake Shore, etc. Ry., 91 N. Y. 483 (1883); Kane *v.* Bloodgood, 7 Johns. Ch. 90 (1823); Beers *v.* Bridge-

Accordingly, whenever a dividend is regularly declared and credited to a depositor it becomes his property, to which he is entitled in preference to the creditors of the corporation.[1] If the funds to pay a dividend are placed by the corporation, on deposit at a bank or elsewhere, the deposit is made and remains at the risk of the corporation and not of the stockholders, until a reasonable time after actual notice is given to the latter.[2] And it cannot be withdrawn and reclaimed either by the corporation or a receiver of the corporation, since the stockholders acquire, by virtue of the declaration of the dividend, a lien in equity upon the deposit.[3]

But where the fact that a dividend has been voted by directors is not made public, or communicated to the stockholders, and no fund is set apart for payment, the vote may be rescinded.[4]

port Spring Co., 42 Conn. 17 (1875); Fawcett *v.* Laurie, 1 Dr. & Sm. 192 (1860); *Re* Le Blanc, 14 Hun, 8 (1878). Upon the latter point compare People *v.* Merchants', etc. Bank, 78 N. Y. 269 (1879). Dividends on life-insurance policies, when once declared, cannot be varied by the company subsequently. Heusser *v.* Continental Life Ins. Co., 20 Fed. Rep. 222 (1884). Execution or garnishee process cannot be levied on stock held by an individual as trustee, where the debt is his individual debt. Nor can it be levied on the dividend from such stock. So held where stock was owned by a city in trust for the citizens. Hitchcock *v.* Galveston Wharf Co., 50 Fed. Rep. 263 (1880). A dividend of notes which, however, the stockholders agree to hold and the corporation agrees to pay if the notes are not paid by the maker, is not such a setting apart of the notes as to prevent their being taxed as corporate property. Adams *v.* Delta, etc. Co., 89 Miss. 817 (1906).

1 Van Dyck *v.* McQuade, 86 N. Y. 38 (1881); Peckham *v.* Van Wagenen, 83 N. Y. 40 (1880). A dividend declared and ordered deposited to the order of the stockholders and so held until the further order of the court is legal, and the amount cannot be taxed as belonging to the bank. Pollard *v.* First Nat. Bank, 47 Kan. 406 (1891).

2 King *v.* Paterson, etc. R. R., 29 N. J. L. 82, 504 (1860).

3 *Re* Le Blanc, 14 Hun, 8 (1878); aff'd, 75 N. Y. 598; Beers *v.* Bridgeport Spring Co., 42 Conn. 17 (1875). A six per cent. dividend declared by the board of directors, payable in four payments, is legal and binding if the company has profits to that amount, even though no specific moneys are set apart with which to pay it, and the board of directors have no power, after the payment of the first quarter, to rescind the remaining payments, even though they discovered that they had overvalued the assets, it still appearing that there were sufficient profits to pay the dividend. McLaren *v.* Crescent, etc. Co., 117 Mo. App. 40 (1906).

4 Ford *v.* Easthampton, etc. Co., 158 Mass. 84 (1893). A stockholder who accepts a dividend which has been declared in lieu of one already declared and thus revoked, cannot claim both dividends. Albany, etc. Co. *v.* Arnold, 103 Ga. 145 (1897). Where the charter allows the directors to pay "interim dividends," in other words, dividends to apply on the next regular dividend, an interim dividend may be revoked after it has been declared and before it has been paid. Lagunas, etc. Co. *v.* Schroeder & Co., 85 L. T. Rep. 22 (1901).

The stockholders' right to a dividend regularly declared, and to the fund set apart by the corporation to pay the dividend, is not affected by the subsequent insolvency of the corporation.[1] But where no specific fund has been set aside, a stockholder not having claimed or received his dividend has, upon the insolvency of the corporation, merely a claim of debt against the corporation, and must come in and fare as the other creditors do.[2]

Not only must the time of payment be reasonable, but a reasonable place of payment must be designated, and the entire transaction must be in good faith.[3]

§ 542. *It is a debt which may be collected by legal proceedings.*— The debt which the corporation owes its stockholders, when a dividend is declared and the day of payment arrives, is one which may be collected by the usual action at law. A suit to compel the declaration of a dividend must be in equity; but when the dividend is not paid after it has been regularly declared the stockholder's action is at law, and he may sue in *assumpsit* for the amount due him by the resolution declaring the dividend,[4] under certain circum-

1 Le Roy *v.* Globe Ins. Co., 2 Edw. Ch. 657 (1836).

2 Lowne *v.* American Fire Ins. Co., 6 Paige, 482 (1837); Curry *v.* Woodward, 44 Ala. 305 (1870); s. c., 53 Ala. 371. Where a dividend is declared in 1894, but is not called for by one stockholder until 1897, after the company has passed into an assignee's hands, he is a general creditor to that amount, but is not entitled to be paid in full unless a specific sum was deposited for the purpose of paying this dividend. Hunt *v.* O'Shea, 69 N. H. 600 (1899).

3 King *v.* Paterson, etc. R. R., 29 N. J. L. 82 (1860).

4 Jackson *v.* Newark Plank Road Co., 31 N. J. L. 277 (1865); West Chester, etc. R. R. *v.* Jackson, 77 Pa. St. 321 (1875); Coey *v.* Belfast, etc. Ry., Ir. Rep. 2 C. L. 112 (1866); King *v.* Paterson, etc. R. R., 29 N. J. L. 504 (1860); Stoddard *v.* Shetucket Foundry Co., 34 Conn. 542 (1868); Hall *v.* Rose Hill, etc. Co., 70 Ill. 673 (1873); City of Ohio *v.* Cleveland, etc. R. R., 6 Ohio St. 489 (1856); Marine Bank *v.* Biays, 4 Har. & J. (Md.) 338 (1818); State *v.* Baltimore, etc. R. R., 6 Gill (Md.), 363 (1848); Kane *v.* Bloodgood, 7 Johns. Ch. 90, 132 (1823); Jones *v.* Terre Haute, etc. R. R., 57 N. Y. 196 (1874); Fawcett *v.* Laurie, 1 Dr. & Sm. 192, 202 (1860); Dalton *v.* Midland Counties Ry., 13 C. B. 474 (1853); Scott *v.* Central R. R. etc. Co., 52 Barb. 45 (1868). See Beers *v.* Bridgeport Spring Co., 42 Conn. 17 (1875), sustaining a remedy in equity. But if a stockholder is not entitled to share in the dividend according to the terms of the resolution declaring it, he cannot have his action of *assumpsit*. State *v.* Baltimore, etc. R. R., 6 Gill (Md.), 363 (1848). In suing for a dividend the plaintiff must allege that the dividend has been declared. Hill *v.* Atoka, etc. Co., 21 S. W. Rep. 508 (Mo. 1893). See subsequent decision in 124 Mo. 153. Where a dividend has been paid to all stockholders except one, he may collect his by a suit. Southwestern, etc. Ry. *v.* Martin, 57 Ark. 355 (1893).

stances, he may file a bill in equity for an accounting.[1] But *mandamus* is not a proper remedy in such a case.[2]

§ 543. A demand is necessary before the action at law by the stockholder can be maintained.[3]

It has been held, however, that the commencement of the suit constitutes in itself a sufficient demand.[4] Under ordinary circumstances interest is not recoverable upon dividends which have been declared, but which the stockholder has not claimed. The right to interest arises only upon a demand and a refusal to pay.[5] A stockholder is not entitled to interest on dividends, even where he has demanded the same after they have been declared, where an attachment is pending against his stock.[6] The statute of limitations begins to run only after demand.[7]

1 Keppel *v.* Petersburg R. R., Chase's Dec. 167 (1868); s. c., 14 Fed. Cas. 357. This is the usual remedy where preferred stockholders sue to have a dividend declared. See § 272, *supra.*

2 Van Norman *v.* Central Car, etc. Co., 41 Mich. 166 (1879). But see *dicta* in King *v.* Paterson, etc. R. R., 29 N. J. L. 504 (1861), and Le Roy *v.* Globe Ins. Co., 2 Edw. Ch. 657 (1836).

3 Hagar *v.* Union Nat. Bank, 63 Me. 509 (1874); Scott *v.* Central R. R. etc. Co., 52 Barb. 45 (1868); State *v.* Baltimore, etc. R. R., 6 Gill (Md.), 363 (1848); King *v.* Paterson, etc. R. R., 29 N. J. L. 504 (1860). A mere letter of inquiry has been held under this rule an insufficient demand. Scott *v.* Central R. R. etc. Co., 52 Barb. 45 (1868). A demand while the shares are under and subject to an attachment by the corporation is not such a demand as this rule contemplates. Hagar *v.* Union Nat. Bank, 63 Me. 509 (1874). No demand of the dividend is necessary before suit if the corporation has refused to pay it. Redhead *v.* Iowa, etc. Bank, 127 Iowa, 572 (1905).

4 Robinson *v.* New Berne Nat. Bank, 95 N. Y. 637 (1884); Keppel *v.* Petersburg R. R., Chase's Dec. 167 (1868). This accords with the settled theory of the law as to demand in similar cases. See East New York, etc. R. R. *v.* Elmore, 5 Hun, 214 (1875); Delamater *v.* Miller, 1 Cow. 75 (1823); Everett *v.* Coffin, 6 Wend. 603 (1831); Walradt *v.* Maynard, 3 Barb. 584 (1848); Carroll *v.* Cone, 40 Barb. 220 (1862); aff'd, 41 N. Y. 216; Ayer *v.* Ayer, 33 Mass. 327 (1835).

5 Keppel *v.* Petersburg R. R., Chase's Dec. 167 (1868); s. c., 14 Fed. Cas. 357; Boardman *v.* Lake Shore, etc. R. R., 84 N. Y. 157, 187 (1881); State *v.* Baltimore, etc. R. R., 6 Gill (Md.), 363, 387 (1848); Philadelphia, etc. R. R. *v.* Cowell, 28 Pa. St. 329 (1857); Bank of Louisville *v.* Gray, 84 Ky. 565 (1886); Cochran *v.* McGee, 53 S. W. Rep. 519 (Ky. 1899). As to interest on preferred dividends, see ch. XVI, *supra.*

6 Mustard *v.* Union Nat. Bank, 86 Me. 177 (1893).

7 The statute of limitations begins to run against a stockholder's suit to collect dividends only after a demand and refusal, or notice to a shareholder that his right to dividends is denied. Philadelphia, etc. R. R. *v.* Cowell, 28 Pa. St. 329 (1857); Bank of Louisville *v.* Gray, 84 Ky. 565 (1886); Kobogum *v.* Jackson Iron Co., 76 Mich. 498 (1889); Bedford County *v.* Nashville, etc. Ry., 14 Lea (Tenn.), 525 (1884). *Cf.* Winchester, etc. Co. *v.* Wickliffe, 100 Ky. 531 (1897). Suit for a dividend may be brought at any time within the period of the statute of

In England, however, it has been held that where dividends are credited up to the personal accounts of the stockholders, and for nearly twenty years certain stockholders do not claim dividends so credited to them, the statute of limitations is a bar, and, the company having been sold out by authority of a statute, the proceeds are to be divided among the stockholders without regard to such past-due and unpaid dividends. The statute of limitations began to run from the time the dividends became payable, and the company is not to be considered as a trustee in that respect.[1] Where property is sold on foreclosure and distribution ordered, and some of the money is unclaimed for over ten years, the court may order that money distributed among the other bondholders who have not been paid in full; otherwise to the general creditors; otherwise to the stockholders.[2]

The action at law for the payment of a dividend which has been declared should be against the corporation, and not against the corporate officers.[3] But where the treasurer of an incorporated com-

limitations. Redhead *v.* Iowa Nat. Bank, 127 Iowa, 572 (1905). The statute of limitations does not begin to run against the collection of a dividend until it is demanded. A provision of a new charter into which the old company is merged, applying a three-year statute of limitations to dividends, does not affect dividends on old stock which has not come into the reorganization. Armant *v.* New Orleans, etc. R. R., 41 La. Ann. 1020 (1889). In Bills *v.* Silver King Min. Co., 106 Cal. 9 (1895), it is held that the statute of limitations begins to run against the right of a stockholder to sue for his dividends from the time when his administrator inquires at the corporate office as to whether all dividends had been paid to decedent, even though a false answer in the affirmative was made by the corporation. Even though a person subscribes for stock in a turnpike company in 1857 and he does not claim the stock or dividends, and after seven years does not attend meetings or pay any attention to his interest, and dies in 1868, nevertheless his representatives may collect the dividends due on the stock and may claim the stock. The statute of limitations is no bar if the company has never notified him that his right to the stock is disputed. Owingsville, etc. Co. *v.* Bondurant's Adm'r, 107 Ky. 505 (1900). Even though a claimant of stock brings suit to have it issued to him, and succeeds, yet if he does not claim the past dividends he cannot maintain a second suit for them, more than ten years having elapsed since the dividends were declared. Citizens', etc. Co. *v.* Belleville, etc. R. R. 157 Fed. Rep. 73 (1907). A provision in a railroad charter that the city may regulate tolls so that only a certain amount of profits shall go to the stockholders, and the surplus shall be paid to the city, does not give the state the right to the surplus, unless the state demanded the same, and where the company surrendered the charter and accepted a new one without such provision, the state has no cause of action for past profits. Terre Haute, etc. R. R. *v.* Indiana, 194 U. S. 579 (1904).

1 *Re* Severn, etc. Ry., [1896] 1 Ch. 559.

2 American Loan & T. Co. *v.* Grand Rivers Co., 159 Fed. Rep. 775 (1908).

3 French *v.* Fuller, 40 Mass. 108

pany withheld a dividend belonging to one of the stockholders on the ground that he himself owned the stock, an action of *assumpsit* against him individually was sustained.[1] In a case where a stockholder had been unjustly deprived of his stock, it was held that he could not sue an individual stockholder to recover a dividend which should have been paid to him, but that his action was properly against the corporation.[2] In a stockholder's suit at law for a dividend which has been declared, he cannot include a cause of action in equity against the directors for a conspiracy to illegally increase the capital stock and to enjoin them from doing so.[3] In actions on the part of stockholders to enforce the payment of dividends, the validity or legality of the dividend cannot be questioned by the corporation.[4] When a corporation is sued for a dividend by two claimants therefor, it may support a bill of interpleader between them.[5]

§ 544. *Right of the corporation to apply dividends to the payment of debts due to it by the stockholder — Dividends in payment of subscription price of stock.*—It is well settled that if, at the time a dividend becomes payable, the stockholder owes the corporation any debt, the dividend due that stockholder may be applied in liquidation of the indebtedness; and if the corporation is sued for the dividend it may set up the debt by way of set-off or counter-claim.[6]

(1839); Smith *v.* Poor, 40 Me. 415 (1855); s. c., 3 Ware, 148 (1858); s. c., 22 Fed. Cas. 627. A stockholder's remedy for a dividend which has been declared is an action at law against the company, and not against the directors personally, unless they have converted the dividend or have set it aside and refused to use it for that purpose. Searles *v.* Gebbie, 115 N. Y. App. Div. 778 (1906); aff'd, 190 N. Y. 533.

1 Williams *v.* Fullerton, 20 Vt. 346 (1848).

2 Peckham *v.* Van Wagenen, 83 N. Y. 40 (1880).

3 Searles *v.* Gebbie, 115 N. Y. App. Div. 778 (1906); aff'd, 190 N. Y. 533. See also § 739, *infra.*

4 See § 540, *supra.*

5 Salisbury Mills *v.* Townsend, 109 Mass. 115 (1871). See also §§ 387, 538, *supra.* In England the rule was formerly otherwise. Dalton *v.* Midland Ry., 12 C. B. 458 (1852).

6 Hagar *v.* Union Nat. Bank, 63 Me. 509 (1874); Philadelphia, etc. R. R. *v.* Cowell, 28 Pa. St. 329 (1857); King *v.* Paterson, etc. R. R., 29 N. J. L. 504 (1860); Sargent *v.* Franklin Ins. Co., 25 Mass. 90 (1829); Bates *v.* New York Ins. Co., 3 Johns. Cas. 238 (1802); Donnally *v.* Hearndon, 41 W. Va. 519 (1895). See also § 526, *supra.* But a contrary rule prevails as to a deceased stockholder, upon a winding up of the company and a distribution of its assets. See Merchants' Bank, etc. *v.* Shouse, 102 Pa. St. 488 (1883); Brent *v.* Bank of Washington, 2 Cranch, C. C. 517 (1824); s. c., 4 Fed. Cas. 61. See also, *contra*, in general, *Ex parte* Winsor, 3 Story, C. C. 411 (1844); s. c., 30 Fed. Cas. 312. By agreement a dividend may be applied to an unpaid call. Kenton, etc. Co. *v.* McAlpin, 5 Fed. Rep. 737 (1880). For a contract of a corporation to sell to its superintendent shares of its stock at his option, and to allow him to pay for the stock by the dividends, see Goodwin, etc. Co.'s Appeal, 117 Pa. St.

This, however, is not upheld where the registered stockholder has sold and transferred his certificate of stock before the dividend is payable.[1] The company cannot retain the dividend to secure a debt for which the stockholder is only surety or guarantor, the debt not yet being due,[2] nor can it set off a claim which it has against the plaintiff and another person jointly.[3]

Where a corporation has made profits it may declare a dividend thereof, and apply such dividend to the unpaid subscription price of subscribers to its capital stock.[4] But a payment of the subscrip-

514 (1888). The only right that a corporation has to retain a dividend from a stockholder who owes it money is based on set-off. Gemmell *v.* Davis, 75 Md. 546 (1892).

1 Where a stockholder of record pledges his certificates of stock, and no transfer is made on the books, and subsequently a dividend is declared, and after such dividend is payable, but before it is actually paid, the pledgee presents to the company the stock for transfer with a written request of the pledgor to the same effect, together with an assignment by the pledgor to the pledgee of the dividend, it is no defense to the company that it has a claim against the pledgor for a personal debt or for a debt of a firm in which he is interested. American Nat. Bank *v.* Nashville, etc. Co., 36 S. W. Rep. 960 (Tenn. 1896). This set-off is not good on a debt against the transferrer where the certificates were sold, although not transferred on the books, before the dividend was declared. A pledgee of stock, even though not recorded as a stockholder, is entitled to dividends declared after the pledge was made, as against a claim of the corporation against the pledgor as an offset. Gemmell *v.* Davis, 75 Md. 546 (1892). Where the corporation retains dividends as an offset to a debt due from the stockholder to the corporation, and the latter brings suit in equity for an accounting and the court decides in the stockholder's favor, he may have judgment for the dividends, even though he did not ask for any affirmative relief. Consolidated, etc. Co. *v.* Wisner, 110 N. Y. App. Div. 99 (1905); aff'd, 188 N. Y. 624.

2 Solomon *v.* First Nat. Bank, 72 Miss. 854 (1895); First Nat. Bank *v.* De Morse, 26 S. W. Rep. 417 (Tex. 1894).

3 Rumney *v.* Detroit, etc. Co., 129 Mich. 644 (1902).

4 Where the corporation has an accumulated profit, and that profit is by agreement with the stockholders applied to unpaid subscriptions, such stock is then paid up. Kenton, etc. Co. *v.* McAlpin, 5 Fed. Rep. 737 (1880). See also § 168, *supra.* It is a question for the jury whether fraud exists in the sale of stock, represented to be paid up, when part of the payments had been by dividends from the corporation. Kryger *v.* Andrews, 65 Mich. 405 (1887). Where a by-law provides that dividends on stock not paid up shall be credited on the amount unpaid, the company cannot deprive such stock of the dividends altogether. Gellermann *v.* Atlas, etc. Co., 87 Pac. Rep. 1059 (Wash. 1906). A corporation having charter power to purchase the stock of other corporations may give its certificates of indebtedness in payment therefor, and may also issue with such certificates its preferred stock, the dividends to be used to pay the principal and interest of such certificates, the preferred stock then to belong to the vendors. Ingraham *v.* National Salt Co., 130 Fed. Rep. 676 (1904), overruling 122 Fed. Rep. 40.

tion price by what purports to be a dividend or distribution of profits is invalid as against creditors, where such profits did not exist.[1] At common law a company cannot divide any part of its assets among its shareholders, as a reduction of the amount already paid on the subscription price of the stock. In England the statutes expressly authorize that mode of distributing assets.[2] Even though subscribers claim that their stock was to be paid for by dividends, yet such an agreement is no defense as against creditors.[3] An agreement of the corporation with a stockholder to pay to him in dividends the amount he pays for the stock cannot be enforced as an obligation of the corporation.[4] A bonus paid by citizens may be used by subscribers for stock in partial payment for their stock, unless the bonus was made directly to the corporation.[5]

§ 545. *The courts very rarely compel the directors to declare a dividend.*—The board of directors declare the dividends, and it is for the directors, and not the stockholders, to determine whether or not a dividend shall be declared.[6]

When, therefore, the directors have exercised this discretion and refused to declare a dividend, there will be no interference by the courts with their decision, unless they are guilty of a wilful abuse of their discretionary powers, or of bad faith or of a neglect of duty. It requires a very strong case to induce a court of equity to order the directors to declare a dividend, inasmuch as equity has

1 Gager *v.* Paul, 111 Wis. 638 (1901). An illegal dividend applied to the payment of the subscription price does not prevent a suit in behalf of corporate creditors to collect the subscription price. Crawford *v.* Roney, 61 S. E. Rep. 117 (Ga. 1908).

2 *Re* Piercy, 95 L. T. Rep. 868 (1906). The common law rule is of course different, if the capital stock is reduced. See § 289, *supra*.

3 Hawkins *v.* Citizens', etc. Co., 38 Oreg. 544 (1901), holding also that the cancellation of such portion of subscriptions as is in excess of a certain dividend declared is illegal as against creditors existing at the time of such cancellation. See also § 170, *supra*.

4 Smith *v.* Alabama, etc. Assoc., 123 Ala. 538 (1899).

5 McDermott *v.* Squier, 124 Mich. 523 (1900).

6 Quoted and approved in Schell *v.* Alston Mfg. Co., 149 Fed. Rep. 439 (1906). "The directors of a corporation, and they alone, have the power to declare a dividend of the earnings of the corporation and to determine its amount." Hunter *v.* Roberts, etc. Co., 83 Mich. 63 (1890). The board of directors and not the stockholders declare dividends. Grant *v.* Ross, 100 Ky. 44 (1896). See also the various cases in this and succeeding sections. Under the New Jersey statutes dividends must be paid in January, unless the charter or by-laws fix some other date therefor. Marquand *v.* Federal Steel Co., 95 Fed. Rep. 725 (1899), holding also that where the charter provides that dividends on the common stock shall be declared after the close of any fiscal year, the corporation has no power to pay any dividends on the common stock prior to the close of the fiscal year, and hence cannot pay quarterly dividends on the common stock.

no jurisdiction, unless fraud or a breach of trust is involved.[1] There have been many attempts to sustain such a suit, yet, although the courts do not disclaim jurisdiction, they have quite uniformly refused to interfere.[2] The discretion of the directors will not be

1 Quoted and approved in Schell *v.* Alston Mfg. Co., 149 Fed. Rep. 439 (1906).

2 New York, etc. R. R. *v.* Nickals, 119 U. S. 296 (1886), rev'g 15 Fed. Rep. 575; Ely *v.* Sprague, Clarke, Ch. 351 (1840); Williams *v.* Western Union Tel. Co., 93 N. Y. 162 (1883); Reynolds *v.* Bank of Mt. Vernon, 6 N. Y. App. Div. 62 (1896); aff'd, 158 N. Y. 740; Park *v.* Grant Locomotive Works, 40 N. J. Eq. 114 (1885); Barnard *v.* Vermont, etc. R. R., 89 Mass. 512 (1863); Chaffee *v.* Rutland R. R., 55 Vt. 110, 133 (1882); Barry *v.* Merchants' Exchange Co., 1 Sandf. Ch. 280 (1844); Rex *v.* Bank of England, 2 B. & Ald. 620 (1819), where the court refused to grant a *mandamus* for an examination of the accounts with a view to compelling a dividend. In the case of Burden *v.* Burden, 159 N. Y. 287, 308 (1899), the court held that so long as the directors are acting honestly and within their discretionary powers in accumulating a surplus in an iron manufacturing corporation, a stockholder must submit, but "if it can be shown that trustees of a corporation are guilty of fraud and bad faith in accumulating a large surplus to the injury of the stockholders, a court of equity would doubtless interfere." The court in this case refused to interfere, although the capital was $2,000,000 and the surplus $1,100,000, $500,000 of which was in the bank and $600,000 invested in stocks which were not in a legal sense a surplus, but were capital whose income alone would go to swell the regular dividends of the corporation, and it appearing also that the corporation had paid very large dividends. The discretion of the directors in regard to declaring dividends will not be interfered with in the absence of fraud or an abuse of discretion. Knapp *v.* Jarvis Adams Co., 135 Fed. Rep. 1008 (1905). The directors are not bound to declare a dividend on the common stock, even though there are profits sufficient for that purpose after paying the dividend on the preferred stock, and even though the profits available for the common dividend may otherwise be absorbed in subsequent years to pay the preferred dividend. Stevens *v.* United States, etc. Corp., 68 N. J. Eq. 373 (1905), holding also that even though the accumulated profits are millions of dollars, yet where they amount to only six per cent. of the capital stock and are largely invested in the property, the court will not order the declaration of a dividend. Directors may apply the profits to strengthening the capital, if they act in good faith. Robertson *v.* Bucklen & Co., 107 Ill. App. Rep. 369 (1903). Where the profits are properly used to pay debts, a guarantor of dividends cannot question the propriety of such use of the profits. Pratte *v.* Enslow, 46 W. Va. 527 (1899). The directors are bound to distribute as profits only such part of the net income as they think proper; and their judgment of what is proper is conclusive upon the stockholders. State *v.* Baltimore, etc. R. R., 6 Gill (Md.), 363 (1847). *Cf.* Dent *v.* London Tramways Co., L. R. 16 Ch. D. 344 (1880). See also § 272, *supra.* In Park *v.* Grant Locomotive Works, 40 N. J. Eq. 114 (1885), the court said: "In cases where the power of the directors of a corporation is without limitation and free from restraint, they are at liberty to exercise a very liberal discretion as to what disposition shall be made of the gains of the business of the corporation. Their power over

interfered with by the courts, unless there has been bad faith, wilful neglect, or abuse of discretion.[1]

Accordingly the directors may, in the fair exercise of their discretion, invest profits to extend and develop the business, and a reasonable use of the profits to provide additional facilities for the business cannot be objected to or enjoined by the stockholders.[2]

them is absolute so long as they act in the exercise of an honest judgment. They may reserve of them whatever their judgment approves as necessary or judicious for repairs and improvements, and to meet contingencies, both present and prospective."

In State *v.* Bank of Louisiana, 6 La. 745 (1834), the court refused to order a bank to declare a dividend although it had profits on hand of about one-tenth of its capital. The court said: "If the board honestly err in these matters, we are not ready to say the courts possess the power to rectify its mistakes." The remedy is in the elections. Courts will not order a dividend to be declared unless the directors "refuse to declare a dividend when the corporation has a surplus of net profits which it can, without detriment to its business, divide among its stockholders, and when a refusal to do so would amount to such an abuse of discretion as would constitute a fraud, or breach of that good faith which they are bound to exercise towards the stockholders." A dividend will not be ordered when the profits are invested in the plant and in long-time notes. Hunter *v.* Roberts, etc. Co., 83 Mich. 63 (1890). In Smith *v.* Prattville, etc. Co., 29 Ala. 503 (1857), the court refused to order a dividend, inasmuch as the charter expressly vested discretion as to that matter in the board of directors. A stockholder cannot have a receiver appointed merely because the directors reserved the profits for a surplus instead of distributing them by way of dividends. Marcuse *v.* Gullett, etc. Co., 52 La. Ann. 1383 (1900).

1 Greeff *v.* Equitable, etc. Soc., 160 N. Y. 19, 32 (1899).

Where large dividends are made by a manufacturing company, it is entirely within the fair and honest discretion of the directors whether the remaining profits shall be passed to surplus or used for dividends. McNab *v.* McNab, etc. Co., 62 Hun, 18 (1891); aff'd, 133 N. Y. 687, the court holding also that the fact that a manufacturing company extended its business so as to include iron pipe as well as brass, and loaned money, which loans, however, the president was willing to

2 Where a corporation having a large surplus proposed, with the concurrence of a majority of the stockholders, to employ the surplus in extending the business, although such extension was opposed by a minority of the stockholders, it appearing that the proposed enlargement of the corporate enterprise was clearly *intra vires*, it was held on a bill brought by the dissenting minority for an injunction against the proposed use of the surplus, and praying a distribution of it among the stockholders, that the facts were not such as to require the interposition of the court on behalf of the minority. Pratt *v.* Pratt, 33 Conn. 446 (1866), the court saying: "On a question of this sort much must necessarily be left to the discretion of the managing directors; and so long as they keep within the objects contemplated by the articles of association, and the expenditure is not unreasonable in reference to the amount of their capital, a court of equity ought very seldom to interfere with them."

Profits may also be set aside for the payment of indebtedness, though it is not yet due.[1] Where stock is pledged and the pledgee is in control of the company, and, instead of declaring dividends, he honestly and intelligently applies the profits to improvements, the pledgor cannot hold him liable for not declaring dividends, and for not thus decreasing the debt for which the stock was given

take up, and had owned government bonds, is not sufficient to entitle a stockholder who has acquiesced therein to demand that all profits be paid out in dividends. Although the road was leased and the floating debt was only $1,000, and the bonded debt, $70,000, was due in seventeen years, and the other expenses only $6,000, while the company had $36,000 on hand and the regular rental for its road coming in, yet the court refused to order a dividend, in Karnes *v.* Rochester, etc. R. R., 4 Abb. Pr. (N. S.) 107 (1867), the court holding also that a demand must first be made, and that the directors, instead of the company, are the proper parties defendant. In Barnard *v.* Vermont, etc. R. R., 89 Mass. 512 (1863), there was a contract to pay dividends, and it was upon this contract that the court based its right to pass upon the ability of the company to declare a dividend. The court refused to order a dividend. In Richardson *v.* Vermont, etc. R. R., 44 Vt. 613 (1872), the court decreed the payment of what was substantially a dividend to the stockholders, but stated that an accounting must first be had to ascertain whether there was available for that purpose "a fund adequate not only for the payment of the claims of the plaintiffs in the cause, but for the payment of all other stockholders having like claims;" and there "must be a surplus fund over and above what is requisite for the payment of the current expenses of the business, for discharging its duties to creditors, and over and above what reasonable prudence would require to be kept in the treasury to meet the accidents, risks, and contingencies incident to the business of operating the railroad." In Dent *v.* London Tramways Co., L. R. 16 Ch. D. 344 (1880), the court compelled the company to pay a dividend on the preferred stock, where there were profits available, and the common stockholders proposed to use all the profits for long-neglected repairs, the real reason being that there were profits sufficient for a dividend on the preferred, but not on both the common and preferred. The court said that profits meant the "surplus in receipts, after paying expenses and restoring the capital to the position it was in on the first of January in that year." Where a bill in equity, filed for the purpose of obtaining an accounting and the declaration of a dividend, does not clearly make out the existence of a surplus which the directors ought to distribute, the suit will fail. A discovery will not be granted where there is no allegation that information is refused, or that the party cannot examine the books, or that a *mandamus* was inadequate. Wolfe *v.* Underwood, 96 Ala. 329 (1892). Where the licensor of a patent is to have from a corporation as licensee a certain payment from the net profits, such payment not to be cumulative and to be subject to provision for a reserve fund, it is legal for the company to pass a sum to the reserve fund, and also a further sum for depreciation and the cost of licenses. Bagot, etc. Co. *v.* Clipper, etc. Co., [1902] 1 Ch. 146.

1 Karnes *v.* Rochester, etc. R. R., 4 Abb. Pr. (N. S.) 107 (1867).

in pledge.[1] The free exercise of the director's discretion cannot be interfered with by the contracts of promoters or original incorporators as to the disposition of corporate profits.[2] A court will not compel a foreign corporation to declare a dividend.[3] Under the New Jersey statute a stockholder may file a bill to compel the declaration of a dividend out of accumulated profits not reserved for working capital by vote of the stockholders, as provided in the statute.[4] Where the stockholders are given power by statute to fix the amount of the reserve for working capital, their discretion cannot be questioned by a minority stockholder.[5] A stockholder's bill to compel the directors to declare a dividend under the New Jersey statute must allege that the accumulated profits are larger than the reserve as fixed by the stockholders.[6] Where, by a by-law, the board of directors has power to set aside from the profits such sum as they think proper as a reserve fund to meet contingencies, they have power, after paying dividends on the preferred stock, to carry the balance to a reserve fund, although the common stock is thereby deprived of any dividend.[7] A by-law, however, that directors shall establish a secret reserve fund which the shareholders shall know nothing about and which the auditors shall not report to the shareholders, is contrary to the English statute requiring the auditors to

1 Zellerbach *v.* Allenberg, 99 Cal. 57 (1893).

2 The agreement of the promoters and preliminary subscribers to the stock of the proposed company as to the division and disposition of the net profits does not bind the company unless it has expressly acquiesced in such agreement. Coyote, etc. Co. *v.* Ruble, 8 Oreg. 284 (1880). But if expressly ratified by the company it is binding. Richardson *v.* Vermont, etc. R. R., 44 Vt. 613 (1872), where an agreement to pay annual interest to the stockholders out of the net profits was considered.

3 Berford *v.* New York Iron Mine, 4 N. Y. Supp. 836 (1888). See also § 734, *infra.*

4 Griffing *v.* A. A. Griffing, etc. Co., 61 N. J. Eq. 269 (1901). The court refused to order a dividend in the case Raynolds *v.* Diamond, etc. Co., 69 N. J. Eq. 299 (1905), although profits to the amount of the capital stock had been invested in the plant, and no dividends paid, it appearing that all the stockholders had assented to a resolution leaving it with the board of directors to declare or withhold dividends.

5 Lillard *v.* Oil, etc. Co., 56 Atl. Rep. 254 (N. J. 1903).

6 Trimble *v.* American, etc. Co., 61 N. J. Eq. 340 (1901).

7 Fisher *v.* Black, etc. Co., [1901] 1 Ch. 174. In the important case of Burland, etc. *v.* Earle, etc., [1902] A. C. 83, the Privy Council, passing on a by-law authorizing the directors, subject to the approval of a meeting of the stockholders, to set apart any portion of the profits for a reserve fund of a corporation that had paid on an average dividends of forty per cent. per annum, the capital stock being $200,000, and had accumulated, as undivided profits, $264,000, which was carried in profit and loss account, held that a stockholder could not maintain a suit to declare the accumulation to be *ultra vires* and to obtain

report fully to the shareholders.[1] The discretion of the directors in accumulating a reserve for a banking corporation will not be interfered with unless the directors act unfairly or in bad faith.[2] A surplus of a company may be invested in such securities as the board of directors may deem best, and the board is not confined to securities in which a trustee may invest.[3]

Nevertheless the discretion of the directors in the matter of declaring or refusing to declare a dividend is not absolute, and where there is a clear abuse of power in refusing to declare the dividend, a court of equity will, at the instance of any stockholder, compel the proper authorities to declare and pay the dividend.[4] A stock-

a distribution thereof among the stockholders.

1 Newton *v.* Birmingham, etc. Co., Ltd., 95 L. T. Rep. 135 (1906).

2 Hence even though the reserve amounts to $2,500,000 in a savings institution, the court will not order the distribution of any part thereof. Mulcahy *v.* Hibernia, etc. Soc., 144 Cal. 219 (1904).

3 Burland, etc. *v.* Earle, etc., [1902] A. C. 83. In this case the surplus was invested in bank shares and mortgages, and such investment was made in the name of a director. The court further stated that such investments should not be in speculative securities.

4 A bill in equity lies to compel the payment of preferred dividends where the stockholder has repeatedly sought an accounting and there apparently is money available to pay such dividends. Cratty *v.* Peoria, etc. Assoc., 219 Ill. 516 (1906), the court saying, (p. 522): "Generally, the question of declaring a dividend is intrusted to the sound discretion of the directors; and, as to common stock, such discretion wil not be interfered with by a court of equity in the absence of bad faith or arbitrary or unjustifiable conduct. But different rules apply with respect to the right of holders of preferred stock to invoke the aid of a court to order the declaration and payment of dividends on their stock." Where a stockholder who has pledged his stock, is refused permission to examine the books and no dividends have been declared, although large profits have been made, and the majority stockholders are planning to deprive him of his stock, he may file a bill to compel the declaration of a dividend. Anderson *v.* W. J. Dyer & Bro., 94 Minn. 30 (1904). Where there are only five stockholders and all of them are directors, three of them cannot, either at a stockholders' or directors' meeting, vote to themselves exorbitant salaries nor the entire profits made by the company on articles manufactured under patents owned by them. In this case the court decreed that one-third of the profits from articles manufactured under such patents should belong to the company. The minority stockholders in a suit to compel the declaration of a dividend may bring into the fund moneys so illegally paid out. Crichton *v.* Webb Press Co., 113 La. 167 (1904). In the case of Matter of Rogers, 161 N. Y. 108, 112 (1899), the court of appeals said: "An argument is made, which has the sanction of some of the authorities, to the effect that all of the assets of a corporation are deemed capital until a dividend is declared. We may concede that assets are ordinarily so treated in going concerns, but the rule has its limitations. The directors must act in good faith. If they fail to do so, and it clearly appears that they have

holder's suit to compel the declaration of a dividend does not lie where the stockholder has not applied to the directors therefor and does not allege that the directors would refuse to give such application proper consideration.[1] Laches on the part of the stockholders

accumulated earnings not required in the prosecution of the business, which they withhold from the stockholders for illegitimate purposes, a court of equity may interfere and compel a distribution of such earnings." Where two directors, forming a majority of the board, vote themselves very large salaries, and refuse information to another director who is the only other stockholder, and refuse to declare dividends, and proceed to convey the property of the company to another company controlled by themselves, a court of equity will set aside the illegal conveyances and the resolutions authorizing the salaries, and will order the books to be opened to the other director, and will order dividends to be declared. The court, however, will not appoint a receiver and enjoin the continuance of the business, and will not order a distribution of the assets of the company. Laurel Springs Land Co. *v.* Fougeray, 50 N. J. Eq. 756 (1893), rev'g Fougeray *v.* Cord, 50 N. J. Eq. 185; rev'd on another point in 57 N. J. Eq. 318. Where for seven years a stockholder who owned a majority of the stock elected himself and two of his dummies as directors of the company, and caused the board to vote a large salary to himself as president and manager, and had leased to the company his property at a large rental, the salary and rental are illegal and void; and inasmuch as the company had failed to pay its dividends by reason of such acts, a court of equity, upon the suit of another stockholder, ordered the president to account, and appointed a receiver of the company and directed that its affairs be wound up. The court ordered a repayment of the dividends and a distribution thereof among the stockholders. Miner *v.* Belle Isle Ice Co., 93 Mich. 97 (1892); Brown *v.* Buffalo, etc. R. R., 27 Hun, 342 (1882). See also Park *v.* Grant Locomotive Works, 40 N. J. Eq. 114 (1885). In this case there was a contract that the net profits should be divided annually. Scott *v.* Eagle Fire Co., 7 Paige, 198 (1838); Pratt *v.* Pratt, 33 Conn. 446 (1866); Beers *v.* Bridgeport Spring Co., 42 Conn. 17 (1875). Upon a sale of all the property of the corporation the directors may be compelled to declare a dividend. Cramer *v.* Bird, L. R. 6 Eq. 143 (1868). A stockholder cannot sue for profits until a dividend is declared. Beveridge *v.* New York, etc. R. R., 112 N. Y. 1 (1889). Where an employee gives his note in payment for subscription for stock, such note to be paid out of future dividends, the court will hold that the note has been paid when the dividends were earned, but, for the purpose of defrauding the subscriber, were not declared. Morey *v.* Fish, etc. Co., 108 Wis. 520 (1901). A lawyer having a contract with a corporation that he should receive five per cent. of its net earnings may enforce the agreement by a suit in equity where net earnings exist and the directors ignore the contract. Dupignac *v.* Bernstrom, 37 N. Y. Misc. Rep. 678 (1902); aff'd, 76 N. Y. App. Div. 105. Where, pending a suit by a stockholder to have a dividend declared, the corporation is sold out after he has sold his stock retaining the right to such dividend, if ordered by the court, he may maintain a bill in equity for an accounting. Phillips *v.* Jacobs, 108 N. W. Rep. 899 (Mich. 1906).

1 Maeder *v.* Buffalo, etc. Co., 132 Fed. Rep. 280 (1904).

in failing to commence their suit to compel the payment of a dividend until the corporation becomes insolvent is fatal.[1] And the court will also consider that the aggrieved stockholders may, if a majority, refuse to re-elect the directors at the next election, or may sell their shares.[2]

§ 546. *Dividends can usually be made only from profits—Exceptions to this rule—What are profits which may be used for dividends.*—As against the dissent of stockholders or creditors, a dividend can lawfully be made only out of profits. The payment of it must leave the capital stock of the company intact and unimpaired, or the dividend itself will be held illegal.[3] Where, however, a corporation is formed by a partnership to sell its property and divide the profits it may do so notwithstanding a statute prohibiting dividends from capital stock.[4] A contract of directors to pay a dividend as a debt at fixed intervals, being in reality a preferred dividend, cannot be enforced either at law or in equity, except out of net profits like other dividends.[5] An agreement of the corporation with a stockholder to pay to him in dividends the amount he pays for the stock cannot be enforced as an obligation of the corporation.[6] A company may, however, legally pay interest on such part of the subscription as is paid in before required by calls. Such interest may be paid although there are no profits.[7] An agreement by which some of the directors of a company sell their stock to the remaining stockholders, and take pay therefor from the assets of the corporation, is not illegal if all the stockholders assent and the corporation is not injured.[8] Where the sole owner of the stock of a corporation executes

1 Scott *v.* Eagle Fire Co., 7 Paige, 198 (1838).

2 Barry *v.* Merchants' Exchange Co., 1 Sandf. Ch. 280 (1844).

3 Lockhart *v.* Van Alstyne, 31 Mich. 76 (1875); Hughes *v.* Vermont Copper Min. Co., 72 N. Y. 207, 210 (1878). See also § 272, *supra*, and cases in notes to this section. As to whether the corporation may defend on this ground against a suit for dividends, see § 540, *supra*. As to what constitutes a payment of dividends out of capital, see 3 Ry. & Corp. L. J. 409, reviewing English decisions.

4 Baldwin *v.* Miller & Lux, 92 Pac. Rep. 1030 (Cal. 1907).

5 Painesville, etc. R. R. *v.* King, 17 Ohio St. 534 (1867). See also ch. XVI, *supra*. A loan from stockholders to be repaid from the first profits is payable absolutely within a reasonable time if no profits are made. Busby *v.* Century, etc. Co., 27 Utah, 231 (1904).

6 Smith *v.* Alabama, etc. Assoc., 123 Ala. 538 (1899). See also § 544, *supra*.

7 Lock *v.* Queensland, etc. Co., [1896] A. C. 461. H. L. aff'g [1896] 1 Ch. 397.

8 Raymond *v.* Colton, 104 Fed. Rep. 219 (1900), holding also that the assent of a few minor stockholders whose stock was given to them may be presumed, in case they have not objected to an agreement whereby some of the stockholders sell their stock to the others and take their pay from the corporation itself and resign their offices and substitute new

the note of the corporation for his individual indebtedness, no one

parties as directors. See also §§ 548, 671, *infra*, and § 535, *supra*. In New York, however, the Penal Code prohibits such a dividend. Penal Code, § 594. Persons sued at law by a corporation for accepting its money from its president and using it to pay the president's debt, may file a bill in equity to enjoin the suit at law on the ground that the president owned or controlled all the stock and used the corporation for his private purposes, and that the money was so paid with the consent of all the stockholders and officers. Leigh *v.* Kewanee, etc. Co., 127 Fed. Rep. 990 (1904). Where two parties own all the stock, and by agreement one of them takes some of the corporate assets and thereafter the matter is settled satisfactorily and the stock sold, the purchasers knowing of the facts cannot complain. Peterson *v.* Elholm, 130 Wis. 1 (1906). A business corporation cannot defeat an accommodation note if all the stockholders assented thereto and there are no creditors. Perkins *v.* Trinity, etc. Co., 69 N. J. Eq. 723 (1905), the court saying: "To permit stockholders of corporations to unanimously make a dispostiion of the corporate property where no one else's rights are in any way prejudiced, and afterwards to repudiate their action upon the ground that it was beyond the power of the fictional body to do the act, could serve no useful purpose, and would be merely available in aid of fraud." Even though a dividend has been paid partially out of capital stock, yet if the error is about to be corrected by profits during a subsequent year, a stockholder's suit to compel the directors to replace the amount will not lie. Towers *v.* African, etc. Co., Ltd., [1904] 1 Ch. 558. A creditor of a corporation may object to a mortgage given to secure the individual debts of its stockholders incurred in purchasing stock in the corporation, even though the creditor became such after the transaction. *In re* Haas Co., 131 Fed. Rep. 232 (1904). The presumption is that the dividend was not paid from the capital stock. Redhead *v.* Iowa Nat. Bank, 127 Iowa, 572 (1905). Notes of the corporation issued by way of an illegal dividend cannot be offset against liability on the unpaid subscription price of the stock. Shields *v.* Hobart, 172 Mo. 491 (1903). In a suit at law by a corporation against its treasurer for corporate funds, he cannot set up that he and another person were the sole stockholders at the time the funds were divided between them and that their accounts had been settled. Leigh *v.* National, etc. Co., 223 Ill. 407 (1906). In the case Home, etc. Co., *v.* Barber, 67 Neb. 644 (1903), where the purchaser of stock sued to hold former stockholders liable for corporate assets appropriated by them, the court found that such use of assets had been taken into consideration in fixing the price at which the stock had been sold, and hence refused to hold the parties liable. Where all the stock has been issued for property the corporation cannot then give notes in addition as against corporate creditors. Haines, etc. Co. *v.* Highland, etc. Co., 88 Pac. Rep. 865 (Ore. 1907). In the case of First National Bank, etc. *v.* Winchester, 119 Ala. 168 (1898), where a private corporation had but four stockholders and two of them bought the stock of the other two and paid therefor by notes signed by them and the corporation and secured by mortgage on the corporate property, the court held that the note was not enforceable against the corporation, but held that the mortgage was legal as against subsequent creditors, mortgagees, and purchasers from the corporation who took with notice of the facts. Approving Swift *v.* Smith, 65 Md. 428 (1886).

Where three persons have formed a

but the creditors of the corporation can complain.[1] A mortgage given by a corporation to secure the debts of its principal stockholder and

corporation and transferred a patent to it for all its capital stock, and are the sole stockholders, there being no creditors, they may purchase the patent back and give the corporation their note for the par value of the whole capital stock. Although the corporation subsequently becomes insolvent the transaction cannot be impeached. Skinner *v.* Smith, 56 Hun, 437 (1890); aff'd, 134 N. Y. 240 (1892). It is legal for a coal corporation, with the assent of all its stockholders, to sell all its property to its president, and for him to pay therefor in cash and by a mortgage on the property so purchased, he also agreeing to pay all the debts of the company. Payment was made directly to the stockholders, and they transferred their stock to him in addition to the transfer of the property. A subsequent creditor of the company who knew all the facts cannot complain. Parke, etc. Co. *v.* Terre Haute, etc. Co., 129 Ind. 73 (1891).

Practically there was a division of the corporate assets among the stockholders in Boston, etc. Co. *v.* Bankers', etc. Co., 36 Fed. Rep. 288; aff'd *sub nom.* United, etc. Co. *v.* Boston, etc. Co., 147 U. S. 431 (1893). In this case the usual and simple process of one company selling all its property to the other company and taking purchase-money mortgage bonds in payment, and then distributing the bonds among its stockholders, was not adopted, but the mortgage was given by the vendor company, the object being not to have the mortgage cover existing property of the vendee company. The vendee company at the same time agreed to construct new lines and place them under the mortgage. The whole scheme was awkward, and was sustained by the courts only after prolonged litigation.

Although a corporation sells all its property to an individual for purchase-money mortgage bonds, and distributes these bonds among its stockholders, without paying the creditors, nevertheless a *bona fide* purchaser of such bonds is protected as against the corporate creditors. A former decree in a court of equity against the trustee of the mortgage in regard to the matter does not bind the bondholders, although a suit at law against the trustee would have bound them. Lebeck *v.* Ft. Payne Bank, 115 Ala. 447 (1897). Where a corporation distributes all its assets among its stockholders without paying the debts, a corporate creditor may hold them liable, but he must first obtain a judgment against the corporation, and execution must be returned unsatisfied. Lamar *v.* Allison, 101 Ga. 270 (1897). See 69 Atl. Rep. 1090.

Even though two persons own the entire capital stock of a railroad company, yet if they use a part of its assets for their own individual purposes and make false entries on the books, some of the entries showing cash on hand, but which is not on hand, they are liable to the company later when it has passed into other hands. Saranac, etc. R. R. *v.* Arnold, 167 N. Y. 368 (1901).

Where the directors, with the consent and knowledge of all the stockholders, there being no creditors, pay a part of the capital stock to the stockholders by way of dividends, and afterwards the directors are compelled to pay back such sums in order to liquidate subsequent debts, the directors may recover from the stockholders the sums so paid to the latter.

1 Millsaps *v.* Merchants', etc. Bank, 71 Miss. 361 (1893). See also § 548, *infra.*

manager is void as against corporate creditors.[1] Even though the president and secretary-treasurer of a manufacturing company own all the stock, yet if the president uses a check of the corporation, payable to its own order and endorsed by it, to pay his personal debt, corporate creditors, upon the insolvency of the corporation, may compel the trust company that cashed the check to refund the money.[2] Where a few persons own all the stock of a company, and use the profits for personal expenses and miscellaneous purposes, irrespective of the corporation, all the stockholders knowing thereof and assenting thereto, a policy of insurance issued to one of them is his, even though the premiums were paid out of the corporate profits, it being shown that all this was done while the corporation was solvent, and that no rights of creditors then intervened, and that all the debts represented by the receiver arose subsequently.[3] Even though a bond dividend results in the impairing of the capital stock, the court will not interfere if no harm can come from it.[4] A statutory liability for dividends paid out of the capital stock abrogates all common-law liability, and if such statute does not prohibit such dividends they may be declared and paid subject to such liability.[5]

In view of the rule that dividends can be made only from profits, if any one objects, it becomes important to ascertain what part of the income of a corporation constitutes "profits" which may be used for a dividend. This question has caused the courts considerable difficulty. There have been various definitions, explanations, and different states of facts involved in the cases which have come before the courts. The supreme court of the United States has said that "the term 'profits,' out of which dividends alone can properly be declared, denotes what remains after defraying every expense, including loans falling due, as well as the interest on such loans."[6] An

Moxham *v.* Grant, [1899] 1 Q. B. 480; aff'd, [1900] 1 Q. B. 88.

Under the New Hampshire statute of 1844 to the effect that the state should be entiled to the net profits of railroads in excess of ten per cent. per annum on the money invested by the stockholders, the state must do more than prove that more than ten per cent. dividends have been paid to the stockholders. The state must prove that the excess came from the earnings of the road and was not a division of the capital or derived from some source other than tolls paid by the public. State *v.* Manchester, etc. R. R., 70 N. H. 421 (1901).

1 American, etc. Co. *v.* Norment, 157 Fed. Rep. 801 (1907).

2 Ward *v.* City Trust Co., 192 N. Y. 61 (1908), rev'g 117 N. Y. App. Div. 130, the court intimating that the trust company would have been protected if inquiry by it would not have resulted in developing the actual facts.

3 Little *v.* Garabrant, 90 Hun, 404 (1895); aff'd, 153 N. Y. 661.

4 Chaffee *v.* Rutland R. R., 55 Vt. 110 (1882).

5 People *v.* Barker, 141 N. Y. 251 (1894).

6 Mobile, etc. R. R. *v.* Tennessee, 153 U. S. 486 (1894).

English court says that profits are "the excess of the current gains over the working expenses as shown by revenue accounts as distinguished from capital accounts." [1] A clear idea of what constitutes profits available for dividends can be obtained only by a study of the cases themselves.[2]

[1] *Re* London & Gen. Bank, 72 L. T. Rep. 227, 229 (1894); aff'd, [1895] 2 Ch. 166, 673. The House of Lords in Dovey, etc. *v.* Cory, [1901] A. C. 477, said: "Even the distinction between fixed and floating capital which in an abstract treatise like Adam Smith's Wealth of Nations is appropriate enough, may, with reference to a concrete case, be quite inappropriate. It is easy to lay down as an abstract proposition that you must not pay dividends out of capital, but the application of that very plain proposition may raise questions of the utmost difficulty in their solution. I desire, as I have said, not to express any opinion, but as an illustration of what difficulties may arise, the example given by the learned counsel of one ship being lost out of a considerable number, and the question whether all dividends must be stopped until the value of that lost ship is made good out of the further earnings of the company or partnership, is one which one would have to deal with. On the one hand, people put their money into a trading concern to give them an income, and the sudden stoppage of all dividends would send down the value of their shares to zero and possibly involve their ruin. On the other hand, companies cannot at their will and without the precautions enforced by the statute reduce their capital; but what are profits and what is capital may be difficult and sometimes an almost impossible problem to solve." "There is no hard-and-fast rule by which the company can determine what is capital and what profit. It may be safely said that what losses can be properly charged to capital and what to income is a matter for business men to determine, and it is often a matter on which the opinion of honest and competent men will differ. . . . There is no single definition of the word 'profits' which will fit all cases." Bond *v.* Barrow, etc. Co., [1902] 1 Ch. 353.

[2] "Net earnings are, properly, the gross receipts, less the expenses of operating the road to earn such receipts. Interest on debts is paid out of what thus remains; that is, out of the net earnings. Many other liabilities are paid out of the net earnings. When all liabilities are paid, either out of the gross receipts or out of the net earnings, the remainder is the profit of the shareholders to go towards dividends, which in that way are paid out of the net earnings." St. John *v.* Erie Ry., 10 Blatchf. 271, 279 (1872); s. c., 21 Fed. Cas. 167; s. c., aff'd, 22 Wall. 136 (1874); Warren *v.* King, 108 U. S. 389 (1883); Van Dyck *v.* McQuade, 86 N. Y. 38, 47 (1881). "Popularly speaking, the net receipts of a business are its profits." Eyster *v.* Centennial Board, 94 U. S. 500 (1876). "Surplus earnings" are said to be the moneys available for dividends. Williams *v.* Western Union Tel. Co., 93 N. Y. 162, 191 (1883). "Net earnings" is a term synonymous with "net income," and also "net income" as used in the statute under consideration. Phillips *v.* Eastern R. R., 138 Mass. 122 (1884). In Belfast, etc. R. R. *v.* Belfast, 77 Me. 445 (1885), it is said that the term "net earnings" does not imply that the company is wholly out of debt. In Park *v.* Grant Locomotive Works, 40 N. J. Eq. 114 (1885), it is said that profits mean "the clear gains of any business venture, after deducting the capital invested in the business, the expenses incurred in its conduct, and the losses

There are some general principles connected with this subject which have been established by the adjudications. It is not necessary for a railroad or other corporation to use its profits to pay its funded or bonded debt instead of using those profits for a divi-

sustained in its prosecution;" and further, that bills receivable constitute a part of the assets or net profits, but are not to be considered as the basis of a dividend, unless they can be sold without material loss. In the following cases the term "net profits," or an equivalent phrase, is defined: Coltness Iron Co. *v.* Black, L. R. 6 App. Cas. 315 (1881); New York, etc. R. R. *v.* Nichals, 119 U. S. 296 (1886). In Richardson *v.* Buhl, 77 Mich. 632 (1889), the court approved of the following statement: "That the first thing to be done by any manufacturer who would ascertain his net earnings during the preceding year is to take a careful inventory of what he has left, including his plant and machinery, and then make just and full allowances for all losses and shrinkages of every kind that he has suffered in his property during the year, and for all expenses of every kind, ordinary or extraordinary, that have occurred during the year; and, having made such inventory, and deducted such losses and shrinkage of every kind, his net earnings will be the difference between all his investments in his business and all his expenses of every kind on the one hand, and this new inventory, with the reductions properly made, and all that he has received of every kind, on the other hand; and if his books are properly kept and proper deductions made, these net earnings will finally appear on the balance sheet to the credit of the profit-and-loss account." In Gratz *v.* Redd, 4 B. Mon. (Ky.) 178, 187 (1843), it is held that capital paid in on stock which is afterwards forfeited does not thereby become profits and liable to be distributed as a dividend, also that money paid in as capital must remain and be treated and expended as capital, whether the stock that represents it is forfeited or not. To distribute such money as profits is to squander and dissipate the capital stock. "Gross earnings" include earnings of the railroad through a transfer company operated by it. Dardanelle, etc. Ry. *v.* Shinn, 52 Ark. 93 (1889). "The assets, resources, and funds of the corporation must consist of cash on hand and other property, and, if such assets exceed the liabilities, a dividend can be lawfully declared; in other words, a profit exists." Hubbard *v.* Weare, 79 Iowa, 678 (1890); Miller *v.* Bradish, 69 Iowa, 278 (1886). See also McDougall *v.* Jersey, etc. Co., 2 Hem. & M. 528 (1864). Where the stockholders pay all the debts and in connection therewith some unnecessary real estate is sold, a subsequent creditor cannot complain that the sale impaired the capital stock. Beardslee *v.* Shickler, 68 Atl. Rep. 44 (Penn. 1907). Where by statute a city is entitled to a percentage of a railroad company's net income from passenger traffic, the railroad cannot deduct its general expenses and damages to property nor interest on money used in construction in arriving at the net income. City of New York *v.* Manhattan Ry. Co., 119 N. Y. App. Div. 240 (1907). Where a city is entitled to a percentage of the "net income" from a street railway, this means the gross receipts, less general expenses, such as station, train and maintenance expense, but without deduction for taxes, damages to property and interest on debts. City of New York *v.* Manhattan Ry. Co., 192 N. Y. 90 (1908).

dend.[1] But it is necessary to pay the interest on such bonded debt before any dividend is declared.[2]

A past-due floating debt should be paid or funded before a dividend is declared.[3] A corporation often owes large debts and still has its

1 A company has power to and does raise its capital both by stock and by borrowing. "They expend that money in executing the works, and, the works having been executed, the capital of the company remains in the shape of the station-houses, the permanent way, the warehouses, and everything else which requires expenditure of capital. The shareholders . . . are not to be told that all these things are to be paid for before they are to have any dividends out of the income." Mills *v.* Northern Ry., L. R. 5 Ch. 621, 631 (1870). For a learned and very satisfactory discussion of when net earnings are to be retained for the purpose of accumulating a fund to pay a corporate debt not yet due, see Hazeltine *v.* Belfast, etc. R. R., 79 Me. 411 (1887). In Gratz *v.* Redd, 4 B. Mon. (Ky.) 178, 188 (1843), the court said that all interest must be paid out of profits, and should not be charged to construction account; also that a sinking fund should be provided and an annual contribution made to it out of the profits. Even though earnings received on a lease of the corporate property are used to pay diivdends, the lessee agreeing to pay the interest on the mortgage debt for a certain time, yet such dividends are not illegal, unless the corporation was insolvent at the time of the payment of the dividends or there was fraud. New Hampshire Sav. Bank *v.* Richey, 121 Fed. Rep. 956 (1903).

2 Mobile, etc. R. R. *v.* Tennessee, 153 U. S. 486, 498 (1894); Gratz *v.* Redd, 4 B. Mon. (Ky.) 178, 188 (1843). A dividend cannot properly be based on a statement which includes accrued interest with no allowance for interest on liabilities; outstanding accounts with no allowance for bad debts; and expense for perfecting a machine, it not being a success. Hubbard *v.* Weare, 79 Iowa, 678 (1890). Whether the interest on debentures can be legally charged upon the capital account of the company, the revenue available for dividend being thereby increased, was not decided in Bloxam *v.* Metropolitan Ry., L. R. 3 Ch. 337, 344, 350 (1868), but a preliminary injunction against the dividend was granted. Interest on money borrowed which accrues during process of construction and before the enterprise commences to earn money, may be charged to capital stock and need not be paid out of revenue. Hinds *v.* Buenos Ayres, etc. Co., 95 L. T. Rep. 780 (1906).

3 The funded debt need not be paid before dividends are declared, but "any debts which have been incurred and which are due from the directors or the company, either for steam-engines, for rails, for completing stations, or the like, which ought to have been and would have been paid at the time, had the defendants possessed the necessary funds for that purpose, those are so many deductions from the profits, which, in my opinion, are not ascertained till the whole of them are paid." Corry *v.* Londonderry, etc. Ry., 29 Beav. 263, 273 (1860). However, in Stevens *v.* South Devon Ry., 9 Hare, 313, 326 (1851), a stockholder failed in his suit to enjoin dividends until the floating debt was paid. The court said: "I am of opinion that the court ought not, upon this ground, to interfere by injunction. . . . I think also that the question upon this third point is one of internal management, with which the court cannot interfere." In Belfast, etc. R. R. *v.* Belfast, 77 Me. 445 (1885), the court said: "Net earnings are the

capital stock intact, and hence outstanding and disputed claims need not be first paid.[1]

A proper sum must first be expended or set aside for repairs and reconstruction to replace depreciation due to wear and tear.[2] In

gross receipts less the expenses of operating the road to earn such receipts; also less the interest on the bonded, funded, permanent, or standing debt; also floating debts 'which it is not wise and prudent to place in the form of a funded debt or to postpone for later payment;' also an annual contribution to a sinking fund to pay the funded debt, when the condition of the company renders it expedient, as where the company will at some future time earn only its operating expenses. The court also said that whether the floating debt should be paid and a contribution be made to a sinking fund 'depends upon the financial resources and abilities of the corporation and the prospects of its road,' and further, that the cost of construction may be charged to the capital-stock account." A dividend declared by a debenture company without provision being made for payment of its contingent liabilities may be illegal as against creditors. Crawford *v.* Roney, 61 S. E. Rep. 117 (Ga. 1908).

1 The court will not enjoin a dividend where the company shows that it has the necessary profits, even though there are outstanding claims on illegally issued stock. Carpenter *v.* New York, etc. R. R., 5 Abb. Pr. 277 (1857). Where the company denies that the complainant is a stockholder, a preliminary injunction falls. Blatchford *v.* New York, etc. R. R., 5 Abb. Pr. 276 (1857). Directors are not liable to replace dividends declared (by reason of a statute making them so liable if the dividends are not "from the surplus profits"), although dividends were declared while the company, being engaged in mining, assumed a mortgage debt in buying additional property, a sinking fund being begun to meet that liability gradually, and although the money to pay the dividend was borrowed, money to that amount having been put into improvements, and although losses due to an injunction against using a stream of water were not at once charged up to operating expense. Excelsior, etc. Co. *v.* Pierce, 90 Cal. 131 (1891).

2 In Davison *v.* Gillies, L. R. 16 Ch. D. 347, note (1879), the court, at the instance of a stockholder, enjoined the declaration of a dividend on the ground that the street-railway tracks of the company had become worn out, and needed very expensive repairs, for which no provision had been made by the company, and that this capital so used up must be restored before a dividend was declared. The by-laws prohibited dividends except from profits. The court said: "A tramway company lay down a new tramway. Of course the ordinary wear and tear of the rails and sleepers, and so on, causes a sum of money to be required from year to year in repairs. It may or may not be desirable to do the repairs all at once; but if at the end of the first year the line of tramway is still in so good a state of repair that it requires nothing to be laid out on it for repairs in that year, still, before you can ascertain the net profits, a sum of money ought to be set aside as representing the amount in which the wear and tear of the line has, I may say, so far depreciated it in value as that that sum will be required for the next year or next two years. . . . I should think no commercial man would doubt that this is the right course—that he must not calculate net profits until he has provided for all the ordinary repairs and wear and tear

other words, the fund available for dividends is ascertained by taking into account the cost of repairs and a reasonable allowance for depreciation, giving credit for all actual permanent improvements.[1] But in the case of a company owning patent rights, or of a mining company whose product when once used can never be replaced, it

occasioned by his business. . . . That being so, it appears to me that you can have no net profits unless this sum has been set aside. When you come to the next year, or the third or fourth year, what happens is this: as the line gets older the amount required for repairs increases. If you had done what you ought to have done, that is, set aside every year the sum necessary to make good the wear and tear in that year, then in the following years you would have a fund sufficient to meet the extra cost." See also, as to construction account, Mackintosh *v.* Flint, etc. R. R., 34 Fed. Rep. 583 (1888). In determining whether a railroad rate is reasonable the cost of construction and equipment in a particular year may be distributed over a series of years. Illinois, etc. R. R. *v.* Interstate Commerce Commission, 206 U. S. 441 (1907). Where a corporation agrees to pay over a part of its profits during the year it cannot decrease them by charging off a large sum to depreciation. Miller *v.* Car Trust Co., 120 N. Y. App. Div. 442 (1907).

1 Depreciation at the rate of two per cent. a year was charged in one case, but the directors were held liable under the New Jersey statute for illegally declaring dividends. Whittaker *v.* Amwell Nat. Bank, 52 N. J. Eq. 400 (1894). "The following quotation from Greene on "Corporation Finance" (1897, pp. 83, 114) will show how an auditor would treat depreciation. He says:

"One of the perplexing things in the financial management of a large manufacturing or trading company is the treatment of the expenditures for the care of the plant. A depreciation account in some shape must be kept by every company or firm in business. The real estate may decline in value and in any case, in any progressing concern, money will be required to be spent each year to adjust the buildings more perfectly to the requirements of the business, and yet these adjustments may not add anything to the salable value of the property, and should not, therefore, be added in the accounts to the company's investment in real estate. In like manner, machinery will wear out, and is always subject to the danger of new inventions, which may render the old machinery practically worthless. It is not easy to foresee when a new outfit will be in part or in whole required, though experience soon places a limit to the number of years in which a given set of machinery may be useful. The proper course in these cases is always the conservative one. The corporation should estimate the probabilities of depreciation always against itself, and set aside yearly such sums from its profits as will suffice to renew so much of the plant as may be expected to wear out or to become useless in a given time. Unless this depreciation fund is carefully thought out and its separation from profits rigidly insisted upon, the shareholders of the corporation and perhaps the bondholders may in the course of years find that their securities cover a property of little or no business value. If certain sums are not set aside to meet this depreciation, and if for this reason dividends are paid larger than would otherwise be the case, to the extent to which this is carried, the returns received by the shareholders are not dividends, but their capital returned to them in piecemeal. These depreciation sums should be real and not merely book-keeping liabilities of the company to itself.

"Modern corporation accounting requires that in theory a sharp line of distinction should be drawn between outlays which may be considered a part of the regular working expenses, and those which are chargeable to an increased investment in the business. In theory the former should be deducted from the gross earnings before the net revenue is determined, while the latter may be met by an increased issue of bonds or shares. There is no doubt of the correctness of this principle in general, but in its practical application it is subject to

is not necessary to set aside funds for the purpose of purchasing new patents or a new mine.[1]

great modification. English shareholders in American corporations usually insist upon such a system of accounting as divides the expenditures strictly according to this rule; and such indeed is the general practice in Great Britain. By charging to capital every item small and large which could by any possibility be construed to be a betterment, the British railways have increased their capitalization until they are dependent for a continuance of interest payments on good traffics year by year. Thus far no harm has come to these railways from this policy, because the fluctuations in the volume of their traffics have been comparatively slight.

"But in the United States more caution must be observed in this matter. From the very nature of the case, business of all kinds in a developing country must be more subject to changes in profitableness than in older countries. The very character of the American people, energetic and progressive, makes business all the more liable to such fluctuations. Bad years follow good years in every line of American industry, although differences are less violent in those trades which are the longest established, and among those companies which have been in operation long enough to render their business comparatively stable. The principle, therefore, of charging all so-called betterments to capital and meeting the cost from the sale of bonds or shares, requires modification according to the circumstances of each particular company. The more fluctuating the volume of business has been or is likely to be, the more important is it that in one form or another a part of the profits in prosperous years should be withheld from the shareholders and put into the property or set aside for its renewal. To those who wish a working principle to distinguish the proper items to be charged to capital account in the actual management of American corporations, railway and other, the following definition is suggested: No additions to the property, either to the real estate or to the machinery (if a manufacturing company), or to the road-bed and track (if a railway company), should be considered betterments and charged to capital, unless they increase the productivity or earning capacity of the plant. Under this rule the purchase of additional equipment for a railway would be an expenditure which could conservatively be met by the issue of bonds or equipment notes, because such purchases would enable a larger volume of traffic to be handled; on the other hand, the replacement of a wooden bridge by an iron one would not be a proper charge to capital, under our definition, unless it was one of a series of expenditures deliberately resolved upon in order that heavier trains could be run and a larger volume of traffic handled, thus increasing the revenues of the company—an increase which our theory demands should be clearly seen to be possible after the various amounts of capital set aside for this purpose had been spent. The same rule might be applied to corporations other than railways; the safe course is to charge against revenues (possibly through the profit and loss account) the cost of all additions to the property which do not increase the output or decrease the cost of production. Yet any rule or any principle in so delicate a matter can properly be applied in each case only after a careful study of all the circumstances, including the business of past years and the prospect for the future. . . .

"Every active concern must in some shape keep a depreciation account, to which shall be charged certain sums for renewal of machinery, etc., before profits are divided. If this is not done, the company will at the end find itself without plant and without money."

[1] A mining of patent-right company may make dividends without setting aside sinking funds to meet the gradual consumption of capital stock. The argument to the contrary "leads to the conclusion that the most prosperous mining corporation, doing the heaviest business and paying the largest dividends, is suffering from the greatest impairment of capital and has drifted furthest towards final and hopeless insolvency." People, etc. *v.* Roberts, 156 N. Y. 585 (1898). In the case of Bond *v.* Barrow, etc. Co., [1902] 1 Ch. 353, the court said that it had not been decided that every company owning wasting property need create a depreciation fund, but it had been decided only that some companies with wasting assets need not have a depreciation fund.

A company owning a mine, lease, or patent may declare dividends out

In estimating the profits for a year for the purpose of declaring a dividend, it is not necessary to take into account the decrease in of its net proceeds, although the necessary result is that that much is permanently taken away from the substance of the estate. Excelsior, etc. Co. *v.* Pierce, 90 Cal. 131 (1891). Judge Lindley, in Verner *v.* General, etc. Trust, [1894] 2 Ch. 239, 266, said: "But the word 'profits' is by no means free from ambiguity. The law is much more accurately expressed by saying that dividends cannot be paid out of capital than by saying that they can only be paid out of profits. The last expression leads to the inference that the capital must always be kept up and be represented by assets which, if sold, would produce it; and this is more than is required by law. Perhaps the shortest way of expressing the distinction which I am endeavoring to explain is to say that fixed capital may be sunk and lost, and yet that the excess of current receipts over current payments may be divided, but that floating or circulating capital must be kept up, as otherwise it will enter into, and form a part of, such excess, in which case to divide such excess without deducting the capital which forms part of it will be contrary to law." In Lambert *v.* Neuchatel Asphalte Co., 51 L. J. (Ch.) 882 (1882), a stockholder sought to enjoin a dividend on the ground that the beds of asphalt belonging to the company were being consumed by the company, and that funds sufficient to replace this consumption should be set aside before any dividend was declared. Otherwise the capital would gradually be entirely used up. The court refused the injunction, inasmuch as the by-laws of the company gave absolute discretion to the stockholders to determine the net profits. No creditor's rights were involved in the case.

A very full and careful discussion of the right to declare dividends out of a mining property is to be found in Lee *v.* Neuchatel Asphalte Co., L. R. 41 Ch. D. 1, 20, 22, 24 (1889). In that case, however, the mines were at the time of the litigation more valuable than at the time when the company was formed, and it is to be noticed that the rules laid down expressly assumed that enough property existed to pay all creditors after declaring the dividend. The court said, per Lindley, J.:

"It is obvious with respect to such property, as with respect to various other properties of a like kind, mines and quarries and so on, every ton of stuff which you get out of that which you have bought with your capital may, from one point of view, be considered as embodying and containing a small portion of your capital, and that if you sell it and divide the proceeds you divide some portion of that which you have spent your capital in acquiring. It may be represented that that is a return of capital. All I can say is, if that is a return of capital, it appears to me not to be such a return of capital as is prohibited by law. . . .

"As I pointed out in the course of the argument, and I repeat now, suppose a company is formed to start a daily newspaper; supposing it sinks £250,000 before the receipts from sales and advertisements equal the current expenses, and supposing it then goes on, is it to be said that the company must come to a stop, or that it cannot divide profits until it has replaced its £250,000, which has been sunk in building up a property which if put up for sale would perhaps not yield £10,000? That is a business matter left to business men. If they think their prospects of success are considerable, so long as they pay their creditors there is no reason why they should not go on and divide profits,

the value of the assets and the impairment of the capital stock of the company prior to that year. The fact that in a year prior to the declaration of the dividend some portion of the capital has been lost and has not since been made good affords no ground for restraining the payment of a dividend out of profits subsequently earned.[1] A corporation "which has lost part of its capital can lawfully declare or pay a dividend without first making good the cap-

so far as I can see, although every shilling of the capital may be lost. It may be a perfectly flourishing concern, and the contrary view, I think, is to be traced to this that there is a sort of notion that the company is debtor to capital. In an accountant's point of view it is quite right, in order to see how you stand, to put down company debtor to capital. But the company do not owe the capital. What it means is simply this: that if you want to find out how you stand, whether you have lost your money or not, you must bring your capital into account somehow or other. . . .

"If a company is formed to acquire and work a property of a wasting nature, for example, a mine, a quarry, or a patent, the capital expended in acquiring the property may be regarded as sunk and gone, and if the company retains assets sufficient to pay its debts, it appears to me that there is nothing whatever in the act to prevent any excess of money obtained by working the property over the cost of working it from being divided amongst the shareholders; and this, in my opinion, is true although some portion of the property itself is sold, and in some sense the capital is thereby diminished. . . .

"But it is, I think, a misapprehension to say that dividing the surplus after payment of expenses of the produce of your wasting property is a return of capital in any such sense as is forbidden by the act."

The court held consequently that the stockholder's suit to enjoin the dividend must fail.

1 Hence where, in 1882, £72,000 was charged off for bad debts, but this was offset by credit for £69,000 for increase in the value of land owned by the company, this transaction was not to be considered in 1885 in ascertaining the profits of 1885. It is immaterial whether the alleged increase in the value of the land was correct or not. Bolton *v.* Natal Land, etc. Co., [1892] 2 Ch. 124. Though the capital stock has been impaired in time past, it has been held that dividends may be declared out of profits subsequently earned without setting them aside to restore the lost capital. Healey, Company Law & Pr. (3d ed. 1894), 138. Where a bank sells its business for a certain sum, and subsequently buys back a portion of it for another sum, it may declare a dividend of the surplus that remains after deducting from the first-mentioned sum the second-mentioned sum, and also the capital stock. Lubbock *v.* British Bank, etc., [1892] 2 Ch. 198. At common law a company may pay a dividend, even though its capital stock has been impaired in past years. Where losses incurred by a banking company during the year are written off, and the balance of the receipts in each year over the outgoings in the same year, after making some allowance for bad debts and deductions for sums carried over to a reserve fund, is treated as the profit of that year, and is divided as dividends without making any further provision for the losses of previous years, the directors are not liable on the ground that the dividends were paid out of capital, although this method of procedure would ultimately

ital which has been lost."[1] Thus, although a mining company for several years is obliged to pay the interest on its debts out of the capital stock, nevertheless in subsequent years, when large profits are earned, it may use such profits for dividends in any year after paying the interest on the debt for that year. The company need not first restore the capital stock.[2] Neither need it accumulate profits to offset the "water" in its stock.[3]

In Connecticut it is held that dividends may be declared on pre-

exhaust the paid-up capital of the company. The discretion of the managers in fixing the losses to be charged to capital and those to be charged to income is not inquired into by the courts, unless obviously improper charges to capital have been made, in order to increase apparent profits. The directors are not personally liable unless they were culpably or grossly negligent in the matter. Even though a director knew his name was signed to a report to the stockholders after he has resigned, yet he is not liable, where he took no part in drawing the report or in recommending the dividend based thereon. It seems that an improper dividend may be recovered from the directors, even though the creditors have all been paid and the stockholders will have the benefit of the recovery, they having been ignorant of the fact that the dividends were paid from capital stock. *Re* National Bank of Wales, [1899] 2 Ch. 629, rev'g 79 L. T. Rep. 667. The House of Lords in Dovey, etc. *v.* Cory, [1901] A. C. 477, declined to discuss the question as to whether the losses in one year must be made up out of the following year's profits, that question not being directly involved in the case.

1 Verner *v.* General, etc. Trust, [1894] 2 Ch. 239. "However much capital you have lost at any given date, if your profit and loss account shows a profit balance, then to the extent of that profit balance you are entitled to distribute that money as dividend, notwithstanding the fact that you have lost capital which you have not replaced." *Re* Hoare & Co. Ltd., [1904] 2 Ch. 208. Where the value of the assets of a solvent company has fallen below the nominal amount of the capital stock, the company, in the absence of any special provisions in its articles or of a contract binding the company, is under no obligation to make good such depreciation in the value of the assets before declaring a dividend out of the profits. Depreciation in the value of the lease and good-will of a company is a loss of "fixed" as distinguished from "floating" capital. The balance sheet of a company cannot therefore be impeached on the ground that it does not charge anything against revenue in respect of depreciation of good-will. Wilmer *v.* McNamara & Co., [1895] 2 Ch. 245.

2 Bosanquet *v.* St. John, etc., Ltd., 77 L. T. Rep. 206 (1897).

3 Even though it is clear that property was transferred to a corporation for stock and bonds, the par value of which is much greater than the actual value of the property, yet a dividend on the stock cannot be enjoined by a stockholder on the ground that the profits should be used to add to the actual value of the assets sufficient to make them equal to the par value of the stock and bonds so issued, even though the amount of "water" is $11,000,000, it appearing that there were no floating debts and it not appearing that any one was defrauded. Goodnow *v.* American, etc. Co., 66 Atl. Rep. 607 (N. J. 1907), aff'd 69 Atl. Rep. 1015.

ferred stock where the net earnings since the issue of the stock are sufficient, even though prior to such issue the capital stock had been impaired,[1] but that ordinarily, in declaring dividends, the directors are not justified in assuming that the value of property which was originally received in payment for stock is still worth that value, and if such property at the time of the dividend was not actually worth the par value of the stock which was issued for it, the dividend is illegal, and a director receiving such dividend as a stockholder may be compelled to pay it back at the instance of a receiver of the corporation.[2] This rule is also subject to statutory restrictions, as, for instance, in New York state, where dividends can be made only from "surplus profits."[3] A dividend may be declared although the company has not yet completed its works.[4] In the case of railroads, the cost of additional rolling-stock and improvements may be charged to capital account, and need not be paid before a dividend is declared.[5] Where one company buys out another and agrees to pay a certain salary to an officer of the latter, or a lump sum in lieu thereof, such lump sum, if paid, is a part of the capital stock, and need not be considered as expenses.[6]

Insurance companies cannot declare dividends out of unearned premiums.[7] Banks cannot declare dividends out of interest not

1 Cotting *v.* New York, etc. R. R., 54 Conn. 156 (1886).

2 Davenport *v.* Lines, 72 Conn. 118 (1899), *contra*, 69 Atl. Rep. 1015.

3 See L. 1892, ch. 688, § 23, and Penal Code, § 594.

4 In Browne *v.* Monmouthshire Ry., 13 Beav. 32 (1851), the court refused to enjoin a company from declaring a dividend, the only ground of complaint being that the company had not yet completed its works. Penalties due by reason of a contractor not completing his contract within a specified time may be used for dividends. Such penalties, however, may be released. Alcoy, etc. Co. *v.* Greenhill, 79 L. T. Rep. 257 (1898).

5 Rolling-stock may be carried to capital account instead of being charged to operating expense. Mills *v.* Northern Ry., L. R. 5 Ch. App. 621 (1870). For a definition of "net earnings" as used in the federal statutes in regard to the government's claims on the Pacific railroads, see Union Pacific R. R. *v.* U. S., 99 U. S. 402 (1878); U. S. *v.* Central Pac. R. R., 99 U. S. 449 (1878); U. S. *v.* Kansas Pac. Ry., 99 U. S. 455 (1878); U. S. *v.* Sioux City, etc. R. R., 99 U. S. 491 (1878). Although ordinarily from the gross earnings there should be deducted "a reasonable amount for betterments and improvements, rendered necessary by the gradual increase of traffic, the better discharge of business, and the public accommodation," in arriving at the net earnings under the Thurman act relative to the Pacific railroads, no such deductions are to be made. U. S. *v.* Central Pac. R. R. 138 U. S. 84 (1891).

6 Royal Ins. Co. *v.* Watson, [1897] A. C. 1.

7 Unearned premiums received by an insurance company, on which the risks are still running, are not surplus profits out of which dividends can legally be made, there not being a sufficient surplus on hand in excess of the capital stock to meet the prob-

yet received.[1] The question of what constitutes profits applicable to dividends arises often in connection with preferred stock.[2]

Profits earned and invested in times of prosperity may properly be paid out as dividends subsequently and at a time when no dividends have been earned.[3] The by-laws may provide that any surplus carried to the reserve may subsequently be used for dividends to make good lost capital, or to apply to any other purpose within the charter powers of the company.[4] When the company has used profits for improvements, it may lawfully borrow an equivalent sum of money for the purpose of a dividend.[5] And it may properly

able losses on risks not yet terminated. De Peyster *v.* American Fire Ins. Co., 6 Paige, 486 (1837). See also Scott *v.* Eagle Fire Co., 7 Paige, 198 (1838); Lexington, etc. Ins. Co. *v.* Page, 17 B. Mon. (Ky.) 412 (1856).

1 "Money earned as interest, however well secured, or certain to be eventually paid, cannot in fact be distributed as dividends to stockholders, and does not constitute surplus profits." People *v.* San Francisco Sav. Union, 72 Cal. 199 (1887). In Iowa it has been held that where a bank with a capital of $106,860; assets of $156,904; liabilities of $56,065, declares and pays a dividend of ten per cent., *i. e.* $10,686, the corporate creditors could not compel the stockholders to return the dividend. Miller *v.* Bradish, 69 Iowa, 278 (1886). In *Re* London & Gen. Bank, 72 L. T. Rep. 227, 230 (1894); aff'd, [1895] 2 Ch. 166, 673, the court intimates "that nothing ought to be included as annual profit which could not be realized as a profit if need should be," the court having before it the question of interest earned but not collected. Where the directors in declaring dividends include as good assets renewed notes, it may be for the jury to decide whether such renewed notes were in the due course of business or were taken merely to cover defaulted and bad debts. Dykman *v.* Keeney, 34 N. Y. App. Div. 45 (1898).

2 See ch. XVI, *supra*.

3 Mills *v.* Northern Ry. etc. Co., L. R. 5 Ch. 621 (1870); Hoole *v.* Great Western Ry., L. R. 3 Ch. 262 (1867); Beers *v.* Bridgeport Spring Co., 42 Conn. 17 (1875); *Re* Mercantile Trading Co., L. R. 4 Ch. 475 (1869).

4 Such reserve need not be represented by specific property set apart, but may be a part of the general assets. In case of a loss, a part of the reserve may be used to cancel the loss, and part may be canceled by reducing the capital stock, although this process will leave a reserve available at once for dividends after the loss has been charged off. A reserve differs from a reserve fund in that the latter represents specific property set apart and the former does not. *Re* Hoare & Co., Ltd., [1904] 2 Ch. 208. The court in a dictum stated that the premium paid on the issue of stock at a price greater than par might be used for a dividend. Where the stockholders contribute a surplus and afterwards distribute it again, this is not a dividend within the meaning of a tax statute. People *v.* Knight, 96 N. Y. App. Div. 120 (1904). Funds accumulated by a bank and carried on the books under the head of profit and loss may not be "surplus," yet may be subject to taxation as an accretion to capital. Leather, etc. Bank *v.* Treat, 128 Fed. Rep. 262 (1904).

5 Mills *v.* Northern Ry., etc. Co., L. R. 5 Ch. 621 (1870); *Re* Mercantile Trading Co., L. R. 4 Ch. 475, 492 (1869). A dividend may be declared if the revenue account shows profits, even though such profits are not on

borrow money to pay a dividend if, upon a fair estimate of its assets and liabilities, it has assets in excess of its liabilities and capital stock equal to the amount of the proposed dividend.[1] The subsequent insolvency of the corporation does not invalidate a dividend declared when there were net profits.[2] The English authorities go further and hold that where profits have been earned and properly entered as profits on the corporation books they belong to the stockholders, even though thereafter the corporation becomes insolvent and is wound up before such profits are declared to be and set apart as dividends.[3] And even though the business is a hazardous one, money need not be set aside for possible disasters.[4]

Upon a reduction of the capital stock the surplus funds over and above the full amount of the capital stock as reduced may be divided among the stockholders, the only restriction being that such a distribution must leave the reduced capital stock entire and unimpaired. A stockholder may insist upon a division of such a surplus.[5]

hand in the way of cash. *Re* London & Gen. Bank, 72 L. T. Rep. 227 (1894); aff'd, [1895] 2 Ch. 166. 673.

1 *Re* Mercantile Trading Co., L. R. 4 Ch. 475 (1869). "A company is quite as competent to declare dividends out of property which is invested for the time being in buildings, or anything else, as it is out of cash in hand, and it is not at all necessary that a company, any more than an individual, should have cash at the bank on which he can draw in order to declare dividends." Municipal, etc. Land Co. *v.* Pollington, 63 L. T. Rep. 238 (1890).

2 Reid *v.* Eatonton Mfg. Co., 40 Ga. 98 (1869); Le Roy *v.* Globe Ins. Co., 2 Edw. Ch. 637 (1836). In deciding whether a dividend was rightfully made, the transaction must be viewed from the standpoint of that time, and not in the light of subsequent events. Notes or overdrafts by persons then considered abundantly good, included among the corporate assets when the dividend was declared and paid, should not be regarded as losses sustained by the corporation because they afterwards proved to be unavailable. Main *v.* Mills, 6 Biss. 98 (1874); s. c., 16 Fed. Cas. 506, where it is stated that this decision was afterwards partially reversed. *Cf.* Flitcroft's Case, L. R. 21 Ch. D. 519 (1882), where the directors figured in what they knew were bad debts.

3 The creditors of the corporation are entitled to the corpus of the estate, but not to any profits. If there is preferred stock, such profits go to that stock. Bishop *v.* Smyrna, etc. Ry., [1895] 2 Ch. 265.

4 A balance sheet sustaining a dividend is upheld where the business is extra-hazardous, such as blockade-running, and such dividend need not be refunded, even though the blockade runners are lost and other assets turn out to be worthless. *Re* Mercantile Trading Co., L. R. 4 Ch. App. 475 (1869).

5 Seeley *v.* New York, etc. Bank, 8 Daly, 400 (1878); s. c., Thompson Nat. Bank, Cas., 804, aff'd, 78 N. Y. 608 (1879); Strong *v.* Brooklyn Cross-Town R. R., 93 N. Y. 426, 435 (1883). See also § 548, *infra;* Eyster *v.* Centennial Board, 94 U. S. 500 (1876); Parker *v.* Mason, 8 R. I. 427 (1867). In the case *Re* Welsbach, etc. Co., Ltd., [1904] 1 Ch. 87, the court said: "Broadly speaking, a reduction of capital by writing off loss is, I repeat,

The question of dividends where one road is consolidated with another is considered elsewhere.[1]

§ 547. *A stockholder may enjoin an illegal dividend.*—A court of equity will, upon the application of a stockholder, enjoin an attempt to distribute in dividends any part of the capital stock.[2] But the courts will not lightly review the decision of the board of directors in regard to whether the necessary profits actually exist.[3] The court

not to the injury, but to the benefit of the shareholder. The persons whom it may injure are the creditors (if any). The result of writing off the loss is, that the company is no longer bound to keep the balance of its debit in respect of capital as large a sum; but, to the extent to which it resumes paying dividends at an earlier date, of course the creditors lose assets to which they would otherwise be entitled." See also *Re* Hoare & Co., Ltd., [1904] 2 Ch. 208, *supra*. Where the capital stock is reduced, and the corporate property over and above the reduced capital stock is distributed among the stockholders, this is not a dividend within the meaning of the New York tax statute. People, etc. *v.* Roberts, 41 N. Y. App. Div. 21 (1899).

1 See § 270, *supra*.

2 Macdougall *v.* Jersey Imperial Hotel Co., 2 Hem. & M. 528 (1864); Bloxam *v.* Metropolitan Ry., L. R. 3 Ch. 337 (1868); Salisbury *v.* Metropolitan Ry., 38 L. J. (Ch.) 249 (1869); s. c., on further hearing, 22 L. J. Rep. 839; Carlisle *v.* Southeastern Ry., 1 Macn. & G. 689 (1850); Ward *v.* Sittingbourne, etc. Ry., L. R. 9 Ch. 488 (1874); Davison *v.* Gillies, L. R. 16 Ch. D. 347, n. (1879). "Dividends can be rightfully paid only out of profits. Corporations are liable to be enjoined by shareholders or creditors from making a distribution in dividends of capital." Mobile, etc. R. R. *v.* Tennessee, 153 U. S. 486 (1894), a dictum. A stockholder has the right to enjoin the payment of a dividend from the capital stock, but the bill for that purpose must be explicit in its allegations. Coquard *v.* National, etc. Co., 171 Ill. 480 (1898). See also cases in preceding section. By its certificate of incorporation a New Jersey corporation may have power to purchase and retire part or all of its preferred stock, and to issue in payment therefor its bonds or to sell its bonds and use the proceeds to retire such preferred stock, or it may purchase and hold such stock for reissue. The offer to purchase must be made *pro rata* to all the preferred stockholders. Under the reserved rights to amend, alter, or repeal charters, the rights of stockholders among themselves cannot be impaired, except as required by public interest, but, while it is true that the charter constitutes a contract between the stockholders, yet under this reserved power the legislature may authorize existing corporations to purchase and retire preferred stock and issue in lieu thereof mortgage bonds, such amendment being construed to be in behalf of the public interest. Where a corporation has charter authority to retire its preferred stock and issue mortgage bonds in lieu thereof, on a vote of the directors and stockholders, a minority stockholder cannot enjoin such action on the ground that it would be disastrous in its effect on the corporation. Berger *v.* United States Steel Corp., 63 N. J. Eq. 809 (1902).

3 Where the directors declare a dividend after a proper investigation of the financial position of the company, the court will not lightly interfere with the payment thereof; but where they declare it without proper investi-

will not interfere if neither the stockholders nor the corporate creditors can be injured by the dividend.[1] The payment of a dividend will not be enjoined at the instance of a stockholder on the ground that there are no net profits, where the statute gives complete remedy at law against the directors, by rendering them personally liable for such dividends, there being no allegation that they are insolvent.[2] Where public notice is given on the first day of a month that a dividend on the preferred stock will be paid on the thirtieth day of the month, a bill filed on the twenty-fifth of the month to enjoin such dividend is too late, inasmuch as there is not time for the corporation to properly answer before the dividend is payable.[3] It has been held that if the dividend has been declared, but not paid, the stockholders must be joined as parties,[4] but this is hardly sound law.[5] The United States court sitting in the New York district has power to enjoin the payment of a dividend by a New Jersey corporation where such dividend is illegal.[6] A corporate creditor has no standing in court to enjoin a dividend, even though it will impair the capital stock.[7] But, in certain cases, owners of claims, even though

gation or professional assistance, and it is called in question, the burden of proof is upon them to show that it is to be fairly paid out of net profits. *Re* County Marine Ins. Co., L. R. 6 Ch. App. 104 (1870). See also Hoole *v.* Great Western Ry., L. R. 3 Ch. App. 262 (1867).

1 "Equity would not interfere with a dividend unless it appeared that somebody in particular was hurt or liable to be injured. It would not interfere after all danger had passed, and for the sake of vindicating general principles." Chaffee *v.* Rutland R. R., 55 Vt. 110, 133 (1882).

2 Schoenfeld *v.* American Can Co., 55 Atl. Rep. 1044 (N. J. 1903).

3 Schoenfeld *v.* American Can Co., 55 Atl. Rep. 1044 (N. J. 1903).

4 A stockholder may file a bill in behalf of himself and other stockholders to enjoin the declaration of dividends where there are no net profits; but where he has not joined all the stockholders as parties, he cannot enjoin the payment of a dividend already declared, even though the time of payment has not yet arrived. Fawcett *v.* Laurie, 1 Dr. & Sm. 192 (1860). To same effect, Carlisle *v.* Southeastern Ry., 1 Macn. & G. 689 (1850). See Browne *v.* Monmouthshire Ry., 13 Beav. 32 (1851); Coates *v.* Nottingham Water-works Co., 30 Beav. 86 (1861).

5 Even though a dividend has been declared, the payment of it may be enjoined at the instance of stockholders, and all the stockholders need not be jonied as parties defendant. Marquand *v.* Federal, etc. Co., 95 Fed. Rep. 725 (1899).

6 Marquand *v.* Federal, etc. Co., 95 Fed. Rep. 725 (1899). The decision in Howell *v.* Chicago, etc. R. R., 51 Barb. 378 (1868), denying jurisdiction, was overruled on this point in Prouty *v.* Michigan, etc. R. R., 1 Hun, 655 (1874). See also §§ 546, 734, *infra.*

7 Mills *v.* Northern Ry. etc. Co., L. R. 5 Ch. App. 621 (1870). See also § 735, *infra.* In Massachusetts no equitable relief can be granted against a foreign corporation, which has neither offices nor place of business in that state, to compel the company to declare and pay dividends according to the stipulations of their

not yet due, may prevent a distribution of capital stock upon a reduction thereof, unless security is given.[1]

§ 548. *Dividends which impair the capital stock may be illegal, and may be recovered back from the stockholders—Dividends on dissolution.*—As already shown, as against dissenting stockholders and as against corporate creditors a dividend can be lawfully declared only when sufficient net profits have been earned to pay that dividend. Accordingly, a dividend paid wholly or partly from the capital stock may be illegal, and may subject the corporation and the stockholders to serious liability. Hence the rule has been firmly established that, where dividends are paid in whole or in part out of the capital stock, corporate creditors, being such when the dividend was declared, or becoming such at any subsequent time, may, to the extent of their claims, if such claims are not otherwise paid, compel the stockholders to whom the dividend has been paid to refund whatever portion of the dividend was taken out of the capital stock.[2] The supreme court of the United States,

certificates of preferred stock. Williston *v.* Michigan Southern, etc. R. R., 95 Mass. 400 (1866). See also Berford *v.* New York Iron Mine, 4 N. Y. Supp. 836 (1889).

1 *Re* Telegraph Const. Co., L. R. 10 Eq. 384 (1870).

2 Curran *v.* Arkansas, 15 How. (U. S.) 304 (1853); Railroad Co. *v.* Howard, 7 Wall. 392 (1868); Osgood *v.* Laytin, 48 Barb. 463 (1867); aff'd, 3 Keyes, 521; Johnson *v.* Laflin, 5 Dill. 65, 86, note (1878); aff'd, 103 U. S. 800 (1880); Hastings *v.* Drew, 76 N. Y. 9, 19 (1879); Sagory *v.* Dubois, 3 Sandf. Ch. 466 (1846); Wood *v.* Dummer, 3 Mason, 308 (1824); s. c., 30 Fed. Cas. 435; Gratz *v.* Redd, 4 B. Mon. (Ky.) 178 (1843); Bank of St. Mary's *v.* St. John, 25 Ala. 566 (1854); Bartlett *v.* Drew, 57 N. Y. 587 (1874); Heman *v.* Britton, 88 Mo. 549 (1885); Story, Eq. Jur. (13th ed., 1886), § 1252. A stockholder who receives an illegal dividend is liable for it, even though he has paid it over to another person to whom the stock belonged. Finn *v.* Brown, 142 U. S. 56 (1891). Where the stockholders distribute the assets among themselves, a creditor may follow the assets. Panhandle Nat. Bank *v.* Emery, 78 Tex. 498 (1890). The stockholders of a corporation have, in Louisiana, no right to appropriate any part of its assets to pay large salaries to themselves as officers of the company, until all creditors who are not stockholders have been paid. Cochran *v.* Ocean Dry Dock Co., 30 La. Ann. 1365 (1878). In Lexington, etc. Ins. Co. *v.* Page, 17 B. Mon. (Ky.) 412 (1856), it is held that the action to recover the dividend in such a case may be maintained by the company or its assigns where the dividend had been paid by mistake. See also, in general, Skrainka *v.* Allen, 7 Mo. App. 434 (1879); Ward *v.* Sittingbourne, etc. Ry., L. R. 9 Ch. App. 488 (1874); Clapp *v.* Peterson, 104 Ill. 26 (1882), holding that the property so withdrawn was liable for the creditor's whole debt and not merely for a *pro rata* share thereof. If a fixed per cent. is drawn out by stockholders instead of a dividend, and this per cent. exceeds the profits, a stockholder, upon the insolvency of the corporation, must pay back the excess received by him. Reading Trust Co. *v.* Reading Iron Works, 137 Pa. St. 282 (1890).

however, has held that the receiver of a national bank cannot recover a dividend paid to a stockholder, even though it was paid entirely out of capital, where the stockholder receiving such dividend acted in good faith, believing the same to be paid out of profits, and where the bank, at the time such dividend was declared and paid, was not insolvent.[1] But a receiver of a national bank may recover back dividends paid at a time when the bank was insolvent, even though the stockholders did not know of such insolvency, and it seems that a suit in equity lies for that purpose.[2]

A stockholder may by bill in equity compel a return of a dividend paid out of the capital stock.[3] A stockholder, however, who receives dividends wrongfully declared cannot then, as a corporate creditor, hold other stockholders liable on a statutory liability for wrongfully declaring dividends.[4] And a corporate creditor may

Creditors may reach shares of stock that the corporation which becomes insolvent has distributed without a dividend. McKusick *v.* Seymour, etc. Co., 48 Minn. 158 (1892). Where the company is insolvent and all its property is sold and the proceeds divided among the stockholders the creditors may compel them to repay the same. Mitchell *v.* Jordan, 36 Wash. 645 (1905).

A payment of the subscription price by what purports to be a dividend or distribution of profits is invalid as against creditors, where such profits did not exist. Gager *v.* Paul, 111 Wis. 638 (1901). A preferred stockholder is liable to corporate creditors for illegal dividends paid on his stock the same as a common stockholder is. American, etc. Co. *v.* Eddy, 130 Mich. 266 (1902).

1 McDonald *v.* Williams, 174 U. S. 397 (1899). The court held also that "the theory of a trust fund has no application to a case of this kind." A stockholder is not liable to creditors of the corporation for dividends received by him without knowing that they were not paid from profits while the corporation was a going concern and apparently solvent. Great Western, etc. Co. *v.* Harris, 128 Fed. Rep. 321 (1903); aff'd, 198 U. S. 561. Under a statute allowing corporations to recover back from stockholders dividends paid to the latter from capital stock, it is no defense that the dividend was paid and received in good faith. American, etc. Co. *v.* Eddy, 138 Mich. 403 (1904).

2 Hayden *v.* Williams, 96 Fed. Rep. 279 (1899). In the case of Hayden *v.* Brown, 94 Fed. Rep. 15 (1899), in a suit by a receiver, judgment was rendered against various Vermont stockholders in a national bank in Nebraska for dividends paid from the capital stock, except so far as recovery was barred by the statute of limitations. See also Fort Payne Bank *v.* Alabama Sanitarium, 103 Ala. 358 (1894); Bingham *v.* Marion T. Co., 27 Ind. App. 247 (1901); *Re* Denham, L. R. 25 Ch. D. 752 (1883). It has been held in England, however, that where the by-laws provide that the directors, for salary, shall have ten per cent. of the surplus profits over a certain dividend, they may recover it, although they sue for it many years afterwards, when it turns out that the assets were overestimated, but in good faith. *Re* Peruvian Guano Co., [1894] 3 Ch. 690.

3 Holmes *v.* Newcastle, etc. Co., L. R. 1 Ch. D. 682 (1875).

4 Thompson *v.* Bemis Paper Co., 127 Mass. 595 (1879).

by his acts be estopped from attacking the dividend.[1] A purchaser of stock cannot complain of dividends illegally paid prior to his becoming a stockholder where it would be inequitable to allow him to do so.[2] Notes given by an insolvent corporation for unearned dividends are not legal except in *bona fide* hands.[3]

A corporate creditor may compel stockholders to refund the amount received by them on a distribution of the corporate assets upon dissolution or a sale of all the assets of the company, to the extent that his claim has not been paid, after he has exhausted his remedy against the corporation itself.[4] So also the stockholders are not allowed to defraud creditors by bringing about a foreclos-

1 "A corporate creditor may by his acts estop himself from his right to attack a dividend." Lawrence *v.* Greenup, 97 Fed. Rep. 906 (1899). Thus, where a company is insolvent, and bondholders have agreed to sell their bonds to a certain party at seventy-five cents on the dollar, and that party then agrees with the corporation to acquire and cancel the bonds and take the property from the corporation for a nominal consideration, and after he has made such agreement the bondholders decline to and proceed to foreclose their mortgage and realize ninety cents on the dollar, the court will not compel the stockholders to pay to the bondholders the corporate assets which the sotckholders have distributed among themselves. Brooks *v.* Brooks, 174 Pa. St. 519 (1896).

2 Home Fire Ins. Co. *v.* Barber, 67 Neb. 644 (1903).

3 Alabama, etc. Co. *v.* Chattanooga, etc. Co., 37 S. W. Rep. 1004 (Tenn. 1896).

4 See §§ 549, 672, *infra.* A solvent corporation does not hold its property in trust for its creditors, even though it is in process of liquidation, and hence a partial distribution of the assets of a bank to the stockholders during liquidation, when the bank was solvent and retained what seemed to be sufficient assets to pay its liabilities, cannot be recovered back subsequently by the receiver in an action at law, although it turned out that the remaining assets were not sufficient to pay all liabilities, no bad faith being involved. Lawrence *v.* Greenup, 97 Fed. Rep. 906 (1899). Where a construction company distributes its assets among its stockholders without paying its creditors, the stockholders may be compelled to disgorge to the extent of the debts so remaining unpaid. Grant *v.* Southern Contract Co., etc., 104 Ky. 781 (1898). A debt of a stockholder to be paid from "dividends" must be paid from the dividends of assets, if the company dissolves. Cozad *v* McKee, 130 Pa. St. 406 (1889). Distribution of funds of incorporated association. Ashton *v.* Dashaway Assoc., 84 Cal. 61 (1890). Upon the winding up of a building association distribution is made on the basis of fictitious dividends being first charged against each member and dues paid being credited to them. Boice *v.* Rabb, 24 Ind. App. 368 (1900). A corporate creditor, after obtaining a judgment against the corporation and having execution returned unsatisfied, may hold liable the stockholders who received the stock of another corporation which took over all the assets of the former corporation, even though such stockholders were not stockholders of record. Each stockholder is liable for the entire amount received by him to the amount of the claim, and it is not necessary to join

ure and purchase of the property by themselves at a low price which will not pay the corporate debts.[1] But this is the extent to which the common law goes. So long as corporate creditors are paid, no one is injured by the stockholders distributing among themselves the assets.[2]

The distribution of the assets among the stockholders, upon a reduction of the capital stock[3] or dissolution, is made upon equitable principles.[4]

§ 549. *Proceedings to recover back such a dividend.*—It is in general the practice, where dividends have been paid out of the capital stock in prejudice of the rights of corporate creditors, for a judgment creditor, upon the return of his common-law execution against the corporation wholly or partly unsatisfied, to commence an action in equity on behalf of himself and all other creditors who may come in, in the nature of a creditors' bill, against the stockholders to whom the dividend was unlawfully paid, to recover back so much thereof as was paid out of the capital stock.[5]

all the stockholders. Williams *v.* Commercial Nat. Bank, 90 Pac. Rep. 1012 (Ore. 1907).

1 A foreclosure which is brought about by the stockholders for the purpose of buying in the property and reorganizing the property so as to protect the mortgage bondholders and also the stockholders, but to cut off the claims of unsecured creditors, and particularly to cut off a guaranty on the bonds of another corporation, is illegal, and if such facts are proved the foreclosure sale will be set aside. Louisville, etc. Ry. *v.* Louisville Trust Co., 174 U. S. 674 (1899), the court saying (p. 683), "no such proceedings can be rightfully carried to consummation which recognize and preserve an interest in the stockholders without also recognizing and preserving the interests, not merely of the mortgagee, but of every creditor of the corporation. In other words, if the bondholder wishes to foreclose and exclude inferior lienholders or general unsecured creditors and stockholders he may do so; but a foreclosure which attempts to preserve any interest or right of the mortgagor in the property after the sale must necessarily secure and preserve the prior rights of general creditors thereof. This is based upon the familiar rule that the stockholders' interest in the property is subordinate to the rights of creditors; first of secured and then of unsecured creditors. And any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation." *Cf.* § 886, *infra.*

2 See §§ 3 and 546, *supra,* and §§ 671, 766, *infra.*

3 See § 289, *supra.*

4 See § 641, *infra.*

5 Hastings *v.* Drew, 76 N. Y. 9 (1879); Bartlett *v.* Drew, 57 N. Y. 587 (1874); McLean *v.* Eastman, 21 Hun, 312 (1880); Gratz *v.* Redd, 4 B. Mon. (Ky.) 178 (1843); Curran *v.* Arkansas, 15 How. 304 (1853); Grant *v.* Ross, 100 Ky. 44 (1896). See also U. S. *v.* Globe Works, 7 Fed. Rep. 530 (1881); Brewer *v.* Michigan Salt Assoc., 58 Mich. 351 (1885). See also § 548, *supra.* And see Vose *v.* Grant, 15 Mass. 505 (1819), where it was held that an action as for tort could

It is a necessary condition precedent to the right to bring this action that a valid judgment shall have been obtained against the corporation, and that execution thereon shall have been returned wholly or partly unsatisfied, and this judgment is conclusive as to the merits of the creditor's claim.[1] It is held in Missouri that a stockholder in an insolvent bank cannot be compelled to pay back a dividend to liquidate a creditor's claim against the bank for negligence, unless the remedy against the negligent officers has first been exhausted.[2] A corporation may file a bill in equity to enjoin the foreclosure of a mortgage securing bonds, which have been issued to the stockholders as a dividend illegally, and to compel the surrender of the bonds for cancellation, it appearing that no other rights have intervened.[3] In a suit to foreclose a mortgage there cannot be joined a claim for dividends illegally paid.[4] If the treasurer is sued by a corporate creditor to reach assets of the cor-

not be maintained by a creditor against an individual stockholder who had received dividends. Spear *v.* Grant, 16 Mass. 9, 15 (1819), holding that an action at law will not lie. An action on the case for fraud lies for a conspiracy, the stock having been sold back to the corporation bank and the bank then closed. Bartholomew *v.* Bentley, 15 Ohio, 659 (1846). Where all the property of a telegraph company is sold and the proceeds distributed among the stockholders, a creditor of the company may by a bill in equity compel the stockholders to pay the claim against the corporation, the proceeds being a trust fund. Baltimore, etc. Co. *v.* Interstate Co., 54 Fed. Rep. 50 (1893).

1 In a judgment creditor's suit to reach assets of an insolvent corporation which have been turned over to the stockholders in fraud of creditors, the judgment of the creditor against the corporation cannot be impeached except by fraud and jurisdiction. All of the stockholders need not be joined, but if any stockholder wishes the equities adjusted as between the various stockholders, he can file a cross-bill. Singer *v.* Hutchinson, 183 Ill. 606 (1900); Sturges *v.* Vanderbilt, 73 N. Y. 384 (1878). In this case there was no recovery against a director who had sold his stock and ceased to participate in the company's affairs five years before the dissolution. Dudley *v.* Price, 10 B. Mon. (Ky.) 84 (1849); Andrew *v.* Vanderbilt, 37 Hun, 468 (1885); Hastings *v.* Drew, 76 N. Y. 9 (1879), where this liability was enforced against one who had become a purchaser of stock after the cause of action arose upon which the judgment was secured, the stock being by the terms of the transfer subject to all claims aginst it. In a suit by judgment creditors of a corporation to hold stockholders liable for dividing its assets, all of its property having been sold to another corporation for stock of the latter delivered directly to the stockholders of the former, the judgment by the creditor against the corporation cannot be impeached except for fraud or want of jurisdiction. Montgomery *v.* Whitehead, 90 Pac. Rep. 509 (Col. 1907).

2 Daugherty *v.* Poundstone, 120 Mo. 300 (1906).

3 Gunnison, etc. Co. *v.* Whitaker, 91 Fed. Rep. 191 (1898). See § 848, *infra.*

4 New Hampshire Sav. Bank *v.* Richey, 121 Fed. Rep. 956 (1903). See § 848, *infra.*

poration which he holds, he cannot interplead.[1] A receiver may be authorized by the court to institute the suit.[2] He may file a bill in equity to compel stockholders to refund dividends illegally paid by them.[3] He represents the creditors as well as the corporation and stockholders. As an officer of the court he may sue, and is not estopped by the acts of the corporation.

In a suit by a receiver of a national bank to recover back dividends illegally paid, the books of the bank are competent evidence to prove the acts of the corporation and its financial condition, except as to dealings between the corporation and the defendant.[4] It has been held that even though a receiver is in charge, yet a judgment creditor may file a bill to compel a stockholder to pay back an illegal dividend and also to account for property transferred to him by the corporation for a portion of his stock, the receiver being made a party defendant.[5]

1 A treasurer cannot interplead between the stockholders and a corporate creditor who is seeking to reach bonds received by the corporation in payment for its property. Stone *v.* Reed, 152 Mass. 179 (1890).

2 A receiver of the corporation is the proper party to sue to recover back any dividends which were paid from the capital stock. Corporate creditors cannot sue for these after the receiver goes in. It is doubtful whether the corporation itself could complain of such dividends. A sale of the assets by the receiver does not carry this cause of action. Minnesota, etc. Co. *v.* Langdon, 44 Minn. 37 (1890). Dividends paid out of capital may be recovered back by the receiver so far as necessary to pay corporate debts if the company becomes insolvent. Mills *v.* Hendershot, 70 N. J. Eq. 258 (1905). A receiver of an insolvent bank may recover from the stockholders all dividends paid them out of the capital stock. Corn *v.* Skillern, 75 Ark. 148 (1905). In New York the receiver of an insolvent corporation may maintain an action for the benefit of the creditors against the stockholders to recover the sums received by them as dividends at the time the company was insolvent; and in such an action the creditors of the corporation are proper parties defendant for the purpose of restraining them from proceeding individually against the stockholders separately to recover the unlawful dividends. Osgood *v.* Laytin, 3 Keyes, 521 (1867). See also Lexington, etc. Ins. Co. *v.* Page, 17 B. Mon. (Ky.) 412 (1856), holding that an assignee of the company for the benefit of the company might sue. But a receiver's suit cannot in such a case be brought for the benefit of the stockholders. Butterworth *v.* O'Brien, 39 Barb. 192 (1863). *Cf.* McLean *v.* Eastman, 21 Hun, 312 (1880). An order of the court directing a receiver to recover dividends illegally paid is not an adjudication binding on the stockholders to the effect that such dividends were illegally paid. Stewart *v.* Marion, etc. Co., 155 Ind. 174 (1900). A court may authorize a receiver to bring suit against a stockholder for dividends paid while the corporation was insolvent. Kretschmar *v.* Stone, 43 S. Rep. 177 (Miss. 1907).

3 Hayden *v.* Thompson, 71 Fed. Rep. 60 (1895), rev'g 67 Fed. Rep. 273.

4 Hayden *v.* Williams, 96 Fed. Rep. 279 (1899).

5 Bowker *v.* Hill, 115 Fed. Rep. 528 (1879).

In the creditor's suit all the stockholders who can be reached should be made parties defendant, and as to those unknown or insolvent or beyond the jurisdiction there should be a proper averment in the bill.[1] The corporation is a necessary party defendant to the bill.[2]

The stockholder who is compelled to pay more than his equitable proportion of any unpaid corporate debt may, in a proper proceeding, resort to his associates for contribution.[3] A transferee of stock against which creditors have this claim at the time of transfer is not liable to respond in a creditor's suit therefor.[4] The statute of limitations runs in favor of stockholders, who receive such dividends in good faith and without actual notice, from the time they are paid.[5]

1 Wood *v.* Dummer, 3 Mason, 308 (1824); s. c., 30 Fed. Cas. 435; Bartlett *v.* Drew, 57 N. Y. 587 (1874). In the case last cited it is held that the creditor is not required to bring his suit on behalf of other creditors who may choose to come in, but may sue alone and for his own benefit exclusively, and that he need not make all the stockholders parties, but may pursue one, any, or all, as he may elect, upon the theory that with the equities between the stockholders themselves he has nothing to do, unless he choose to intervene to settle them. See also Brewer *v.* Michigan Salt Assoc., 58 Mich. 351 (1885); Pacific Ry. *v.* Cutting, 27 Fed. Rep. 638 (1886); Williams *v.* Boice, 38 N. J. Eq. 364 (1884). Many stockholders may be joined as defendants in a suit in equity to recover back illegal dividends, even though some received a greater number of dividends than others. Hayden *v.* Thompson, 71 Fed. Rep. 60 (1895).

2 First Nat. Bank *v.* Smith, 6 Fed. Rep. 215 (1879), followed in Dormitzer *v.* Illinois, etc. Co., 6 Fed. Rep. 217 (1881). Where all the assets have been distributed, an action against the stockholders to recover back damages for a tort committed by the corporation must include the corporation as a co-defendant. Swan, etc. Co. *v.* Frank, 39 Fed. Rep. 456 (1889); aff'd, 148 U. S. 603. In a suit to compel stockholders of a foreign corporation to discover and account for corporate property illegally divided among them, the property must be definitely described. Service on the corporation by publication is insufficient. King *v.* Sullivan, 93 Ga. 621 (1894). In a suit by a corporate creditor to hold stockholders liable for illegal dividends, the corporation is a necessary party defendant. Lathrop, etc. Co. *v.* Byrne, 115 N. Y. App. Div. 846 (1906).

3 Bartlett *v.* Drew, 57 N. Y. 587 (1874).

4 Hurlbut *v.* Tayler, 62 Wis. 607 (1885).

5 The statute of limitations runs against an action to recover back illegal dividends from stockholders. It begins to run from the time when the dividend is paid, provided the stockholder did not know or have reason to know the condition of the company. Hayden *v.* Thompson, 71 Fed. Rep. 60 (1895); Lexington, etc. Ins. Co. *v.* Page, 17 B. Mon. (Ky.) 412, 446 (1856). See also *Re* Mammoth Copperopolis, 50 L. J. (Ch.) 11 (1880); Dudley *v.* Price, 10 B. Mon. (Ky.) 84 (1849). A dividend paid out of capital may be recovered back by a receiver at any time within six years after such payment if the stockholders did not know that the dividend was paid out of capital, but a court of equity will not apply the statute of

§ 550. *The liability herein of the corporate officers.*—The liability of the corporate officers as to dividends paid out of the capital stock is not definitely determined. They of course are liable for the amount of any such dividend that they themselves receive as stockholders.[1]

Some cases go to the full extent of holding the directors liable absolutely for all dividends paid out of capital stock. But the better rule is that, when the directors declare a dividend in good faith and without negligence, they are not to be held liable merely because the dividend turns out to have impaired the capital stock.[2] Direct-

limitations as regards officers and directors receiving such dividend. Mills *v.* Hendershot, 70 N. J. Eq. 258 (1905).

1 A receiver may recover back a dividend paid to a director when the corporation was insolvent. Davenport *v.* Lines, 72 Conn. 118 (1899); Main *v.* Mills, 6 Biss. 98, and note (1874); s. c., 16 Fed. Cas. 506, where a dividend paid to the president, but not legitimately earned, was recovered from the president of a bank by the assignee in bankruptcy. In 16 Fed. Cas. 506 it is stated that this decision was afterwards partially reversed. *Re* County Marine Ins. Co., L. R. 6 Ch. App. 104 (1870), which was the case of a marine insurance company, where the directors declared a bonus on the shares of stock without making out a profit and loss account, and it was held that a director who had received such bonus on a balance sheet thus carelessly drawn up should, in consequence of his neglect of duty, repay the amount to the liquidator. It was the gross neglect of the directors which militated so strongly against them, and both the lord justices declared the court would not have so held had there been *bona fides* and regularity in the declaration of the bonus. *Re* Denham, L. R. 25 Ch. D. 752 (1883). Here it was held that an innocent director was not personally responsible for the fraudulent reports and balance sheets and the dividends paid under them, and that—having regard to the extraordinary powers vested by the articles in the chairman, and to the fact that the books had been kept and audited by duly authorized officers, and that the director sought to be charged had no reason to suspect any misconduct—he was not liable to repay any of the dividends so received by him, although they were in fact paid out of the capital. Where the directors pay a dividend to themselves only, without there being any profits, they must refund the same. Latimer *v.* Equitable, etc. Assoc., 78 Mo. App. 463 (1898). Directors declaring dividends in good faith are liable each only for the amount actually received by him, unless their conduct amounted to tort, in which case they would be generally liable for the whole sum so paid out. Ebelhar *v.* German, etc., 91 S. W. Rep. 262 (Ky. 1906).

2 Excelsior Petroleum Co. *v.* Lacey, 63 N. Y. 422 (1875). In a suit at common law to hold directors liable for illegally declaring dividends fraud and bad faith must be shown. Davenport *v.* Lines, 77 Conn. 473 (1905). Directors are not liable to corporate creditors, either at common law or under a statute, for paying dividends when they supposed, and the books showed, that the company was prosperous and had profits for distribution, but it subsequently turned out that the president had embezzled the funds and substituted fictitious notes of customers and had falsified the books in omitting debts for material,

ors are not personally liable for dividends improperly paid, where they honestly believe in a state of facts which would justify the

there being no proof that the directors, even in the exercise of ordinary diligence, would have discovered that the company was insolvent. Chick *v.* Fuller, 114 Fed. Rep. 22 (1902). Where losses incurred by a banking company during the year are written off, and the balance of the receipts in each year over the outgoings in the same year, after making some allowance for bad debts and deductions for sums carried over to a reserve fund, is treated as the profit of that year, and is divided as dividends without making any further provision for the losses of previous years, the directors are not liable on the ground that the dividends were paid out of capital, although this method of procedure would ultimately exhaust the paid-up capital of the company. The discretion of the managers in fixing the losses to be charged to the capital and those to be charged to income is not inquired into by the courts, unless obviously improper charges to capital have been made, in order to increase apparent profits. The directors are not personally liable unless they were culpably or grossly negligent in the matter. Even though a director knew his name was signed to a report to the stockholders after he has resigned, yet he is not liable, where he took no part in drawing the report or in recommending the dividend based thereon. It seems that an improper dividend may be recovered from the directors, even though the creditors have all been paid and the stockholders will have the benefit of the recovery, they having been ignorant of the fact that the dividends were paid from capital stock. *Re* National Bank of Wales, [1899] 2 Ch. 629, rev'g 79 L. T. Rep. 667. In *Re* Mercantile Trading Co., L. R. 4 Ch. App. 475 (1869), it was held, in accordance with this view, that where the action of a board of directors in making a dividend was *bona fide*, they are not liable for errors of judgment in preparing a balance sheet showing the assets of the concern. In this case it appears that the directors included among the corporate assets a debt due the company by the government of the Confederate States; some cotton owned by the company but stored within the limits of the Confederacy; and certain merchant ships engaged in running the blockade, all which were estimated at their full value. These assets being subsequently destroyed and lost to the company, its bankruptcy followed. Osgood *v.* Laytin, 3 Keyes (N. Y.), 521 (1867), was an action by a receiver to recover dividends improperly declared. The court said: "Ignorance of facts that it was the duty of the managers to know—not to know which was gross ignorance—cannot excuse the managers and impart any virtue or validity to acts otherwise clearly illegal, and which were a palpable fraud upon the creditors." But the directors of a bank are not liable for dividends declared in good faith, even though it subsequently turns out that debts to the bank which they considered good were found to be bad. Witters *v.* Sowles, 31 Fed. Rep. 1 (1887). However, the court in *Re* Oxford Building, etc. Soc., 55 L. T. Rep. 598 (1886), say it is settled that "directors who improperly pay dividends out of capital are liable to repay such dividends personally upon the company being wound up; that the company, or a creditor, or a liquidator may enforce it; that the acquiescence of the stockholders does not affect creditors; that the statute of liquidations does not apply; and that the innocent intent of the directors is no defense. The directors are not personally liable for dividends declared,

payment and rely upon the general manager's certificate as to the assets.[1]

The House of Lords in England has recently held that even though dividends have been declared and paid illegally, by reason of the facts that bad debts have not been charged off, yet a director who acted in good faith and relied upon the statements of the officers of the company in voting for such dividends is not liable to repay the same for the benefit of the stockholders.[2] But where the directors negligently or wilfully and knowingly declare and pay a dividend out of the capital stock, they are personally liable to refund that dividend.[3] Where the directors of a national bank place

even though, in estimating the assets, claims are included which ultimately prove to be bad, the result thereby being that the dividend was paid out of the capital. *Re* London & Gen. Bank, 72 L. T. Rep. 227 (1894); aff'd, [1895] 2 Ch. 166, 673.

1 *Re* Kingston Cotton Mill Co. [1896] 2 Ch. 279, rev'g [1896] 1 Ch. 331.

2 Dovey, etc. *v.* Cory (H. of L.), [1901] A. C. 477.

3 In order to ascertain profits the directors should have a careful valuation. If they employ persons whom they reasonably believe to be competent and adopt their conclusions, they are not liable for mistakes. Where, however, the directors take no active, intelligent, guiding part in the affairs of the company, and really do nothing except as suggested by the secretary, and do not examine the accounts at all, and cause the stockholders to declare dividends on a statement which omits large liabilities, so that dividends are really paid out of the capital stock, such directors are personally liable to corporate creditors for such dividends. The secretary also is liable, he being the active manager of the company. The six-years statute of limitations, however, applies, and only those dividends which have been declared within six years must be repaid. Interest, however, will be allowed. Municipal, etc. Land Co. *v.* Pollington, 63 L. T. Rep. 238 (1890). See also *Re* National Funds, etc. Co., L. R. 10 Ch. D. 118 (1878); Gratz *v.* Redd, 4 B. Mon. (Ky.) 178, 194 (1843); Hill *v.* Frazier, 22 Pa. St. 320 (1853); *Re* Alexandra Palace Co., L. R. 21 Ch. D. 149 (1882); Salisbury *v.* Metropolitan Ry., 22 L. T. Rep. 839 (1870); s. c., on previous hearing, 38 L. J. (Ch.) 249, where the suit was by a non-participating stockholder; Flitcroft's Case, L. R. 21 Ch. D. 519 (1882); Evans *v.* Coventry, 8 De G., M. & G. 835 (1857); Turquand *v.* Marshall, L. R. 4 Ch. App. 376 (1869), denying this remedy to the stockholders as a body. In Burnes *v.* Pennell, 2 H. L. Cas. 497, 531 (1849), Lord Brougham said: "I beg to be understood as going with those who view with the greatest severity the conduct of railway directors in declaring dividends which can only be paid out of capital, because I consider that that is of itself a most vicious and fraudulent course of conduct. It is telling the world that their profits are large when it may be that their profits are *nil*, or that their losses are large with no profits. It is a false and fraudulent representation by act and deed, much to be reprobated; and I go the full length of what my noble and learned friend has laid down, that it would be a just ground, if a course of conduct of this sort were pursued, coupled with such circumstances as clearly to show a fraudulent intent, for proceedings of a graver nature against these parties." The payment of a dividend out

a fictitious value on the assets of the bank in order to declare a stock dividend, such directors are liable for the par value of the stock to the receiver of the bank for the benefit of its creditors, unless the directors show that the stock could not have been otherwise issued or sold.[1] A shareholder who has received and still retains a dividend paid by directors partially out of capital stock, by a *bona fide* mistake, cannot maintain a suit in behalf of himself and other shareholders to compel the directors to restore to the company such part of the dividend, especially where the shareholders knew of the facts at the time of payment.[2] Where the directors make even grave errors in the exercise of judgment they are not liable, but where they surrender their judgment to others, either the manager or auditors, they are liable for dividends illegally paid, especially where they include, as good, loans which they had not looked into, and where they do not take into consideration overdrafts. They will be held liable from the date when a prudent man would not have included in the profits unpaid interest. Each director is liable only for dividends declared or recommended at meetings when he was present.[3]

Frequently, when a dividend is paid out of the capital stock, the

of the capital stock is *ultra vires*. Accordingly, where the directors mislead the stockholders by representing in the reports and balance sheets, as good, debts which they know to be bad, and thus knowingly pay dividends which in fact impair the capital stock, it is not a defense that the stockholders, relying in good faith upon the representations and reports of the directors, pass resolutions declaring the dividends at regular meetings of the corporation; and an action will lie on behalf of creditors to compel the directors to refund. In such an action the directors cannot set off any money due from the company to them, nor have they recourse to the stockholders who took the dividends *bona fide*. Flitcroft's Case, L. R. 21 Ch. D. 519 (1882); *Re* County Marine Ins. Co., L. R. 6 Ch. 104 (1870). See also Scott *v.* Eagle Fire Co., 7 Paige, 198 (1838). Where the directors in a failing corporation transfer all its assets to another corporation for stock of the latter, which they divide among themselves, the creditors of the former may hold the directors liable and may also hold liable the company that received the property for the value thereof. McIver *v.* Young Hardware Co., 57 S. E. Rep. 169 (N. C. 1907). In Kentucky it is doubted whether directors are liable to creditors, the courts of that state seeming to incline to hold them liable only to the corporation or the stockholders. Lexington, etc. R. R. *v.* Bridges, 7 B. Mon. (Ky.) 556, 559 (1847).

1 Cockrill *v.* Abeles, 86 Fed. Rep. 505 (1898).

2 Towers *v.* African, etc. Co. Ltd., [1904] 1 Ch. 558, holding also that even though a dividend has been paid partially out of capital stock, yet if the error is about to be corrected by profits during a subsequent year, a stockholder's suit to compel the directors to replace the amount will not lie.

3 *Re* London & Gen. Bank, 72 L. T. Rep. 227 (1894); aff'd, [1895] 2 Ch. 166, 673. See Stroud *v.* Lawson, [1898] 2 Q. B. 44.

directors are made liable therefor by statute without reference to any fraud or fraudulent intent on their part.[1] A court of equity has power to entertain a suit to enforce the statutory liability of directors for paying dividends in violation of such statute, where there is no other remedy in any other court, even though the money is not needed to pay the company's debts. In New Jersey under a statute formerly existing, a stockholder might maintain such a suit in behalf of himself and other stockholders, for the benefit of the corporation, especially where he was induced to purchase his stock by reason of such dividends. Investors as well as stockholders have a right to rely on dividends as having been earned.[2] This New

1 In Massachusetts, officers of a corporation can be charged, under the statute in force upon the subject in that state (Stat. 1862, ch. 218, § 3; Stat. 1870, ch. 224, §§ 40, 42), with corporate debts after a judgment against the corporation and after a demand and return upon the execution. Chamberlin *v.* Huguenot Mfg. Co., 118 Mass. 532, 536 (1875); Priest *v.* Essex, etc. Co., 115 Mass. 380 (1874). In that state the liability of the directors has been held to be enforceable by corporate creditors only. Smith *v.* Hurd, 53 Mass. 371 (1847). Under the New York statute making directors liable for declaring dividends from the capital stock, they are liable to the extent to which the capital stock is reduced by the dividend, and in the case of bank directors they may show that notes which it is claimed they should have charged off were actually paid later. Dykman *v.* Keeney, 10 N. Y. App. Div. 610 (1896). Under the New York statute the directors are liable to repay only such part of an illegal dividend as will recoup the corporation or its creditors for the actual loss sustained thereby. Dykman *v.* Keeney, 16 N. Y. App. Div. 131 (1897); aff'd, 160 N. Y. 677. Dividing the property is equivalent to a declaration of a dividend so far as the directors are concerned. Rorke *v.* Thomas, 56 N. Y. 559 (1874). Where a statute renders directors liable for declaring a dividend from its capital stock, the creditors may hold them liable for breach thereof, without first exhausting the assets of the corporation, but the corporation is a proper party defendant. The remedy may be at law. Swartley *v.* Oak, etc. Co., 113 N. W. Rep. 496 (Iowa 1907).

2 Appleton *v.* American Malting Co., 65 N. J. Eq. 375 (1903). *Cf.* Siegman *v.* Maloney, 63 N. J. Eq. 422 (1902); aff'd, 54 Atl. Rep. 405. Stockholders are not disqualified from maintaining a suit for the benefit of the corporation, against its directors to reimburse it because of the directors declaring and paying a dividend out of capital, though such stockholders, or the persons from whom they purchased their stock, participated in the dividends, and did not return them. Appleton *v.* American Malting Co., 65 N. J. Eq. 375 (1903). A request by a stockholder to the corporation to bring suit against the directors for declaring dividends in violation of a statute, is not excused by the fact that five out of the twelve directors were directors when such dividends were declared, even though one of the others was a brother of one of the five and another was an employee of one of the five. Siegman *v.* Maloney, 65 N. J. Eq. 372 (1903). A New Jersey statute rendering directors personally liable for dividends paid out of capital was enforced in Siegman *v.* Electric, etc. Co., 65 Atl. Rep. 910 (N. J. 1907), and

Jersey statute rendering the directors personally liable upon corporate insolvency for all dividends paid out of capital stock, even though a part of the money so collected would go to stockholders who had received such illegal dividends, was so inequitable in its operation that in 1904 it was amended so as to be applicable only to any loss actually sustained by the stockholders or the corporation by reason of such dividend.[1] Under the statutes of New York where a New Jersey corporation, doing business in New York, pays dividends from the capital stock, a director participating in declaring the dividend is personally liable therefor, and if the corporation refuses to bring the action a stockholder may bring it in behalf of himself and other stockholders.[2] Where the directors turn over the assets to a stockholder this is the same as a declaration and payment of a dividend, and if it renders the company insolvent the directors are liable under the Massachusetts statute.[3] In Connecticut by statute dividends cannot be legally declared while the capital stock is impaired, and officers voting for such dividends are made liable for all losses resulting therefrom,[4] and in such a suit against directors for paying illegal dividends it may be shown that some of the dividends

the court held that it was no defense that a majority of the stockholders had approved their action. Where the directors of an insolvent corporation who have paid dividends illegally, assign all its assets to an assignee for the benefit of its creditors, the assignee being one of their number, the court may appoint a receiver and remove the assignee, under the New Jersey statute. Gilroy *v.* Somerville, etc. Mills, 67 N. J. Eq. 479 (1904). A statutory liability of a director for voting for the payment of a dividend out of capital was enforced in Siegman *v.* Kissel, 62 Atl. Rep. 941 (N. J. 1906) by a minority stockholder, even though a majority of the stockholders were opposed to the suit. A person who loans money to a corporation organized to bring about a consolidation of other corporations cannot complain that stock issued in exchange for stock of other corporations was returned upon the failure of the plan, and he cannot hold the directors liable under a statute making them liable for distributing the capital stock, where it appears that he was partially responsible for the failure. Audenreid *v.* East, etc. Co., 68 N. J. Eq. 450 (1904). The New Jersey statute imposing a liability on directors for illegally declared dividends was applied in Whittaker *v.* Amwell Nat. Bank, 52 N. J. Eq. 400 (1894).

1 Ch. 143, L. 1904.

2 Hutchinson *v.* Stadler, 85 N. Y. App. Div. 424 (1903). In the case Hutchinson *v.* Curtiss, 45 N. Y. Misc. Rep. 484 (1904) a director in a New Jersey corporation was held liable for $1,855,350 dividends paid from capital, the profits having included contemplated profits on product sold in advance, the raw material not yet having been purchased. The defense that a complaint by a stockholder against a director for negligence and also for paying illegal dividends is multifarious must be raised by demurrer. Weed *v.* First Nat. Bank, 106 N. Y. App. Div. 285 (1905).

3 Pennsylvania Iron Works *v.* Mackenzie, 190 Mass. 61 (1906).

4 Davenport *v.* Lines, 77 Conn. 473 (1905).

were paid by vote of the directors and other dividends were paid by some of the defendants without such vote. Under the Kentucky statutes directors are liable to restore dividends paid by the bank while insolvent, even though they acted in good faith.[1] Where by statute directors are liable to the corporation itself for illegal dividends, which have been paid, and succeeding directors refuse to commence suit, a stockholder may institute such suit in behalf of the corporation after request to the stockholders and directors to institute such suit.[2] Under the New Jersey statutes, if the directors upon the dissolution of a corporation distribute the assets among the stockholders without paying the debts, they are personally liable for such debts.[3] In England, the auditors of a company are officials, and are liable for dividends improperly paid, based on balance sheets improperly made up by the auditors, especially where the auditors included as regular investments loans for which there was no proper security.[4] The manager of a corporation who makes up the accounts may also be liable for dividends illegally declared.[5] After dissolution has been decreed it is too late for a corporate creditor to bring an action to hold the directors liable for declaring dividends out of the capital stock, no fraud in obtaining the dissolution being alleged.[6]

Under certain circumstances, in the absence of actual fraud, the directors who have been compelled to pay the claims of corporate creditors may in turn recover what they have paid in an action against the stockholders.[7] But where a treasurer, who is also a

1 City of Franklin *v.* Caldwell, 96 S. W. Rep. 605 (Ky. 1906).

2 Siegman *v.* Electric, etc. Co., 140 Fed. Rep. 117 (1905).

3 Keen *v.* Maple, etc. Co., 50 Atl. Rep. 467 (N. J. 1901); N. J. Rev. (1877), p. 178; Williams *v.* Boice, 38 N. J. Eq. 364 (1884).

4 *Re* London & Gen. Bank, 72 L. T. Rep. 227 (1894); aff'd, [1895] 2 Ch. 166, 673. Auditors are not officers in the true sense of the word. *Re* Western, etc. Co., [1897] 1 Ch. 617, rev'g 75 L. T. Rep. 648.

5 *Re* London & Gen. Bank, 72 L. T. Rep. 227 (1894); aff'd, [1895] 2 Ch. 166, 673.

6 Coxon *v.* Gorst, [1891] 2 Ch. 73.

7 Salisbury *v.* Metropolitan Ry., 22 L. T. Rep. 839 (1870); s. c. on previous hearing 38 L. J. (Ch.) 249; *Re* Alexandra Palace Co., L. R. 21 Ch. D. 149 (1882). *Cf.* § 548, *supra.* Where a part of the capital stock is paid by the directors to the stockholders with the knowledge and consent of all, but without the capital stock being regularly reduced, the directors may be required, on the dissolution of the corporation, to repay such sum so distributed, but the directors are then entitled to recover from the stockholders the amount so paid to the stockholders. Noxham *v.* Grant, [1900] 1 Q. B. 88, aff'g [1899] 1 Q. B. 480; aff'd, [1900] 1 Q. B. 88. A director who, with knowledge of the insolvency of the company, loans money to the corporation for the purpose of declaring a dividend, is not entitled, upon an assignment of the corporate effects, to repayment of any part of

director, has divided among the stockholders, in violation of the statute, the corporate funds of an insolvent corporation, and is afterwards held liable to creditors, he cannot have contribution from the other directors, even though they took part in the division.[1] Claims against directors who are made liable by statute in these cases may, in the absence of actual fraud on their part, be barred by laches or the statute of limitations.[2] A statutory liability in reference to illegal dividends may not survive the death of a director who is liable.[3]

An action on the case is not the proper remedy of the creditor of

the loan so made until the claims of stockholders are satisfied. Kisterbock's Appeal, 51 Pa. St. 483 (1866). But a director from whom a recovery is had under the Pennsylvania statute (Act of April 7, 1849, § 9), as a wrongdoer, has no right of subrogation as against the corporation. Hill *v.* Frazier, 22 Pa. St. 320 (1853). In this case it was held that, in the creditor's suit against the director, the corporation itself is not a necessary co-defendant. In the case Towers *v.* African, etc. Co., Ltd., [1904] 1 Ch. 558, the court said that if a director is held liable to repay a dividend paid partially out of capital stock, but in good faith, such director may recover from any stockholder, who took such dividend with knowledge of the facts, the amount so received by him.

1 Sharp *v.* Call, 69 Neb. 72 (1903).

2 *Re* Mammoth Copperopolis, 50 L. J. (Ch.) 11 (1880). The acquiescence of stockholders does not bind creditors, and the statute of limitations does not apply. *Re* Oxford, etc. Soc., 55 L. T. Rep. 598 (1886). That the statute of limitations does not apply, see also Flitcroft's Case, L. R. 21 Ch. D. 519 (1882). The statute of limitations does not commence to run against an officer of the corporation who has paid dividends to himself out of the capital stock until the fraud is discovered. Main *v.* Mills, 6 Biss. 98 (1874); s. c., 16 Fed. Cas. 506, where it is stated that this decision was afterwards partially reversed. Where the directors paid out dividends from the organization of the company in 1868 until 1878, and were then stopped at the instance of the board of trade, and the company was wound up in 1886, and in 1889 the receiver brought suit to hold the directors liable, it was held that there was no such delay as to bar the remedy, since the defendants had not been prejudiced by the delay. Masonic, etc. Ass. Co. *v.* Sharpe, [1892] 1 Ch. 154. A dividend paid out of capital may be recovered back by a receiver at any time within six years after such payment if the stockholders did not know that the dividend was paid out of capital, but a court of equity will not apply the statute of limitations as regards officers and directors receiving such dividend. Mills *v.* Hendershot, 70 N. J. Eq. 258 (1905).

3 Boston, etc. R. R. *v.* Graves, 80 Fed. Rep. 588 (1897). A statutory liability of directors for illegal payment of dividends is penal and does not survive the death of a director and is not assignable. Killen *v.* State Bank, 106 Wis. 546 (1900). The statutory liability of directors in an Oregon corporation for declaring dividends out of the capital stock is a penal liability. Patterson *v.* Wade, 115 Fed. Rep. 770 (1902). In the case Gaither *v.* Bauernschmidt, 69 Atl. Rep. 425 (Md. 1908), the court held that contribution between the directors in a receiver's suit to hold them liable for illegal dividends and illegal loans and other wrongful acts might be enforced in the same suit in equity.

an insolvent corporation to hold a director liable for dividends paid out of the capital stock. The remedy is in equity.[1] A suit to hold the directors liable for declaring a dividend out of the capital stock and thereby inducing the plaintiff to purchase the stock cannot at the same time seek to hold the directors liable to the corporation for the dividend so declared.[2] A purchaser of stock from the president cannot hold him liable for misrepresentation that the company's last dividend was six per cent., it appearing that that dividend was actually paid, even though it is proved that it was not paid out of profits, the president, however, having acted in good faith, and supposed that the profits existed.[3] In some states it is a criminal offense to pay dividends from the capital stock.[4]

§ 551. *Guaranty of dividends by contract.*— A guaranty of dividends is often made by the corporation itself that issues the stock. The stock is then called guaranteed or preferred stock. This class of stock is fully considered elsewhere.[5]

A guaranty of dividends frequently is made by a third person. Such a guaranty is often made when one person sells stock to another and guarantees that the corporation will pay certain dividends thereon. It often arises, also, where one company buys out another or leases the property of another corporation and guarantees dividends on the stock or the interest on the bonds of the latter. This subject, also, is considered elsewhere.[6] A foreclosure brought about for the purpose of cutting off a guaranty of the bonds of another corporation is illegal, the real purpose being to allow other creditors of the corporation and the stockholders to obtain the property free from such guaranty.[7]

1 John A. Roebling's, etc. Co. *v.* Mode, 1 Pennewill, 515 (Del. 1899). Where there is a statutory liability of directors to corporate creditors for dividends involving official delinquency, but not intentional fraud, the creditors have no common-law remedy. Ellis *v.* French-Canadian, etc. Ass'n, 189 Mass. 566 (1905).

2 Stroud *v.* Lawson, [1898] 2 Q. B. 44.

3 Nash *v.* Rosesteel, 94 Pac. Rep. 850 (Cal. 1908).

4 See N. Y. Penal Code, § 594; L. H. 92, ch. 692. It is no defense to a criminal prosecution for making false entries in the corporate books that the stockholders lost nothing even if they did receive dividends they did not earn, inasmuch as the entries were fraudulent as to creditors. Commonwealth *v.* Dewhirst, 190 Mass. 293 (1906). As to when the president of a company may be convicted of embezzlement, under the Kentucky statutes, by reason of his taking part in the declaration of an illegal dividend from the capital stock and receiving such dividend on the stock held by himself, see Taylor *v.* Commonwealth, 119 Ky. 731 (1903).

5 See ch. XVI, *supra.*

6 See ch. XLVI, § 775, *infra.*

7 Louisville, etc. Ry. *v.* Louisville Trust Co., 174 U. S. 674 (1899).

CHAPTER XXXIII.

LIFE ESTATES AND REMAINDERS IN SHARES OF STOCK.

§ 552. *The subject.*—Where shares of stock are held by an estate, and the income of the estate is to go to a life tenant for life, and the remainder to another party, the question of whether the life tenant or the remainderman is entitled to a stock dividend or extraordinary cash dividend is a perplexing one. The stock dividend or extraordinary cash dividend may represent profits which were earned or accumulated before the life tenancy began. In that case it is clear that in justice the remainderman should receive it. If, however, it was earned after the life tenancy began, it is clear that the life tenant should have it. If it was earned partly before and partly after the life tenancy began, then it is apparent that in justice some apportionment should be made if possible.

The courts, however, differ widely in laying down rules on this subject. These differences form the subject of this chapter.

§ 553. *The three rules in regard to stock or extraordinary cash dividends.*—When a stock or extraordinary cash dividend is declared upon shares held in trust, or owned in such a way that one person has an estate therein for life and another person the remainder over, there at once arises a contest between life tenant and remainderman. Their interests necessarily conflict, because if such dividend is held to be income, it belongs to the tenant for life; whereas if it is held to be a part of the *corpus,* or principal, it inures to the benefit of the remainderman's estate. There are three well-defined rules upon this subject, which may be denominated respectively the American or Pennsylvania, the Massachusetts, and the English rule.[1] They lead to essentially contrary conclusions, and will be considered in order.

1 Quoted and approved in Alsop *v.* De Koven, 107 Ill. App. Rep. 190, 208 (1903); aff'd, 205 Ill. 309.

§ 554. *The American or Pennsylvania rule.*—This rule, inasmuch as it obtains in nearly every state in the Union, may well be called the American rule. It proceeds upon the theory that the court, in disposing of stock or property dividends, as between life tenant and remainderman, may properly inquire as to the time when the fund out of which the extraordinary dividend is to be paid was earned or accumulated, and also as to the method of accumulation. If it is found to have accrued or been earned before the life estate arose, it may be held to be principal, and, without reference to the time when it is declared or made payable, to belong to the *corpus* of the estate, and not to go to the life tenant. But when it is found that the fund, out of which the dividend is paid, accrued or was earned, not before but after the life estate arose, then it may be held that the dividend is income, and belongs to the tenant for life.[1] The court will also take into consideration the custom and regularity of the corporation in accumulating its surplus, inasmuch as the testator may be presumed to have expected the corporation to continue its accumulation of a surplus or to provide for improvements out of profits. This equitable rule prevails not only in Pennsylvania, where it seems to have been first clearly declared, but also in many other jurisdictions.[2]

1 Earp's Appeal, 28 Pa. St. 368 (1857); Wiltbank's Appeal, 64 Pa. St. 256 (1870). See also the following later Pennsylvania cases in point: Moss's Appeal, 83 Pa. St. 264 (1877); Biddle's Appeal, 99 Pa. St. 278 (1882); Vinton's Appeal, 99 Pa. St. 434 (1882); *Re* Thompson's Estate, 11 W. N. Cas. 482 (1882). *Cf.* Roberts's Appeal, 92 Pa. St. 407 (1880); Thomson's Appeal, 89 Pa. St. 36 (1879). A scrip dividend converted into stock may belong to the life tenant. Philadelphia Trust, etc. Co.'s Appeal, 16 Atl. Rep. 734 (Pa. 1889). A large dividend in cash, owing to a sale of part of the property of an unincorporated association, may be income, and go to the life tenant. Oliver's Estate, 136 Pa. St. 43 (1890). Money received by the corporation from new stock issued to obtain funds to replace profits which had been used for improvements is capital and not income, and does not go to the life tenant. Smith's Estate, 140 Pa. St. 344 (1891). Where the company in which the trustee holds stock gives to its stockholders the option to subscribe to the stock of another company, the premium at which the trustee sells this option is principal and not income. Thomson's Estate, 153 Pa. St. 332 (1893). A life tenant who is entitled to all dividends, whether in money or scrip, is entitled to a dividend of scrip which gives him the right thereafter to have the same *pro ràta* dividends as are paid on the capital stock. *In re* Robinson's Trust, 67 Atl. Rep. 775 (Penn. 1907).

2 *Connecticut:* A stock dividend based upon the profits actually invested in the business is not income or dividends such as pass to the life tenant. Spooner *v.* Phillips, 62 Conn. 62 (1892). Where an estate is merged into a corporation, the life tenant of the real estate cannot claim that a part of the capital stock represents past increase of value and that she is entitled absolutely to that part of

Where a *cestui que trust* is to receive the income until he reaches a certain age and then is to receive the principal, he is considered a life tenant until he arrives at that age. The life tenant takes the entire interest on bonds, although the premium on the bonds grad-

the stock. Hotchkiss *v.* Brainerd Quarry Co., 58 Conn. 120 (1889). Where it is impossible for the company to pay arrears of dividends on cumulative preferred stock, and a compromise is made by which the dividend is to be reduced one-half, and double the amount of stock is to be given to each stockholder, this new stock goes to the remainderman. Mills *v.* Britton, 64 Conn. 4 (1894). A large surplus gradually accumulated by a coal company is a part of the "floating capital" and upon distribution does not go to the life tenant. Society, etc. *v.* Colegrove, 49 Atl. Rep. 902 (Conn. 1901), was a case involving the distribution of a large surplus by the Pennsylvania Coal Company, upon the sale of its assets. Even though a corporation discontinues a part of its business and sells the property used for that part, and distributes the cash as a dividend, this dividend belongs to the life tenant, especially where the value of the property of the corporation is still three times as great as when the trust took effect. Smith *v.* Dana, 77 Conn. 543 (1905). A cash dividend belongs to the remainderman, even though it is due to the corporation absorbing another corporation, it appearing that the price of the stock remains unchanged. Boardman *v.* Boardman, 78 Conn. 451 (1905). While as a rule stock dividends are capital, and not income, yet where the company owns its own stock, which it has acquired in liquidation of a debt owing to it and declares a dividend on such stock, it belongs to the life tenant. Green *v.* Bissell, 65 Atl. Rep. 1056 (Conn. 1907).

Iowa: A stock dividend is presumed to be income, but may be shown to represent the enhanced value of the property of the company, and then it does not represent profits, but does represent capital. Kalbach *v.* Clark, 133 Iowa, 215 (1907).

Kentucky: As between a life beneficiary in corporate stock and the remainderman, a stock dividend will be treated as income if it in fact represents a profit. Hite *v.* Hite, 93 Ky. 257 (1892); s. c. below, 2 Ry. & Corp. L. J. 568.

Maine: For the rule in Maine, see Richardson *v.* Richardson, 75 Me. 570 (1884). A dividend consisting of stock purchased by an issue of bonds by the company belongs, not to the life estate, but to the body of the estate. Gilkey *v.* Paine, 80 Me. 319 (1888).

Maryland: Dividends coming from a fund accumulated during the testator's life to pay a mortgage, but which are not used for that purpose, belong to the life tenant and not to the remainderman. Quinn *v.* Safe-Deposit, etc. Co., 93 Md. 285 (1901). See Thomas *v.* Gregg, 78 Md. 545 (1894). A stock dividend may be income, not principal. Safe Deposit, etc. Co. *v.* White, 102 Md. 73 (1905).

New Hampshire: Lord *v.* Brooks, 52 N. H. 72 (1872); Wheeler *v.* Perry, 18 N. H. 307 (1846); Peirce *v.* Burroughs, 58 N. H. 302 (1878). An increase of stock upon consolidation and a stock dividend thereon are principal. Law *v.* Alley, 29 Atl. Rep. 636 (N. H. 1892). A fifty per cent. cash dividend is presumed to be from the profits and to belong to the life tenant. Walker *v.* Walker, 68 N. H. 407 (1896).

New Jersey: Van Doren *v.* Olden, 19 N. J. Eq. 176 (1868); Ashhurst *v.* Field, 26 N. J. Eq. 1 (1875). Where a few months after the testator's

ually disappears as they come nearer to being due. A stock dividend representing accumulated profits goes to the life tenant, the

death a large cash dividend is declared, the court will consider the profits earned during such months of the year as were prior to his death, and also such part as was earned subsequent to his death, and will apportion the dividend on such basis. Lang *v.* Lang's Executor, 57 N. J. Eq. 325 (1898).

New York: McLouth *v.* Hunt, 154 N. Y. 179 (1897); Riggs *v.* Cragg, 89 N. Y. 479 (1882); *Re* Kernochan, 104 N. Y. 618 (1887); Riggs *v.* Cragg, 26 Hun, 89 (1881); Clarkson *v.* Clarkson, 18 Barb. 646 (1855); Simpson *v.* Moore, 30 Barb. 637 (1859); Woodruff's Estate, Tucker, 58 (1865), and Goldsmith *v.* Swift, 25 Hun, 201 (1881). *Cf.* Cragg *v.* Riggs, 5 Redf. 82 (1880); Scovel *v.* Roosevelt, 5 Redf. 121 (1881). Where the life tenant is entitled to "income and profits" of specific securities, he is entitled to extraordinary distributions or dividends representing accumulated income and profits, if it is established that the amount does not entrench upon the capital, but was from a surplus of corporate earnings and income. Robertson *v.* Brulatour, 188 N. Y. 301 (1907). One of the remaindermen, who has acquiesced in a stock dividend during the life estate, cannot afterwards claim that it was illegal and that he was entitled to the money on which it was based, the life tenant having bequeathed to him all her money. Chester *v.* Buffalo, etc. Mfg. Co., 183 N. Y. 425 (1906). A stock dividend goes to the life tenant and not to the remaindermen, where the words in the will clearly indicate that such was the intent of the testator, it being clear that the stock dividend represents accumulated profits and not a diminution of the capital stock. Lowry *v.* Farmers', etc. Co., 172 N. Y. 137 (1902). In the case Matter of Stevens, 46 N. Y. Misc. Rep. 623 (1905), the court summarized the New York decisions as follows (p. 642): "By the McLouth and Lowry cases, that whether moneys or property, arising from corporate sources, paid over upon shares of stock constituting a trust estate, is to be treated as income belonging to the life tenant or as constituting a part of the capital of the trust estate, will be determined by the court irrespective of any characterization or action on the part of the officers of the corporation in paying it over. By the Kernochan, McLouth and Lowry cases, that dividends paid over upon shares of stock, constituting the trust estate, from earnings of the company, in the form of stock certificates, are to be treated as income and not capital, as between life tenants and remaindermen. By the Kernochan and McLouth cases, that dividends paid upon shares of stock constituting a trust estate, during the continuance of the trust, from surplus earnings of the company accumulated prior to the creation of the trust, will, unless restricted by the terms of the will, be treated as income payable to the life tenant. By the Stewart case, that the price received from sale of shares of capital stock, constituting a trust estate, in excess of the value of such shares at the time of the creation of the trust, is to be deemed an accretion to the capital and go to the remaindermen; and likewise, that the price received for investment securities, in excess of the amount paid therefor by the trustees, is also to be treated as an accretion to the capital and as belonging to the remaindermen, under the terms of a will which creates a trust 'to take, receive, hold, collect, manage, invest and reinvest' the trust estate and pay over the 'net rents, income, issues and profits thereof' as directed by the

court stating that the question is always to be decided according to the actual facts of the transaction. The New York court of ap-

terms of the will. By the Rogers case, that earnings of a corporation accumulated prior to its dissolution and subsequently paid over on shares of stock constituting a trust estate are to be deemed 'profits' belonging to the life tenant, under a trust similar to the one under consideration. In all these cases is the principle recognized that the intention of the testator in creating the trust should be arrived at and carried into effect, where it may be done without violation of law; and in so doing courts will regard the substance and disregard mere matters of form for its accomplishment. Each case must, therefore, depend to a greater or less extent upon its own peculiar circumstances." Profits upon the sale of stock are principal and not income in New York. Whitney *v.* Phœnix, 4 Redf. 180 (1880). In Hyatt *v.* Allen, 56 N. Y. 553, 557 (1874), the court of appeals intimated plainly its disapproval of the rule prevailing in England upon this subject. Farwell *v.* Tweddle, 10 Abb. N. Cas. 94 (1881); Prime's Estate, N. Y. L. J., March 6, 1891, reviewing the authorities. A dividend arising from the sale of a part of the assets of a company belongs to the remainderman. *Re* Curtis, N. Y. L. J., Jan. 24, 1890. Money received from stock upon the winding up of the corporation belongs to the remainderman. *Re* Skillman's Estate, 9 N. Y. Supp. 469 (1890). Where the capital is reduced and returned to the stockholders with a surplus, the surplus goes to the life tenant. *Re* Warren's Estate, 11 N. Y. Supp. 787 (1890). Though the dividends are necessarily from the capital stock, as in mining or other similar corporations, the life tenant is entitled to them. *Re* James, 78 Hun, 121 (1894); aff'd, 146 N. Y. 78 (1895). Where a manufacturing corporation had a capital stock of $300,000, and in course of time it sold its plant and part of its working capital for $2,750,000 of the capital stock of a new corporation, and retained certain cash, bonds, stocks and surplus lands which it proceeded to distribute among its stockholders, the court held that the plant and working capital were practically capital stock, but that the cash, bonds, stocks, and surplus lands were income that went to the life tenant. Matter of Rogers, 161 N. Y. 108 (1899). The words "capital" and "profits," as used in connection with life estates and remainders in stocks, have a different meaning from what they have in determining the right of a corporation to declare dividends. In passing upon the relative interests of a remainderman and life tenant in shares of stock and the dividends therefrom, the courts will sometimes include in capital stock, extensions, improvements, plant, and working capital which have been obtained from past profits and not from subscriptions to the capital stock. Matter of Rogers, 161 N. Y. 108 (1899), the court saying: "What, then, is capital and what is profits? In a manufacturing business a plant is of first importance, and as the business increases an enlargement thereof, with the necessary tools, fixtures, and machinery, is one of the things to which the earnings of the company may properly be devoted. This must be deemed to be fairly within the contemplation of the testator in creating the trusts with the capital stock of this company. After the plant there arises a necessity for raw material and labor to manufacture it. This requires what is usually termed a working capital, and it, of necessity, varies in amount, depending upon the magnitude of the business. It must, therefore, also have been within the contemplation of the

peals says: "For all corporate purposes the corporation may doubtless convert earnings into capital, when such power is conferred by its charter; but when a question arises between life tenants and remaindermen concerning the ownership if the earnings thus converted, the action of the corporation will not conclude the courts." [1]

In New Jersey the reasonable and logical rule is laid down that a cash dividend from earnings is apportioned between the *corpus* of the estate and the life tenant, in the proportion of the lapse of time since the last dividend, unless proof is given that such dividend was earned not day by day but at irregular times. The trustee is justified in distributing the dividend on this basis unless notice by an interested party is given him not to do so.[2]

§ 555. *The Massachusetts rule.*—The rule, which prevails in Massachusetts, Georgia, Rhode Island, and Illinois is sometimes

testator that a reasonable amount would be retained by the directors for this purpose." In the case of Chester *v.* Buffalo, etc. Co., 70 N. Y. App. Div. 443 (1902), where a surplus had been accumulated, partly before the testator's death and partly after it, and a stock dividend was then declared, the court refused to give to the life tenant such part of the stock dividend as would correspond to the surplus accumulated after the testator's death, inasmuch as the same regular dividends had been paid after the testator's death as before, and the testator evidently expected that similar dividends should go to the life tenant.

South Carolina: Profits and income existing when the trust is created are *corpus*, but subsequent profits and income are income. Cobb *v.* Fant, 36 S. C. 1 (1892).

Tennessee: Stock dividends declared from net earnings made after the death of testator, who bequeathed the stock on which the dividends were declared, for life, belong to the life tenant as income, not to the remaindermen as part of the *corpus.* Pritchitt *v.* Nashville Trust Co., 96 Tenn. 472 (1896). For articles on "Right to dividends as between life tenant and remainderman," see 26 Am. L. Rev. 1, and 24 Am. Rep. 169.

Wisconsin: A legacy of one million dollars book value of stock carries a stock dividend thereafter declared from stock then in the treasury. Pabst *v.* Goodrich, 113 N. W. Rep. 398 (Wis. 1907).

1 McLouth *v.* Hunt, 154 N. Y. 179 (1897).

2 Lang *v.* Lang's Ex'r, 57 N. J. Eq. 325 (1898), rev'g 56 N. J. Eq. 603 (1898). The court held that there was no difference between ordinary and extraordinary dividends so far as this right of apportionment is concerned. The court said: "We think that when a dividend is declared out of earnings, the reasonable presumption is that those earnings have been made uniformly, day by day, since the last similar dividend was declared, leaving the parties in interest at liberty to show that the earnings were really made differently. This will afford a practical rule for trustees who receive such a dividend, and if they act on the presumption, without notice to the contrary, either from the parties or by the circumstances, they will be protected. So, also, they should be allowed to presume that dividends are out of earnings, unless like notice shall charge them to the contrary." *Cf.* § 558, *infra.*

called "the rule in Minot's Case." It regards cash dividends whether large or small, as income, and stock dividends, whenever earned and however declared, as capital, and the rule, accordingly, is a simple one. Cash dividends belong to the tenant for life and stock dividends to the *corpus*.[1] There is little doubt, however, that this rule works great hardship and injustice in many cases. Hence the rule is not rigidly adhered to, but the court, in deciding whether the distribution is a stock or a cash dividend, may consider the actual and substantial character of the transaction, and not its nominal character merely.[2]

1 Minot *v.* Paine, 99 Mass. 101 (1868). In this case the principle is thus stated: "A simple rule is to regard cash dividends, however large, as income, and stock dividends, however made, as capital." In subsequent cases this rule has been affirmed and elaborated. Daland *v.* Williams, 101 Mass. 571 (1869); Leland *v.* Hayden, 102 Mass. 542 (1869); Heard *v.* Eldredge, 109 Mass. 258 (1872); Rand *v.* Hubbell, 115 Mass. 461 (1874); Gifford *v.* Thompson, 115 Mass. 478 (1874); Hemenway *v.* Hemenway, 134 Mass. 446 (1883); New England Trust Co. *v.* Eaton, 140 Mass. 532 (1886). See also Harvard College *v.* Amory, 26 Mass. 446 (1830); Balch *v.* Hallet, 76 Mass. 402 (1858); Atkins *v.* Albree, 94 Mass. 359 (1866). Where all the stock of a corporation is sold, and it is a part of the sale that a large accumulated surplus shall be distributed among the old stockholders by way of a dividend, this dividend belongs to the life tenant. Hemenway *v.* Hemenway, 181 Mass. 406 (1902). In the case Lyman *v.* Pratt, 183 Mass. 58 (1903), the court, after quoting the rule from Minot *v.* Paine, "a simple rule is to regard cash dividends, however large, as income, and stock dividends, however made, as capital," said "this general rule has been followed by this court ever since." Hence the court held that even though a cash dividend is paid on the same date that new stock is offered, and the cash dividend is equal to the amount to be paid for the new stock, this is not a stock dividend, and hence such cash dividend belongs to a life tenant and not to the remaindermen.

2 Where a joint-stock association having $12,000,000 surplus invested in securities issues its bonds to the amount of $12,000,000 to its stockholders as a dividend in place of distributing such securities or the proceeds thereof, the interest on the bonds to be paid only from the income from the securities after paying the debts, such bonds do not belong to a life tenant, but belong to the remaindermen. D'Ooge *v.* Leeds, 176 Mass. 558 (1900), the court saying: "In considering the distribution to determine its character, substance, and not form, is regarded. The simple question in every case is whether the distribution made by the corporation is of money to be spent as income, or capital to be held as an investment in the corporation. While this arbitrary rule may sometimes defeat the intention of the testator, in most cases it accomplishes the result intended, and there were practical considerations, as well as principles, which required the adoption of it." Also, "Our court does not inquire further than to ascertain whether the distribution is of money to be used as income, or as of capital, to be continued in the business." The court said also that this was substantially the rule in England, and the rule laid down by the supreme court of the United States. In Daland *v.* Williams, 101 Mass. 571 (1869), where the di-

The supreme court of the United States has held that a life tenant of stock does not take a stock dividend declared during the life

rectors, having voted to increase the capital stock by three thousand shares, declared a cash dividend of forty per cent., and authorized the treasurer to receive that dividend in payment for two thousand eight hundred of the shares, the remaining two hundred shares to be sold, the court held that the transaction was virtually a stock dividend, and that the shares must go to the remainderman's fund. *Cf.* Rand *v.* Hubbell, 115 Mass. 461 (1874). In Leland *v.* Hayden, 102 Mass. 542 (1869), where it appeared that the company had invested its surplus earnings in its own stock, and subsequently declared a dividend of that stock, the life tenant was held absolutely entitled to it. The life tenant takes the dividend where it is in cash, although the cash is derived from increased stock which is offered to the old stockholders for subscription, the profits having been used for improvements. This is not a stock dividend. Davis *v.* Jackson, 152 Mass. 58 (1890). See also Balch *v.* Hallet, 76 Mass. 402 (1858); Reed *v.* Head, 88 Mass. 174 (1863); Harvard College *v.* Amory, 26 Mass. 446 (1830); Gifford *v.* Thompson, 115 Mass. 478 (1874); Hemenway *v.* Hemenway, 134 Mass. 446 (1883). In New England Trust Co. *v.* Eaton, 140 Mass. 532 (1886), it was held, in an elaborate opinion by Devens, J., that the gain or loss arising from the sale of stock held in trust is the gain or loss of the *corpus*, and that the sum received constitutes a new principal. Accordingly, a trustee who has invested in bonds at a premium may retain annually from the income payable to the life tenant such sums as will restore to the fund at its maturity what was taken therefrom at the time of the investment. See also the dissenting opinion of Mr. Justice Holmes in this case; and *cf.* Bowker *v.* Pierce, 130 Mass. 262 (1881); Dodd *v.* Winship, 133 Mass. 359 (1882); Wright *v.* White, 136 Mass. 470 (1884); Parsons *v.* Winslow, 16 Mass. 361 (1820); Lovell *v.* Minot, 37 Mass. 116 (1838). The court will take into consideration, in determining the question as between life tenant and remainderman, the whole character of the transaction, and the nature and source of the property distributed, with due regard to all the facts preceding, attending, and resulting from the declaration of the dividend. In Heard *v.* Eldridge, 109 Mass. 258 (1872), it is said: "The suggestion that the intention of the directors should determine the question whether the dividend is capital or income cannot be correct. . . . It is more safe to look at the character of the property and the transaction." See three interesting and valuable little pamphlets by "A Layman," wherein the merits of the question are fully and learnedly discussed, and entitled respectively "Common Sense *versus* Judicial Legislation;" "Stock Dividends; the Rule in Minot's Case Again Restated with Variations by the Supreme Judicial Court of Massachusetts," and "A Third Chapter on the Rule in Minot's Case." (N. Y.: G. P. Putnam's Sons.) See 5 Am. L. Rev. 720; Perry, Trusts (3d ed.), §§ 544, 545, and notes.

In Georgia the code is construed so as to follow the Massachusetts rule. Millen *v.* Guerrard, 67 Ga. 284 (1881); Ga. Code, § 2256.

In Illinois a stock dividend goes to the remainderman. Billings *v.* Warren, 216 Ill. 281 (1905). A stock dividend based on earnings accumulated during the testator's lifetime goes to the remainderman. Blinn *v.* Gillett, 208 Ill. 473 (1904). An extraordinary

tenancy.[1] Even though a large cash dividend is exactly equivalent to the amount of new stock which is offered to the stockholders for subscription, yet the transaction is not considered as a stock dividend, there being no obligation on the part of the stockholders to take the new stock; hence such a cash dividend belongs to the life tenant.[2]

In Rhode Island the courts have adopted a rule somewhat like "the rule in Minot's Case," without the modification engrafted upon it by the subsequent decisions of the Massachusetts courts. It is a rule which in general prefers the remainderman to the life tenant.[3]

§§ 556, 557. *The English rule.*—In England an ordinary, regular, usual cash or stock or property dividend belongs to the life tenant, while an extraordinary eash or stock or property dividend belongs to the *corpus* of the trust.[4] This rule was established in England in 1799.

cash dividend belongs to the life tenant, but stock dividends do not. De Koven *v.* Alsop, 205 Ill. 309 (1903).

1 Gibbons *v.* Mahon, 136 U. S. 549 (1890). Where a corporation sells the larger portion of its property for cash and stock in another corporation and distributes the same among its stockholders, the court will look at the substance of the transaction, and it being clear that such distribution was not of the profits, the cash and stock will not be considered as income. Mercer *v.* Buchanan, 132 Fed. Rep. 501 (1904).

2 Hyde *v.* Holmes, 84 N. E. Rep. 318 (Mass. 1908). See also § 536, *supra.*

3 Parker *v.* Mason, 8 R. I. 427 (1867); Bushee *v.* Freeborn, 11 R. I. 149 (1875); Brown's Petition, 14 R. I. 371 (1884). A stock dividend is capital and not income. Greene *v.* Smith, 17 R. I. 28 (1890).

4 The courts, perhaps uniformly, insist upon this distinction. Extraordinary dividends may be either of cash or stock, and appear under a variety of names, such as "participations," "distributions," or more commonly, "bonuses." See Witts *v.* Steere, 13 Ves. Jr. 363 (1807); Norris *v.* Harrison, 2 Madd. 268 (1817); Hooper *v.* Rossiter, McClel. (Exch.) 527 (1824). To the point that regular dividends, though increased in amount, go as income to the owner of the life estate, see Barclay *v.* Wainewright, 14 Ves. Jr. 66 (1807); Price *v.* Anderson, 15 Sim. 473 (1847); Bates *v.* Mackinley, 31 Beav. 280 (1862), a cash dividend; to the point that "extra" or unusual dividends, whether of cash or shares, go to augment the principal of the trust fund, see Irving *v.* Houstoun, 4 Pat. H. L. Cas. 521 (1803), a stock dividend; Hooper *v.* Rossiter, McClel. (Exch.) 527 (1824), a stock dividend; *Re* Barton's Trust, L. R. 5 Eq. 238 (1868), a stock dividend; Paris *v.* Paris, 10 Ves. Jr. 185 (1804), a cash dividend; Clayton *v.* Gresham, 10 Ves. Jr. 288 (1804), a cash dividend; Witts *v.* Steere, 13 Ves. Jr. 363 (1807), a cash dividend. *Cf.* Gilly *v.* Burley, 22 Beav. 619 (1856); Straker *v.* Wilson, L. R. 6 Ch. App. 503 (1871); Brander *v.* Brander, 4 Ves. Jr. 800 (1799); Preston *v.* Melville, 16 Sim. 163 (1848); Murray *v.* Glasse, 17 Jur. 816 (1853); Johnson *v.* Johnson, 15 Jur. 714 (1850); Plumbe *v.* Neild, 6 Jur. (N. S.) 529 (1860); Hollis *v.* Allan, 12 Jur. (N. S.) 638 (1866). See also *Re* Hopkins's Trusts, L. R. 18 Eq. 696 (1874); Scholefield *v.* Redfern, 2 Dr. & Sm. 173 (1863); Hartley *v.* Allen, 4

There are, however, cases in England to the effect that extraordinary cash dividends may be decreed to belong to the life tenant.[1] There of course is no question that ordinary cash dividends belong to the life tenant.[2] This rule applies even though it may be

Jur. (N. S.) 500 (1858); Lock *v.* Venables, 27 Beav. 598 (1859), holding to the effect that a specific bequest of "the divdends, interest, and proceeds" of shares will not pass a bonus on the shares. In Alcock *v.* Sloper, 2 Myl. & K. 699 (1833), the income of the testator's long annuities was given to the life tenant. Wilday *v.* Sandys, L. R. 7 Eq. 455 (1869). In Lane *v.* Loughnan, 7 Vict. L. R. Eq. 19 (1881), it was held that the premium on a lease of part of a trust estate belonged to the tenant for life and not to the *corpus*. An executor may plainly transfer the stock to pay the decedent's debts, although it is bequeathed for life with remainder over. Franklin *v.* Bank of England, 1 Russ. 575 (1826). In Clive *v.* Clive, Kay, 600 (1854), by the terms of the deed of settlement the net profits of the concern were to be divided ratably to such an amount as should be declared at the semi-annual meetings, and were to be paid within twenty-one days thereafter; and it was provided that a stockholder was not to receive any dividend after the period at which he ceased to be a proprietor of shares, but the dividends on such shares were to continue in suspense until some other person should become proprietor of them. When a stockholder died sixty-nine days after a half-yearly meeting at which a dividend had been declared, but before notice had been given that such dividend was payable, having by his will bequeathed the interest and annual income arising from all his shares to one for life, and then in remainder to others, it was held that this dividend belonged to the legatee for life, and not to the general personal estate of the testator. See also Title to Dividends, 19 Am. L. Rev. 571; Bostock *v.* Blakeney, 2 Bro. Ch. 653 (1789); 2 Perry, Trusts, §§ 544, 545. Mr. Moak's note, 31 Eng. Rep. 328–332; Browne *v.* Collins, L. R., 12 Eq. 586 (1871), is to the effect that profits of a partnership accrued and earned before, but not set aside *qua* profits until after the death of the testator, belong to the *corpus* of the estate, and that profits accruing after his death go to the tenant for life as income. See also the important review of the whole subject in Bouch *v.* Sproule, L. R. 12 App. Cas. 385 (1887), reversing the court below, Sproule *v.* Bouch, L. R. 29 Ch. D. 635 (1885).

1 In Sugden *v.* Alsbury, L. R. 45 Ch. D. 237 (1890), the court held that the life tenant was entitled to an extraordinary dividend payable in cash. The dividend was called a bonus, but was nothing more or less than a large dividend, being a division of accumulated profits. In Ellis *v.* Barfield, 64 L. T. Rep. 625 (1891), the court held that a large dividend was income and belonged to the life tenant, although it was used by the trustee to pay up the stock in full, and also to purchase new shares which he immediately sold; but the excess for which he sold the stock at a profit belongs to the remainderman.

2 A cash dividend of profits which have been earned since the last preceding dividend, such last preceding dividend having been made in a regular and reasonable time previously, belongs to a life tenant of stock, and not to the remainderman. Barclay *v.* Wainewright, 14 Ves. Jr. 66 (1807); Norris *v.* Harrison, 2 Madd. 268 (1817); Clive *v.* Clive, Kay, 600 (1854); Murray *v.* Glasse, 17 Jur. 816 (1853); Preston *v.* Melville, 16 Sim. 163 (1848); Cuming *v.* Boswell, 2 Jur. (N. S.) 1005 (1856). *Cf.* Ware *v.* Mc-

shown that the dividend in question was earned, wholly or in part, before the commencement of the life estate.[1]

Where it is shown that dividends have been fraudulently retained in prejudice of the rights of the life tenant, and subsequently a bonus is paid upon the shares, it belongs, as income deferred, to the tenant for life, even though it be called a bonus.[2] The life tenant does not take any part of the surplus value of shares upon distribution after dissolution, if such surplus was clearly capital.[3] An English court has recently said: "The true rule to be inferred from the cases as between tenant for life and remainderman seems to me to be that the tenant for life is entitled to all payments out of profits made by the company unless they have been validly capitalized by the company by resolution or otherwise." [4]

In all cases, however, the intent of the grantor or testator is the pole-star, and will be carried out by the courts.[5]

§ 558. *The apportionment of dividends.*—When a life tenant dies before the date at which a dividend is declared, the question arises whether the dividend declared next after his death ought or ought not to be apportioned between the reversioner or remainderman and the estate of the life tenant for the period of time partially covered by the life estate. It is, in general, the rule in such a case that the dividend is not apportionable, but belongs entirely to the *corpus* of the trust fund.[6] But where a tenant for life dies after

Candlish, 11 Leigh (Va.), 595 (1841); Price *v.* Anderson, 15 Sim. 473 (1847); Witts *v.* Steere, 13 Ves. Jr. 363 (1807).

1 Bates *v.* Mackinley, 31 Beav. 280 (1862); Jones *v.* Ogle, L. R. 8 Ch. App. 192 (1872).

2 Maclaren *v.* Stainton, L. R. 11 Eq. 382 (1871); s. c., 3 De G., F. & J. 202 (1861), reversing s. c., 27 Beav. 460 (1859); Edmondson *v.* Crosthwaite, 34 Beav. 30 (1864); Dale *v.* Hayes, 40 L. J. (Ch.) 244 (1871). *Cf.* Lean *v.* Lean, 32 L. T. Rep. 305 (1875); Lambert *v.* Lambert, 29 L. T. (N. S.) 878 (1874); *Re* Tinkler's Estate, L. R. 20 Eq. Cas. 456 (1875).

3 *Re* Armitage, [1893] 3 Ch. 337.

4 *Re* Piercy, 95 L. T. Rep. 868 (1906).

5 Quoted and approved in *re* Robinson's Trust, 67 Atl. Rep. 775 (Penn. 1907). Sproule *v.* Bouch, L. R. 29 Ch. D. 635 (1885); *Re* Hopkins's Trusts, L. R. 18 Eq. 696 (1874); Scholefield *v.* Redfern, 2 Dr. & Sm. 173 (1863); Jones *v.* Ogle, L. R. 14 Eq. 419 (1872); *Re* Box, 1 Hem. & M. 552 (1863). *Cf.* Reed *v.* Head, 88 Mass. 174 (1863); Clarkson *v.* Clarkson, 18 Barb. 646 (1855); Millen *v.* Guerrard, 67 Ga. 284 (1881); Thomson's Appeal, 89 Pa. St. 36 (1879). The life tenant takes a dividend paid immediately after the death of the testator, where the will provides that each share bequeathed by the will should carry the dividend accruing at the time of the testator's death. Lysaght *v.* Lysaght, [1898] 1 Ch. 115 (1897).

6 Pearly *v.* Smith, 3 Atk. 260 (1745); Sherrard *v.* Sherrard, 3 Atk. 502 (1747); Wilson *v.* Harman, 2 Ves. Sr. 672 (1755); Hartley *v.* Allen, 4 Jur. (N. S.) 500 (1858); *Re* Maxwell's Trusts, 1 Hem. & M. 610 (1863); Foote, Appellant, 39 Mass.

the dividend is declared, but before the dividend becomes due, his estate will be entitled to the whole of that dividend.[1] In England, under the statute known as the Apportionment Act of 1870, dividends are apportionable in these cases between the estate of the life tenant and the *corpus;*[2] and in this country at common law, in one or two jurisdictions, there is a tendency to hold that dividends are apportionable.[3] In Maryland a stock dividend has been appor-

299 (1839); Granger *v.* Bassett, 98 Mass. 462 (1868); Clapp *v.* Astor, 2 Edw. Ch. 379 (1834). *Cf.* Hyatt *v.* Allen, 56 N. Y. 553 (1874); Brundage *v.* Brundage, 60 N. Y. 544, 551 (1875); Perry, Trusts, § 556. But in Massachusetts it has been held that sometimes dividends declared after the life tenant's death will, nevertheless, go to his estate. Thus, a life tenancy in stock for the support of the testator's widow and children was held to entitle the widow's estate to a dividend declared after her death, but for a period which expired before that event. Johnson *v.* Bridgewater Mfg. Co., 80 Mass. 274 (1859). See also Ellis *v.* Essex Merrimack Bridge, 19 Mass. 243 (1824); Gifford *v.* Thompson, 115 Mass. 478 (1874). *Cf.* King *v.* Follett, 3 Vt. 385 (1831), in which the residuary legatee claimed from the legatee of certain stock the share of dividends earned in the lifetime of his testator, but declared after his death; the court holding that a sale or gift of stock carries with it all dividends declared after it takes effect, whether earned before or not. A life tenant is not entitled to a proportionate part of a surplus, even though it was accumulated during the life tenancy, no distribution by the corporation being contemplated. Tubb *v.* Fowler, 99 S. W. Rep. 988 (Tenn. (1907). *Cf.* Lang's case, p. 1517, *supra.*

1 Wright *v.* Tuckett, 1 J. & H. 266 (1860); Paton *v.* Sheppard, 10 Sim. 186 (1839).

2 33 & 34 Vict., ch. 35, § 2; Pollock *v.* Pollock, L. R. 18 Eq. 329 (1874), qualifying or explaining Whitehead *v.* Whitehead, L. R. 16 Eq. 528 (1873); Beavan *v.* Beavan, 53 L. T. Rep. 245 (1885). *Cf.* Capron *v.* Capron, L. R. 17 Eq. 288 (1874); and see Banner *v.* Lowe, 13 Ves. Jr. 135 (1806); Hay *v.* Palmer, 2 P. Wms. 501 (1728). The statute applies only to dividends upon the stock of corporations, strictly speaking, and not to those upon the shares in private trading corporations. Jones *v.* Ogle, L. R. 8 Ch. App. 192 (1872). And does not apply to stock dividends. Hartley *v.* Allen, 4 Jur. (N. S.) 500 (1858). Under the Apportionment Act of England, a dividend declared after the death of the tenant for life may be apportioned between his estate and the remainderman. Bulkeley *v.* Stephens, [1896] 2 Ch. 241.

3 In *Ex parte* Rutledge, 1 Harp. Eq. (S. C.) 65 (1824), a dividend was apportioned between life tenant and remainderman. This is regarded as a leading case in favor of apportionment. In Pennsylvania the interest on municipal bonds and on the bonds of private corporations is apportionable; but *quere* whether or not the interest on government bonds would be. Wilson's Appeal, 108 Pa. St. 344 (1885), overruling Earp's Will, 1 Pars. Eq. Cas. (Pa.) 453 (1850). But in Massachusetts the statute of apportionment is held not to apply to dividends upon the stock of corporations. Granger *v.* Bassett, 98 Mass. 462, 469 (1868), construing Mass. Gen. Stat., ch. 97, § 24. In New York an apportionment is provided for by Laws of 1875, ch. 542. See Goldsmith *v.* Swift, 25 Hun, 201 (1881). Where dividends are declared at irregular intervals, such dividends are not apportionable

tioned.[1] At the termination of the life estate no claim can be made in behalf of the life tenant for increase in the value of the stock, no dividends having been declared.[2]

§ 559. *The right to subscribe for new shares as between life tenant and remainderman.*—The right to subscribe for new shares at par upon an increase of the capital stock, which is an incident of the ownership of the stock, does not belong as a privilege to the life tenant, but such an increment must be treated as capital, and be added to the trust fund for the benefit of the remainderman. This is equally the rule whether the trustee subscribes for the new stock for the benefit of the trust or sells the right to subscribe for a valuable consideration. In either event the increase goes to the *corpus*.[3] The subsequent income, however, of such increase belongs, during the continuance of the life tenancy, to the life tenant as in-

under the New York statute. Matter of Kane, 64 N. Y. App. Div. 566 (1901).

1 A stock dividend declared in 1891 to represent profits which for three years had been used for improvements should be apportioned between the life tenant and remaindermen, the testator having died in 1890. Thomas *v.* Gregg, 78 Md. 545 (1894).

2 *In re* Connolly's Estate, 198 Pa. St. 137 (1901). A dividend paid after the death of the life tenant belongs to the remaindermen and there is no apportionment unless the will provides otherwise. Mann *v.* Anderson, 106 Ga. 818 (1899).

3 Quoted and approved in De Koven *v.* Alsop, 205 Ill. 309 (1903). Robertson *v.* Brulatour, 188 N. Y. 301 (1907). Richmond *v.* Richmond, 123 N. Y. App. Div. 117 (1908). Jewett *v.* Schmidt, 45 N. Y. Misc. Rep. 471 (1904). Brown *v.* Brown, 65 Atl. Rep. 739 (N. J. 1907). Atkins *v.* Albree, 94 Mass. 359 (1866); Brinley *v.* Grou, 50 Conn. 66 (1882); Biddle's Appeal, 99 Pa. St. 278 (1882); Moss's Appeal, 83 Pa. St. 264 (1877); Goldsmith *v.* Swift, 25 Hun, 201 (1881); *Re* Bromley, 55 L. T. Rep. 145 (1886). Profit upon the sale of stock is *corpus*, and not income for the life tenant. Whitney *v.* Phœnix, 4 Redf. (Surr.) 180 (1880). *Cf.* Leitch *v.* Wells, 48 N. Y. 585 (1872); Hemenway *v.* Hemenway, 134 Mass. 446 (1883); New England Trust Co. *v.* Eaton, 140 Mass. 532 (1886). A privilege given by a corporation to its stockholders to take additional stock at par is appurtenant to the old stock, and does not belong to the life beneficiary. Hite *v.* Hite, 93 Ky. 257 (1892). Where the life tenant refuses to pay for increased capital stock which is issued at fifty cents on a dollar, the remaining fifty cents being a stock dividend, and the trustee takes the stock for himself, and ten years have elapsed since the life tenant claimed the stock, the statute of limitations is a bar to his suit to compel the trustee to account for the stock. Matter of Smith, 66 N. Y. App. Div. 340 (1901); aff'd, 179 N. Y. 563. Sometimes certificates of new stock issued to represent property acquired are not stock dividends. Chicago, etc. R. R. *v.* Page, 1 Biss. 461 (1864); s. c., 5 Fed. Cas. 600. In Londesborough *v.* Somerville, 19 Beav. 295 (1854), where consols were sold just before a dividend day and the proceeds invested in realty, a tenant for life was held entitled to be paid, as income on the consols, the difference between the price obtained and the value exclusive of the next dividend. See also notes in § 554, and, in general, § 286, *supra*.

come; the new shares are part of the *corpus,* and the life tenant, being entitled to the income from the *corpus,* takes the income from the accretions thereto.[1] Where new stock is issued and the right to subscribe therefor is sold, the proceeds of such sale belong to the remainderman, and only the income to the life tenant.[2] Where a dividend is used to pay for increased capital stock the stock goes to the life tenant.[3]

§ 560. *Miscellaneous questions herein.*—An executrix is liable on stock standing in the name of the estate instead of in the name of the deceased or the executrix, it being shown that the stock formerly stood in the name of the deceased.[4] Even though executors transfer to themselves as trustees certain national bank stock and pay the dividends to a legatee of a share in the estate, yet if the will did not set aside such stock for such legatee, the estate, and not the legatee's interest, is liable for an assessment on such stock.[5] The life tenant must pay calls which are made[6] and taxes levied[7]

1 Quoted and approved in *Re* Eisner's Estate, 175 Pa. St. 143 (1896), and Richmond *v.* Richmond, 123 N. Y. App. Div. 117, 126 (1908). Moss's Appeal, 83 Pa. St. 264 (1877); Biddle's Appeal, 99 Pa. St. 278 (1882), and the cases generally cited in the preceding note; *Re* Bromley, 55 L. T. Rep. 145 (1886).

2 Walker *v.* Walker, 68 N. H. 407 (1896). Cash realized by the sale of the right to subscribe for new stock belongs to the remainderman. Hyde *v.* Holmes, 84 N. E. Rep. 318 (Mass. 1908). A life tenant is not entitled to the price realized by the trustee from the sale of the right to subscribe for new stock, neither is the life tenant entitled to a large sum realized on the sale of the securities in excess of the inventoried value, the sale being for purposes of reinvestment, nor is he entitled to profits on securities purchased and later sold at a higher price, but the life tenant is entitled to a stock dividend representing earnings used by the company to increase its plant. Stewart *v.* Phelps, 71 N. Y. App. Div. 91 (1902); aff'd, 173 N. Y. 621.

3 Brown *v.* Brown, 65 Atl. Rep. 739 (N. J. 1907). Where an extraordinary cash dividend is declared and at the same time the stockholders are given the opportunity to subscribe for new stock at par, a life tenant is entitled to such part of the dividend as was earned since the creation of the life estate, not including anything for natural growth and increase of values. Holbrook *v.* Holbrook, 66 Atl. Rep. 124 (N. H. 1907).

4 Brown *v.* Ellis, 103 Fed. Rep. 834 (1900). See also § 248, *supra.*

5 Earle *v.* Rogers, 105 Fed. Rep. 208 (1900).

6 *Re* Box, 1 Hem. & M. 552 (1863). If the testator owns the stock at the time of his death the specific legatee thereof must pay future calls, but if he did not own it completely the general estate must pay the calls. Day *v.* Day, 1 Dr. & Sm. 261 (1860); s. c., 6 Juris. (N. S.) 365. In case of a life estate, followed by a life estate, followed by a remainder to the nominees of the first life tenant, the estate of the first life tenant is liable for calls made after the remainder commences. Hobbs *v.* Wayet, L. R. 36 Ch. D. 256 (1887). If a call becomes due the day after the testator dies, it is the duty of the executor to pay it from the general fund. Emery *v.* Wason, 107 Mass. 507 (1871).

7 Webb *v.* Burlington, 28 Vt. 188

during the continuance of his estate upon shares held in trust for his benefit. Dividends and interest on stocks and bonds pledged by a testator do not constitute income for annuities.[1] Where stock to produce a fixed income is bequeathed for life, a subsequent increase in the earnings from that stock inures to the benefit of the life tenant.[2] The enhanced price for which stock sells by reason of dividends earned but not declared belongs to the remainder.[3] Profits realized from the enhanced value of securities belong to the remainderman.[4] Where a trustee sells stock by decree of the court on

(1856); Citizens' Mut. Ins. Co. *v.* Lott, 45 Ala. 185 (1871). See also § 248, *supra.*

1 Skinner *v.* Taft, 140 Mich. 282 (1905).

2 Russell *v.* Loring, 85 Mass. 121 (1861). But when a fixed income is bequeathed and the income fails or falls short, the principal must be resorted to. Bonham *v.* Bonham, 33 N. J. Eq. 476 (1881); Haydel *v.* Hurck, 72 Mo. 253 (1880). The opposite rule, however, prevails in New York. Delaney *v.* Van Aulen, 84 N. Y. 16 (1881), reversing s. c., 21 Hun, 274. *Cf.* Crawford *v.* Dox, 5 Hun, 507 (1875). See also § 304, *supra.*

3 Where stock is sold the life tenant is not entitled to such part of the price as might represent the income since the last dividend. The court has no power to make any division. Scholefield *v.* Redfern, 2 Dr. & Sm. 173 (1863), the court refusing to follow Londesborough *v.* Somerville, 19 Beav. 295, and stating that the latter turned upon very special circumstances. See also Abercrombie *v.* Riddle, 3 Md. Ch. 320 (1850); Van Blarcom *v.* Dager, 31 N. J. Eq. 783 (1879); *Re* Stutzer, 26 Hun, 481 (1882); *Re* Gerry's Accounting, 103 N. Y. 445 (1886). A life tenant entitled to "dividends, rents and profits" is not entitled to any increase in the value of the securities during the life tenancy, nor to profits by change of investments, nor money received from the sale of right to subscribe for new stock, nor of profits due to subscribing for new stock. Boardman *v.* Mansfield, 66 Atl. Rep. 169 (Conn. 1907). Where, during the life tenancy, the corporation passes a large portion of its profits to surplus, and by reason thereof the market value of the stock increases and is sold for a higher price, the difference belongs to the life tenant. Simpson *v.* Millsaps, 80 Miss. 239 (1902). Where a will directed that the "dividends, issues and profits" from certain stock should be paid to certain persons until they became thirty years of age, and before that time the company was dissolved and its assets divided, the court held that the invested surplus and working cash capital were dividends, issues and profits, but that materials, betterments and good will were principal. Matter of Stevens, 111 N. Y. App. Div. 773 (1906); aff'd on this point in 187 N. Y. 471.

4 Stewart *v.* Phelps, 71 N. Y. App. Div. 91 (1902); aff'd, 173 N. Y. 621. Concerning the question as to the rights of the life tenant and remainderman where trustees buy securities at a premium or sell them at a premium, see Scovel *v.* Roosevelt, 5 Redf. 121 (1881); Townsend *v.* U. S. Trust Co., 3 Redf. 220 (1877); Duclos *v.* Benner, 5 N. Y. Supp. 733 (1888); Farwell *v.* Tweddle, 10 Abb. N. Cas. 94 (1881); Whittemore *v.* Beekman, 2 Dem. 275 (1883); Cridland's Estate, 132 P. St. 479 (1890). See note in 18 Abb. N. Cas. 185 An increase in the value of securities in which a trust fund of $10,000 is invested belongs to the life tenant where the instrument creating

account of the precarious nature of the stock, the life tenant is not entitled to anything from the *corpus* of the estate, where it is not shown that the income is decreased.[1] The unpaid interest on an income bond, even though cumulative, does not belong to the tenant for life if the bond is sold with all rights as regards arrears.[2] Where bonds are purchased at a premium for a trust estate, enough income may be retained to offset the premium paid so as to keep the trust fund intact.[3] The trustees need not create a sinking fund for securities which were specifically bequeathed.[4] Where, during the life tenancy, the corporation ceases business and is wound up, the life tenant is entitled to such part of the surplus value of the stock as was earned during the life tenancy.[5] Where a trustee has power to sell and reinvest, profits made in this way belong to the *corpus*.[6] Even though the trustee invests in unauthorized security, yet no part

the trust divides "the said principal sum of $10,000" among remaindermen upon the death of the life tenant. Claflin *v.* Dewey, 177 Mass. 166 (1900).

1 Lister *v.* Weeks, 47 Atl. Rep. 588 (N. J. 1900). See s. c., 60 N. J. Eq. 215 (1900).

2 *Re* Taylor's Trust, [1905] 1 Ch. 734.

3 Curtis *v.* Osborn, 65 Atl. Rep. 968 (Conn. 1907). Where the trust estate consists of bonds purchased at a premium the depreciation in their value as they approach maturity must be deducted from the income. Matter of Stevens, 187 N. Y. 471 (1907). Where trustees buy bonds at a premium the premium should be returned to the principal out of the interest. Allis *v.* Allis, 123 Wis. 223 (1904); *contra*, *Re* De Pothonier, [1900] 2 Ch. 529. The income payable to the life tenant is not to be decreased on account of depreciation of the premium on bonds on account of their approaching maturity. *Re* Connecticut, etc. Co., 69 Atl. Rep. 360 (Conn. 1908).

4 Robertson *v.* Brulatour, 188 N. Y. 301 (1907). Where specific *stock* is put in trust the dividends to be paid to a life beneficiary, no deduction can be made from them for depreciation in the value of the stock. Robertson *v.* Brulatour, 111 N. Y. App. Div. 882 (1906).

5 *In re* Connolloy's Estate, 198 Pa. St. 137 (1901). A dividend paid on liquidation by a bank belongs to the remainderman, even though it is paid from the profit and loss account and from the surplus. Brownell *v.* Anthony, 189 Mass. 442 (1905). On dissolution of the corporation the distribution is capital and not income, as between remaindermen and life tenant. Bulkeley *v.* Worthington, etc. Soc., 78 Conn. 526 (1906). A dividend from the assets of the corporation on dissolution belongs to the capital and not the income of a trust estate. Curtis *v.* Osborn, 65 Atl. Rep. 968 (Conn. 1907).

6 *In re* Kemble's Estate, 201 Pa. St. 523 (1902). A life tenant entitled to dividends and income is not entitled to profits made in the sale and reinvestment of the fund. Smith *v.* Hooper, 95 Md. 16 (1902). Where a trustee is authorized to sell the securities and reinvest the money, and he sells bonds at a premium, the premium does not belong to the life tenant. Whittingham *v.* Schofield's Trustee, 67 S. W. Rep. 846 (Ky. 1902).

of the interest received belongs to the remaindermen.[1] Where a trustee is authorized to retain investments owned by the testator at the time of his death, he may retain hazardous coal stocks, and the life tenant is entitled to the entire income.[2] A life tenant is not entitled to have the stock transferred to him on the corporate books.[3] The corporation, if it had notice of the trust, may be held liable for transferring shares in prejudice of the rights of the life tenant.[4]

1 Slade *v.* Chaine, 97 L. T. Rep. 192 (1907).

2 *Re* Bates, 95 L. T. Rep. 753 (1906).

3 Collier *v.* Collier, 3 Ohio St. 369 (1854). *Cf.* State *v.* Robinson, 57 Md. 486 (1881). If a corporation transfers the stock to the life tenant, even by order of the court, and issues a certificate not stating the facts of life tenancy, and tells a purchaser of the certificate that it is all right, the corporation is liable to the remainderman. Caulkins *v.* Gaslight Co., 85 Tenn. 683 (1887). Where a life tenant under a power given by the will to the trustee to turn over the securities to the life tenants, pledges them, but does not sell them, and then dies, the equity belongs to the *corpus* of the estate. Bristol Sav. Bank *v.* Holley, 77 Conn. 225 (1904). In delivering stock to a life tenant the executor may endorse on the certificate that it is to be held by the legatee under the terms of the will. De Loney *v.* Hull, 58 S. E. Rep. 349 (Ga. 1907).

4 Stewart *v.* Fireman's Ins. Co., 53 Md. 564 (1880). Where a life tenant transfers the stock to the remainderman, the former's executor cannot hold the corporation liable for dividends paid to the latter. Kennedy *v.* First Nat. Bank, 115 N. C. 223 (1894). Where a life tenant transfers the stock into his own name, the remainderman may recover the stock upon the death of the life tenant even though the latter was insolvent. Mercantile, etc. Co. *v.* Weld, 85 Md. 685 (1897). A bank is liable to the remainderman for allowing a transfer to the life tenant, even though the transfer to the life tenant is by the executors. Cox *v.* First Nat. Bank, 119 N. C. 302 (1896). Where stock is specifically bequeathed in trust for a certain person during her life and then for her children, and the corporation allows the executor to transfer the stock to the trustee as trustee for the life tenant only, and afterwards allows the trustee to transfer the stock to *bona fide* hands, the corporation is liable for allowing the second transfer. In a suit by a remainderman to recover from a corporation the value of stock which the corporation had transferred to the life tenant absolutely and which had been lost, the statute of limitations does not begin to run until the death of the life tenant, even though the trust was created in 1854 and the life tenant died in 1898. Wooten *v.* Wilmington, etc. R. R., 128 N. C. 119 (1901). See also § 330, *supra.* Where by will the widow is given a life interest in the personalty, and certain stock was transferred to her and she transfers to one of the life tenants such stock, retaining the right to the dividends during her life, and upon her death the other life tenants claim their interest, the corporation may interplead as between them, even though it issued a new certificate in the name of such life tenant, but retained the certificate itself. Dickinson *v.* Griggsville Nat. Bank, 209 Ill. 350 (1904). Even though the corporation allows the life tenant to sell the stock outright, yet if the remainderman does not sue within the period of limitations, after knowledge of the facts, the corporation is not liable. Yeager *v.* Bank of

And an administrator who permits an irregular transfer in fraud of the life tenant's rights makes himself personally liable.[1] A dividend declared before but payable after the testator's death belongs to the estate.[2] A claim of the company against the life tenant for dividends paid cannot be enforced against the remainderman's interest.[3] Where a life interest is given to one person with remainder over, and it is necessary that the stock be sold in order to preserve the estate, a decree of sale is valid if both the executor and life tenant are parties to such suit.[4] A decree of a South Carolina court allowing the transfer of stock held in trust in a South Carolina corporation is not binding on the remaindermen if they were not parties to the proceedings.[5] A gift of stock on condition that the dividends should all go to the owner, and that he should vote it, is a gift of a remainder, with a life interest in the donor.[6] A tenant for life, unless restrained by condition, may sell his interest.[7] Where stock

Kentucky, 106 S. W. Rep. 806 (Ky. 1908).

1 Keeney *v.* Globe Mill Co., 39 Conn. 145 (1872). See also Amiss *v.* Williamson, 17 W. Va. 673 (1881). Where the executor, who is also the life tenant, wrongfully pledges the stock, his executor may rightfully use the funds of the estate to redeem such stock. *In re* Orne's Estate, 192 Pa. St. 626 (1899).

2 De Gendre *v.* Kent, L. R. 4 Eq. 283 (1867). *Cf.* Browne *v.* Collins, L. R. 12 Eq. 586, 594 (1871); Lock *v.* Venables, 27 Beav. 598 (1859). See also Cogswell *v.* Cogswell, 2 Edw. Ch. 231 (1834); Abercrombie *v.* Riddle, 3 Md. Ch. 320 (1850); Wright *v.* Tuckett, 1 Johns. & H. 266 (1860); Furley *v.* Hyder, 42 L. J. (Ch.) 626 (1873).

3 Where a fixed per cent. is paid annually to stockholders instead of dividends and charged to them, and the stock held in pledge for the same, such a payment to the life tenant does not create a valid lien on the stock as against the remainderman. Reading Trust Co. *v.* Reading Iron Works, 137 Pa. St. 282 (1891).

4 Drovers', etc. Bank *v.* Hughes, 83 Md. 355 (1896).

5 Putnam *v.* Lincoln, etc. Co., 118 N. Y. App. Div. 469 (1907).

6 Matter of Brandreth, 169 N. Y. 437 (1902). A gift of stock, the donee to have the possession and management of the same, but the donor to have the income during his life, makes the donee trustee until the death of the donor, and hence such gift is taxable under the New York statutes as a transfer to take effect on his death. Matter of Cornell, 170 N. Y. 423 (1902). In the case State *v.* Probate Court, etc. County, 113 N. W. Rep. 888 (Minn. 1907) a stockholder transferred title to his children and the children then leased to him the use of the stock during his life and the transaction was upheld by the court.

7 Jackson *v.* Van Hoesen, 4 Cowen, 325 (1825); Bailey *v.* Bailey, 97 N. Y. 460, 470 (1884). An estate may be rendered inalienable by vesting it in trustees or by creating future, contingent, or expectant estates, so that there are no persons in being during the two lives who can convey a perfect title. Murphy *v.* Whitney, 140 N. Y. 546 (1894); Williams *v.* Montgomery, 148 N. Y. 519 (1896). An assignment by a life tenant of his interest in stock may not transfer to

in several corporations is put in trust by a deed acknowledged, delivered and accepted by the trustees in New York where the grantor resided, the trust deed is governed by the law of New York, without reference to the residence of the trustees or the subsequent residence of the grantor.[1]

the assignee profits already earned and carried as a surplus account, and hence upon dissolution of the corporation the life tenant may be entitled to such surplus, so far as the same was accumulated before the transfer. Tuttle *v.* First Natl. Bank, 44 N. Y. Misc. Rep. 318 (1904). The New York statute prohibiting the beneficiary from transferring his interest in a trust estate which has been created for the purpose of applying the income to his use (L. 1897, Ch. 417 Sec. 3) does not apply to a trust estate created and carried out in another state, inasmuch as the common law is presumed to govern in such other state. First National Bank *v.* National Broadway Bank, 156 N. Y. 459 (1898).

1 Mercer *v.* Buchanan, 132 Fed. Rep. 501 (1904).

CHAPTER XXXIV.

TAXATION OF SHARES OF STOCK AND OF CORPORATIONS.

§ 561. *The four methods of taxing corporate interests.*—There are, in general, four methods of taxing corporate interests. These are, first, by a tax on the franchise; second, on the capital stock; third, on the real estate and personal property of the corporation; fourth, by a tax on the shares of stock in the hands of the stockholders.[1] There is another mode of taxation which is sometimes adopted—a tax on corporate dividends; but since this is generally construed to be only a method of valuing the franchise or capital stock, it can hardly be called a fifth method of taxing corporate interests.[2]

It is entirely within the discretion of the legislature to say which one of these four methods of taxation shall be adopted, where the matter is not regulated by the state constitution. Not only this, but it is also within the discretion of the legislature to tax the cor-

[1] 2 Redfield, Railw. (3d ed.), p. 453; Ottawa Glass Co. *v.* McCaleb, 81 Ill. 556 (1876); Louisville, etc. R. R. *v.* State, 8 Heisk. (Tenn.) 663, 795 (1875).

[2] See § 572*a*, *infra*.

poration in two or more of these ways—to levy a double tax on the corporate interests, and even to levy a treble or quadruple tax thereon.

A. TAXATION OF SHARES OF STOCK.

§ 562. *Relation of stockholders to the first three methods of taxation.*—The stockholders in a corporation have very little to do directly with any of the first three modes of taxing corporate interests. The tax is levied directly against the corporation, and is paid by the corporate officers out of the treasury of the corporation. If the tax is unauthorized or illegal, or improperly assessed, or is based on too high a valuation, it is ordinarily the duty of the corporate officers to rectify or oppose such tax. The stockholders have nothing to do with the ordinary transaction of corporate business, of which this forms a part. Where, however, the corporate officers refuse, upon request of one or more stockholders, to oppose or decline to pay an unauthorized tax levied in any one of the three methods mentioned above, the stockholder himself may bring a suit in a court of equity, in behalf of and for the protection of the corporate interests, to enjoin the payment and collection of such unauthorized tax.[1]

[1] Dodge *v.* Woolsey, 18 How. 331 (1855); Barnes *v.* Kornegay, 62 Fed. Rep. 671 (1894); State Bank *v.* Knoop, 16 How. 369 (1853); Wilmington R. R. *v.* Reed, 13 Wall. 264 (1871); Delaware R. R. Tax, 18 Wall. 206 (1873); Greenwood *v.* Freight Co., 105 U. S. 13 (1881); Paine *v.* Wright, 6 McLean, 395 (1855); s. c., 18 Fed. Cas. 1010; Foote *v.* Linck, 5 McLean, 616 (1853); s. c., 9 Fed. Cas. 366, holding also that the corporation is a necessary party, and that if the complainant is a non-resident he may bring the suit in the United States circuit court; Davenport *v.* Dows, 18 Wall. 626 (1873), also holding that the corporation is a necessary party defendant; Bailey *v.* Atlantic, etc. R. R., 3 Dill. 22 (1874); s. c., 2 Fed. Cas. 365; Parmley *v.* St. Louis, etc. R. R., 3 Dill. 13, 25 (1874); s. c., 18 Fed. Cas. 1223, 1226. But the stockholder must allege actual tender of the amount of tax conceded to be due. Allegation of readiness to pay is insufficient. Huntington *v.* Palmer, 8 Fed. Rep. 449 (1881). See also Trask *v.* Maguire, 18 Wall. 391 (1873); Wood *v.* Draper, 24 Barb. 187 (1857); London *v.* Wilmington, 78 N. C. 190 (1878). See also § 494, *supra.* The case of State *v.* Flavell, 24 N. J. L. 370 (1854), denies this right. A stockholder's injunction against a tax on corporate property fails when the property is subsequently sold under execution. Secor *v.* Singleton, 35 Fed. Rep. 376 (1888). The general character of such a suit as this comes under the principles of law set forth in ch. XLV, *infra.* A stockholder may enjoin the corporation from obeying an illegal order of railroad commissioners of a state requiring shippers to pay a war revenue stamp tax. Dinsmore *v.* Southern, etc. Co., 92 Fed. Rep. 714 (1899); rev'd on another point in 102 Fed. Rep. 794. A suit in equity lies in the federal court to enjoin the collection of taxes on stock held by one corporation in an-

§ 563. *Tax on shares of stock as distinguished from the other methods.*—A tax on shares of stock is clearly different from a tax upon the franchise, the corporate property, or the capital stock. Especially is it important to distinguish a tax on shares of stock from a tax on the capital stock.[1] The latter is always taxed against

other on the ground that it deprives the stockholder of the equal protection of the law, where the statutes of the state forbid such tax. Louisville T. Co. *v.* Stone, 107 Fed. Rep. 305 (1901). A stockholder in a corporation cannot maintain a bill to enjoin the payment by the corporation of the tax imposed by act of Congress upon such corporation for doing business in Alaska. Corbus *v.* Alaska, etc. Co., 99 Fed. Rep. 334 (1899); aff'd, 187 U. S. 455 (1903).

1 In Porter *v.* Rockford, etc. R. R., 76 Ill. 561 (1875), the court clearly recognized this distinction, and said: "The legal property of the shareholder is quite distinct from that of the corporation, although the shares of stock have no value save that which they derive from the corporate property and franchise, and a tax levied upon the property of the one is not, in a legal sense, levied upon the property of the other." See also Bradley *v.* Bauder, 36 Ohio St. 28 (1880). *Cf.* Delaware R. R. Tax, 18 Wall. 206, 230 (1873); Farrington *v.* Tennessee, 95 U. S. 679 (1877), where the distinction is clearly drawn; Quincy Bridge Co. *v.* Adams County, 88 Ill. 615 (1878). In North Ward Nat. Bank *v.* Newark, 39 N. J. L. 380 (1877); rev'd on another point in 40 N. J. L. 558, the court said: "The moneyed capital of a bank is an entirely different thing from its capital stock. The former is the property of the corporation. It may consist of cash or bills discounted, or be in part invested in real estate or in the securities of federal government. In whatever form it is invested, it is owned by the bank as a corporate entity and not by the stockholders. The stock or shares represent the interests of the shareholders, which entitle them to participate in the net profits of the bank in the employment of its capital, and is a distinct and independent interest or property in the shareholders, held by them like other property." The case of Porter *v.* Rockford, etc. R. R., 76 Ill. 561 (1875), holds also that a tax on the "capital stock" means the property of the corporation and not the aggregate of the shares of stock. See also State *v.* Hamilton, 5 Ind. 310 (1854), where the word "stock" was construed to mean the tangible property of the corporation. But see Trask *v.* Maguire, 18 Wall. 391 (1873), and § 8, *supra*, where the word "stock" is defined. And even though the value of the capital stock is estimated by the aggregate value of the shares, it is still a tax on the capital stock. New Orleans, etc. R. R. *v.* Board of Assessors, 32 La. Ann. 19 (1880). See also State Bank *v.* Richmond, 79 Va. 113 (1884). So also where the franchise is valued in that manner for taxation. Commonwealth *v.* Hamilton Mfg. Co., 94 Mass. 298 (1866); Att'y-Gen. *v.* Bay State Min. Co., 99 Mass. 148 (1868). Hamilton Co. *v.* Massachusetts, 6 Wall. 632 (1867), holds that a tax on the excess of the market value of the stock over the value of the corporate realty and machinery is a franchise tax. In Indiana it is held that a tax on the shares of stock is the proper mode of taxation unless the statute provides otherwise. Whitney *v.* Madison, 23 Ind. 331 (1864). *Cf.* Wright *v.* Stelz, 27 Ind. 338 (1866). The mere fact that the corporation is compelled to pay the tax does not prevent its being considered a tax on the shares. Na-

the corporation, is paid by the corporation, and is based on a valuation which does not necessarily depend on the value of the shares of stock. A tax on the shares of stock is generally levied directly against the stockholders themselves at their place of residence, is based on the market value of the stock, and is entirely distinct from the location, interests, property, or taxes of the corporation itself. There are, however, some instances of taxation herein which are on the border-line between the two. Thus, a statute expressly laying a tax on the capital stock, but requiring the corporation to pay that tax from the corporate funds, has been held to be a tax, not on the shares of stock, but on the property.[1] In other jurisdictions it has been held to be a tax on the shares of stock. Taxes on shares of stock in national banks are frequently so levied and collected, and are held to be upon the shares of stock and not on the capital stock.[2] A tax laid on shares owned by non-residents of the state which creates the corporation and which levies the tax is a tax on the shares of stock and not on the capital stock, even though the corporation is required to pay it and to collect the same from the owners of those shares. A state may tax the shares of stock of a corporation, even though a part of its assets consist of United States bonds.[3]

§ 564. *Tax by a state or municipality on stockholders residing in the state creating the corporation.*—The right of the state to tax resident stockholders of a resident corporation on their shares of stock is undoubted, and has been unquestioned except where double taxation would result therefrom and is prohibited; or where a constitutional provision restricts this mode of taxation.[4] Generally

tional Bank *v.* Commonwealth, 9 Wall. 353, 360 (1869), per Miller, J. Stockholders are liable for taxes levied on a distillery where the statute levies the tax on "persons interested in the use of the distillery." U. S. *v.* Wolters, 46 Fed. Rep. 509 (1891).

1 A tax of one per cent. on capital stock was held in the case Powers *v.* Detroit, etc. Ry., 201 U. S. 543 (1906) to be a tax upon the property of the corporation and not upon the shares of stock. In a tax on the market value of stock less a proportion of the "capital" invested in real estate, the word "capital" means the excess of assets over liabilities. Appeal of Bulkeley, 77 Conn. 45 (1904).

2 See § 570, *infra.*

3 Cleveland T. Co. *v.* Lander, 184 U. S. 111 (1902).

4 In Illinois, under the act of 1872 taxing railroad corporations, resident stockholders in domestic corporations are not taxed. Porter *v.* Rockford, etc. R. R., 76 Ill. 561 (1875). In Iowa stock is taxed under § 813 of the Code. See Cook *v.* Burlington, 59 Iowa, 251 (1882); Henkle *v.* Keota, 68 Iowa, 334 (1886). *Cf.* National State Bank *v.* Young, 25 Iowa, 311 (1868). In Iowa, where deductions for debts are allowed to persons taxed on their "credits," no deduction is allowed from the tax on shares of stock. They are not "credits." Bridgman *v.* Keokuk, 72 Iowa, 42 (1887). As to the valuation of the shares of stock, see

such a tax on resident stockholders is levied on them, not in the municipality where the corporation is, but in the cities, counties, or towns where the stockholders respectively reside. This is always the rule if the statute is silent, and is the rule unless the statute expressly provides otherwise.[1]

Controversies sometimes arise as to the power of a municipality to tax stockholders living in the state, but not in the municipality which levies a tax on their shares of stock, the corporation itself being located within that municipality. The law plainly is that such a tax is unauthorized, illegal, and not collectible, unless the municipality is authorized by statute to levy the tax.[2] A mere general authority to the municipality to tax all property within its boundaries will authorize a tax by it of shares of stock owned by persons living within it.[3] But such authority does not sustain a

St. Charles, etc. R. R. *v.* Assessors, 31 La. Ann. 852 (1879). If the corporation owns shares of its own stock it is taxable the same as though owned by another. Richmond, etc. R. R. *v.* Alamance Co., 84 N. C. 504 (1881).

1 Evansville *v.* Hall, 14 Ind. 27 (1859). A pledgor is the proper person to be assessed on stock which has been pldeged. Tucker *v.* Aiken, 7 N. H. 113 (1834). A pledgee of stock is not subject to a tax levied on the shares of stock held by him. Waltham Bank *v.* Waltham, 51 Mass. 334 (1845). In Massachusetts shares held by executors or administrators are taxed in the town of which the deceased was an inhabitant at the time of his death, and shares held by trustees are taxed in the towns in which the *cestuis que trust* respectively reside. Revere *v.* Boston, 123 Mass. 375 (1877). As to the legal remedy in Massachusetts for an unjust valuation of stock for taxation, see Boston Mfg. Co. *v.* Commonwealth, 144 Mass. 598 (1887). As to taxation of stock under the Vermont law, see Willard *v.* Pike, 59 Vt. 202 (1887). For a case relative to the taxation of stock in Illinois see The Hub *v.* Hanberg, 211 Ill. 43 (1904).

2 A city has no inherent power to levy a tax on the capital stock of a corporation. Macon *v.* Macon Constr. Co., 94 Ga. 201 (1894); Stetson *v.* Bangor, 56 Me. 274 (1868), the court saying: "Municipalities can tax shares of stock only when authorized so to do by some law of the state. They are the creatures of state law, and derive their powers in this respect solely from state enactments;" Griffith *v.* Watson, 19 Kan. 23 (1877); Evansville *v.* Hall, 14 Ind. 27 (1859); Conwell *v.* Connersville, 15 Ind. 150 (1860). Such a tax may be levied under a general power of the municipality to tax property. Gordon *v.* Mayor, etc., 5 Gill (Md.), 231 (1847). *Cf.* Richmond *v.* Daniel, 14 Gratt. (Va.) 385 (1858); Augusta *v.* National Bank, 37 Ga. 620 (1868). Markoe *v.* Hartranft, 6 Am. L. Reg. (N. S.) 487 (1867), holds that in Pennsylvania such a tax is unconstitutional, and that a tax must be levied where the stockholder resides. See also Craft *v.* Tuttle, 27 Ind. 332 (1866).

3 But a municipality can levy a tax only when specially authorized so to do, and can tax only such property as the statute permits it to tax. Cooley, Taxation (2d ed.), 678. Hence, power to a municipality to levy a tax for watchmen purposes will not authorize a tax on shares of stock. Bank of

tax on stockholders residing out of the municipality, although within the state. The location of such shares of stock, as property for purposes of taxation, is not where the corporation is located, but where the stockholder lives.[1] The statutes of the state may change this situs of the stock so as to render it taxable where the corporation is, but unless there is a statute to that effect, such a tax by a municipality is unauthorized and void. Where a corporation purchases its own stock such stock cannot be taxed.[2] The purchaser of the equity of redemption of stock which has been pledged is the owner thereof and may be taxed thereon.[3]

§ 565. *Tax on resident stockholders in a non-resident or foreign corporation.*—It is undoubtedly within the constitutional power of the legislature of a state to enact a statute that persons residing in that state, who are stockholders in a corporation created by another state, shall be taxed on their shares of stock at their residence within the former state.[4] This principle of law is based on the fact that shares of stock are personal property; that they are distinct from the corporate property, franchises, and capital stock;[5] that they follow the domicile of their owner like other personal property, and that consequently he may be taxed therefor wherever he may reside. It accordingly is a question of policy and expediency with a state whether or not it will tax its citizens who are stockholders in foreign corporations.[6] A few of the states levy such taxes.[7]

Georgia *v.* Savannah, Dudley (Ga.), 130 (1832). Under a statute authorizing it, a city may levy a tax on stock in a local bank, even though some of the stockholders are non-residents. Union Bank *v.* City, 94 Va. 316 (1897).

1 See § 566, *infra.*

2 City of Worcester *v.* Board of Appeal, 184 Mass. 460 (1904).

3 Central, etc. Co. *v.* Wright, 124 Ga. 630 (1906).

4 Worthington *v.* Sebastian, 25 Ohio St. 1 (1874); Bradley *v.* Bauder, 36 Ohio St. 28 (1880), holding it valid, although the corporation is taxed in the state where it exists. To same effect, Seward *v.* Rising Sun, 79 Ind. 351 (1881); Dyer *v.* Osborne, 11 R. I. 321 (1876); McKeen *v.* Northampton County, 49 Pa. St. 519 (1865); Dwight *v.* Boston, 94 Mass. 316 (1866); Whitesell *v.* Northampton County, 49 Pa. St. 526 (1865); Great Barrington *v.* County Com'rs, 33 Mass. 572 (1835); Worth *v.* Com'rs, 82 N. C. 420 (1880); s. c., 90 N. C. 409 (1884). A state may levy a tax on stock in a domestic corporation whether owned by residents or non-residents and may compel the corporation itself to pay such tax, giving the corporation a right to recover against the stockholders and a lien on the stock. Notice of such a tax to the corporation in accordance with the statute may be sufficient. Such a tax may be levied under the reserved right to amend the charter. Corry *v.* Baltimore, 196 U. S. 466 (1905).

5 Quoted and approved in Mayor, etc. *v.* Allegany, etc. Com'rs, 99 Md. 1 (1904).

6 Quoted and approved in Hart *v.* Smith, 159 Ind. 182 (1902).

7 State *v.* Hannibal, etc. R. R., 37 Mo. 265 (1866); Ogden *v.* St. Joseph, 90 Mo. 522 (1887); Sturges *v.* Carter, 114 U. S. 511 (1884), upholding such

But New York pursues the more broad and liberal policy that shares of stock should not be taxed where the corporation is already taxed; that the state which furnishes facilities to the corporation for the earning of dividends should have the sole benefit of taxes

a tax in Ohio; Newark City Bank *v.* Assessor, 30 N. J. L. 1 (1862). A state may tax stock in a foreign railroad corporation held by a domestic railroad corporation. Wright *v.* Louisville, etc. R. R., 195 U. S. 219 (1904). In Illinois, also, resident stockholders in foreign corporations are taxed on their shares of stock. Porter *v.* Rockford, etc. R. R., 76 Ill. 561 (1875). Under the Illinois statute a resident of the state is subject to taxation on stock owned by him in a Kansas corporation, all the property of the corporation being in Kansas. *In re* Greenleaf, 184 Ill. 226 (1900); Cooley, Taxation (2d ed.), 57, 221; Holton *v.* Bangor, 23 Me. 264 (1843); Smith *v.* Exeter, 37 N. H. 556 (1859). A statute levying a tax on all property authorizes a tax on stock in foreign and domestic corporations. Hasely *v.* Ensley, 82 N. E. Rep. 809 (Ind. 1907). Stock held by a resident in a foreign corporation may be taxed, and this does not constitute double taxation. Judy *v.* Beckwith, 114 N. W. Rep. 565 (Iowa, 1908). A resident holder of stock in a foreign corporation may be taxed in Kentucky, where the statute exempts merely those stockholders whose corporations report and pay taxes in the state. Commonwealth *v.* Lovell, 101 S. W. Rep. 970 (Ky. 1907). California made a wise resolution when, in 1881, it repealed § 3640 of its political code, taxing shares of stock, and added the following (§ 3608) to the code: "Shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation which they stand for and represent, and the assessment and taxation of such shares and also of the corporate property would be double taxation. Therefore all property belonging to corporations shall be assessed and taxed; but no assessment shall be made of shares of stock, nor shall any holder thereof be taxed therefor." Sustained and applied in Burke *v.* Badlam, 57 Cal. 594 (1884); Spring Valley Waterworks *v.* Schottler, 62 Cal. 69, 118 (1882). But the temptation to tax stockholders in non-resident corporations was yielded to. See San Francisco *v.* Fry, 63 Cal. 470 (1883); San Francisco *v.* Flood, 64 Cal. 504 (1884). A citizen of California may be taxed on mortgage bonds held by him in an Arizona railroad company, payable in New York. Mackay *v.* San Francisco, 113 Cal. 392 (1896). Stocks and bonds of a foreign corporation owned by a resident of California are located in that state for taxation purposes, even though they are pledged for a loan in another state. Stanford *v.* City, etc., 131 Cal. 34 (1900). Bonds secured by a mortgage on a railroad in California are not taxable, under the California constitution, the railroad itself being taxed for its full value. Germania, etc. Co. *v.* City, etc. of San Francisco, 128 Cal. 589 (1900). The situs of stock for the purpose of taxation may be where the owner of the stock resides. Stanford *v.* City, etc., 131 Cal. 34 (1900). But mortgage bonds of a foreign railroad company are taxable. *In re* Fair's Estate, 128 Cal. 607 (1900). If such bonds are held by two trustees, one a resident and the other a non-resident, one-half in value of the bonds will be taxed in the state, even though all the bonds are outside of the state. Mackay *v.* City, etc. of San Francisco, 128 Cal. 678 (1900). See also Webb *v.* Burlington, 28 Vt. 188 (1856); Lycoming County *v.* Gamble, 47 Pa. St. 106 (1864). *Re* Short's Estate, 16 Pa. St. 63 (1851), where a

on such corporate interests; that a tax on resident stockholders in non-resident corporations would generally result in a double taxation of stockholders not residing in the state creating the corporation; and that interstate comity, interests, and financial invest-

decedent who died a resident of Pennsylvania left a fortune in stocks of non-resident corporations. The stocks were held subject to a collateral inheritance tax. In 1879 Pennsylvania adopted in large part the system of taxation that prevails in New York for the taxation of corporations. See Hunter's Appeal, 10 Atl. Rep. 429 (Pa. 1887). By the still later statute of 1885, manufacturing corporations are specially favored in the way of taxation. MacKellar, etc. Co. *v.* Commonwealth, 10 Atl. Rep. 780 (Pa. 1887). In ascertaining the value of stock for purposes of taxation the amount paid in on the stock may be taken as the value if there have been no sales of the stock, and if there is no other evidence as to its value. Commonwealth *v.* People, etc. Co., 183 Pa. St. 405 (1898). In New Jersey now there is no tax on shares of stock except in banks. See Newark Banking Co. *v.* Newark, 121 U. S. 163 (1887), and in that state shares of stock owned by residents in foreign corporations are not taxable if a tax is paid by the corporation itself. State *v.* Ramsey, 54 N. J. L. 546 (1892). In Texas shares of stock are not taxed where the capital or property of the corporation is taxed. Gillespie *v.* Gaston, 67 Tex. 599 (1887). As to Ohio, see R. S. 1886, §§ 2737, 2739, 2744, construed in Jones *v.* Davis, 35 Ohio St. 474 (1880). In Ohio resident stockholders in foreign corporations may be taxed on their stock. Lee *v.* Sturges, 46 Ohio, 153 (1889). In Ohio stock of both foreign and domestic corporations is taxed unless the property of the corporation is taxed in its name in that state. Lander *v.* Burke, 65 Ohio St. 532 (1902). A trustee of an estate consisting of stocks in foreign corporations cannot be taxed thereon in Ohio, even though he resides there, it appearing that the estate itself and the beneficiaries are non-residents. Goodsite *v.* Lane, 139 Fed. Rep. 593 (1905). See also Worth *v.* Ashe County, 90 N. C. 409 (1884); Seward *v.* Rising Sun, 79 Ind. 351 (1881). As to taxation of shares of stock in foreign corporations under the Michigan statutes, see Graham *v.* St. Joseph, 67 Mich. 652 (1888). Under the Michigan statute a resident stockholder in a foreign corporation is taxable on his stock, even though the corporation owns property in Michigan and such property is taxed there, it appearing that from the assessed value of the stock a proportion corresponding to the property in the state had been deducted. Thrall *v.* Guiney, 141 Mich. 392 (1905). Stock held by residents in foreign corporations may be taxed. Bacon *v.* Board, etc. Com'rs, 126 Mich. 22 (1901). Shares of stock may be taxed although the corporation is also taxed. The corporation may be compelled to pay the tax on the shares of stock by deducting it from dividends. South Nashville Street R. R. *v.* Morrow, 87 Tenn. 406 (1889). Under the Connecticut statutes, shares of stock owned by residents in foreign express companies are taxed, even though such companies are not incorporated. Lockwood *v.* Weston, 61 Conn. 211 (1891). In Mayor, etc. of Baltimore *v.* Baltimore, etc. St. Ry., 57 Md. 31 (1881), it was held that stock in street railway companies in Maryland may be taxed, although by statute stock in steam railroad companies cannot be. Stock of a foreign corporation, held by residents, may be taxed, although stock in a domestic corporation is not taxed. Georgia, etc. Co. *v.* Wright, 124 Ga. 596 (1906). Where all the property of a corpora-

ments are promoted best by taxing corporations directly, and not levying a tax on either resident stockholders in non-resident corporations or resident stockholders in resident corporations where the corporation itself is subject to taxation.[1] The injustice of a tax on resident stockholders in foreign corporations is at once apparent when it is considered that the state creating the corporation nearly always taxes the corporation itself or all its stockholders, resident and non-resident; and that if stockholders residing elsewhere are taxed again where they reside, they are taxed both in the state of the corporation, directly or indirectly, and also directly in the state where they reside. No reduction need be allowed in the latter state for taxes levied upon the corporation in another state.[2]

§ 566. *Tax on non-resident stockholders in resident or domestic corporation — Mode of collecting.*—When it is determined by a state that it prefers to levy a tax on shares of stock rather than on the

tion is taxed and its stockholders are also taxed on their stock, this is double taxation, and where there is no statute specifically requiring the taxation of stock, a tax need not be made on the stock of domestic corporations which already pay a tax, even though a similar tax is levied upon stock of foreign corporations. Georgia R. & Banking Co. *v.* Wright, 125 Ga. 589 (1906). In Virginia shares of stock in domestic as well as foreign corporations held by residents are taxed. Jennings *v.* Commonwealth, 98 Va. 80 (1900). Citizens of Alabama owning stock in foreign corporations may be taxed thereon in Alabama. State *v.* Kidd, 125 Ala. 413 (1900).

1 The statute is as follows: "The owner or holder of stock in any incorporated company liable to taxation on its capital shall not be taxed as an individual for such stock." Laws 1896, ch. 908, § 4 (16). See also People *v.* Com. of Taxes, 4 Hun, 595 (1875); aff'd, 62 N. Y. 630, holding that residents of this state, owning shares of stock in a corporation created under and by the laws of this state or of any foreign state, are not subject to be personally assessed and taxed thereon under the laws of this state. Also People *v.* Com'rs, 5 Hun, 200 (1875); aff'd, 64 N. Y. 541. *Re* Enston's Will, 113 N. Y. 174 (1889). For the purpose, however, of making the taxation of moneyed corporations correspond to taxation of stockholders in national banks, and for the purpose of taxing the latter, stockholders in banks incorporated under the laws of New York are taxed on their shares of stock. The tax generally levied on corporations in New York is held to be a tax on their franchises. See People *v.* Home Ins. Co., 92 N. Y. 328 (1883); People *v.* McLean, 80 N. Y. 254 (1880); People *v.* Ferguson, 38 N. Y. 89 (1868); People *v.* Assessors, etc., 76 N. Y. 202 (1879). See People *v.* New York, etc. Co., 92 N. Y. 487 (1883); People *v.* Davenport, 91 N. Y. 574 (1883); Nassau, etc. Co. *v.* Brooklyn, 89 N. Y. 409 (1882); Oswego Starch Factory *v.* Dolloway, 21 N. Y. 449 (1860); People *v.* Com'rs, 95 N. Y. 554 (1884); Valle *v.* Ziegler, 84 Mo. 214 (1884); People *v.* Bradley, 39 Ill. 130 (1866). *Cf.* Bank of Republic *v.* Hamilton County, 21 Ill. 54 (1858). See also Smith *v.* Exeter, 37 N. H. 556 (1859), and Jersey City Gas Light Co. *v.* Jersey City, 46 N. J. L. 194 (1884).

2 See §§ 566, 567, *infra.*

franchises, capital stock, or tangible property of the corporation, or to levy a tax on both, there is no doubt as to its right to tax the stockholders residing within the state. But more difficulty occurs as to the right of the state to tax non-resident stockholders in corporations created by the state. This right has been strenuously denied on the ground that shares of stock are not located at the domicile of the corporation, but follow the domicile of the stockholder.

It is the well-established rule, however, that although shares of stock have at common law a situs at the domicile of the stockholder, yet that a statute enacted by the state creating the corporation may give to the shares of stock a situs at the location of the corporation; that such a statute may thus determine the situs of shares of non-resident stockholders without changing the situs of shares of resident stockholders; and that consequently, under a statute expressly authorizing such a tax, non-resident stockholders in a resident corporation may be taxed thereon in the place where the corporation has its domicile.[1] The method of enforcing the payment

[1] In Ottawa Glass Co. *v.* McCaleb, 81 Ill. 556 (1876), the court said that the legislature might "require the taxes to be paid by the corporation, and collected by them of the shareholder, by deducting the amount from his dividends or otherwise;" State *v.* Mayhew, 2 Gill (Md.), 487 (1845), where the corporation was to pay the tax from dividends if declared, and from profits if no dividends were declared; St. Albans *v.* National Car Co., 57 Vt. 68 (1884), holding that the statute giving shares of stock a situs at the location of the corporation may be passed after the incorporation, and that *mandamus* lies to compel the corporation to pay the tax. In Tappan *v.* Merchants' Nat. Bank, 19 Wall. 490, 499 (1873), the court said: "Personal property, in the absence of any law to the contrary, follows the person of the owner, and has its situs at his domicile. But, for the purpose of taxation, it may be separated from him, and he may be taxed on its account at the place where it is actually located." See also Whitney *v.* Ragsdale, 33 Ind. 107 (1870); Tallman *v.* Butler County, 12 Iowa, 531 (1861); Faxton *v.* McCosh, 12 Iowa, 527 (1861); Mayor, etc. of Baltimore *v.* Baltimore, etc. Ry., 57 Md. 31 (1881). In Maryland shares of stock held by non-residents in domestic corporations are taxed. Corry *v.* Mayor, etc., 96 Md. 310 (1903). *Cf.* Richmond *v.* Daniel, 14 Gratt. (Va.) 385 (1858); also the case of Oliver *v.* Washington Mills, 93 Mass. 268 (1865), which holds such a tax to be unconstitutional. The common-law rule is well expressed in Union Bank *v.* State, 9 Yerg. (Tenn.) 490 (1836), where the court said: "The power to tax non-resident stockholders is denied, and we think correctly; from its very nature it must be a tax *in personam* and not *in rem.* Stock is in the nature of a chose in action and can have no locality; it must, therefore, of necessity follow the person of the owner. . . . Bank stock is not a thing in itself capable of being taxed on account of its locality, and any tax imposed upon it must be in the nature of a tax upon income, and of necessity confined to the person of the owner; and if he be a non-resident, he is beyond the jurisdiction of

of this tax may be by compelling the corporation to pay it and giving it a lien therefor on the stock, or authorizing it to deduct the tax from the non-resident stockholders' dividends; or, if the statute is silent as to the mode of collection, a tax warrant or an attachment and execution therefor may be levied on the shares of stock.[1] Where the statute provides that stock shall be taxed and

the state and not subject to her laws." See also Minot *v.* Philadelphia, etc. R. R., 18 Wall. 206 (1873); Davenport *v.* Miss. etc. R. R., 12 Iowa, 539 (1861); Howell *v.* Cassopolis, 35 Mich. 471 (1877). In Bradley *v.* Bauder, 36 Ohio St. 28 (1880), the court said: "That shares of stock may be separated from the person of the owner by statute, and given a situs of their own, was held in Tappan *v.* Merchants' Nat. Bank, 19 Wall. 490 (1873). But when not so separated, that this situs follows and adheres to the domicile of the owner, is supported by a great weight of authority." See State Tax on Foreign-held Bonds, 15 Wall. 300 (1872). See also Jenkins *v.* Charleston, 5. S. C., 393 (1874). In National Com. Bank *v.* Moblie, 62 Ala. 284 (1878), the court well said: "It may be made the duty of a bank to pay for its shareholders the tax legally assessed against their respective shares, whether the stockholders reside in the state of Alabama or not. Contestations upon these points have been made time and again, sometimes by the banks and sometimes by the shareholders, to avoid this liability. But it is established by repeated adjudications, and ought to be considered definitely settled." And in First Nat. Bank *v.* Smith, 65 Ill. 44 (1872), the court said: "The separation of the situs of personal property from the domicile of the owner for the purposes of taxation is familiar doctrine of the courts of this country, and has been sanctioned by this court in various cases. . . . The act of congress itself contemplates a severance of the situs of such shares from the person of their owner by providing that they should not be taxed except in the state where the bank is established. But, apart from this, it is really much more reasonable to fix the situs of shares at the place where the bank is located, and where it must continue to do its business or wind up its affairs, than to separate by legislation tangible personal property from the person of its owner." In St. Louis Nat. Bank *v.* Papin, 4 Dill. 29 (1876); s. c., 21 Fed. Cas. 203, the following statute was sustained: "The taxes assessed on shares of stock embraced in such list shall be paid by the corporations respectively, and they may recover from the owners of such shares the amount so paid by them, or deduct the same from the dividends accruing on such shares: and the amount so paid shall be a lien on such shares respectively, and shall be paid before a transfer thereof can be made." And again, in American Coal Co. *v.* County Com'rs, 59 Md. 185 (1882), the court said: "The state may give the shares of stock held by individual stockholders a special or particular situs for purposes of taxation, and may provide special modes for the collection of the tax levied thereon." But where the statute merely made the bank the agent to pay the tax and to deduct it from the dividends, the bank is not liable if there have been no dividends. Hershire *v.* First Nat. Bank, 35 Iowa, 272 (1872). Non-resident stockholders in Virginia banks are taxed. Stockholders *v.* Supervisors, 88 Va. 293 (1891). Concerning the situs of stock, see also an article in 45 Alb. L. J. 330.

1 A state may levy a tax on stock

that the corporation shall pay the tax and have a lien therefor on the stock, the stockholder is not personally liable to the corporation

in a domestic corporation whether owned by residents or non-residents and may compel the corporation itself to pay such tax, giving the corporation a right to recover against the stockholders and a lien on the stock. Notice of such a tax to the corporation in accordance with the statute may be sufficient. Such a tax may be levied under the reserved right to amend the charter. Corry *v.* Baltimore, 196 U. S. 466 (1905). The situs of stock held by non-residents is at the domicile of such non-residents, unless the statute requires the corporation to report the stock as the agent of the owners. Covington *v.* First Nat. Bank, 198 U. S. 100 (1905). In Farrington *v.* Tennessee, 95 U. S. 679, 687 (1877), the court said: "The bank may be required to pay the tax out of its corporate funds or be authorized to deduct the amount paid for each stockholder out of his dividend." And, in general, under the act of congress allowing taxation of shares of stock in national banks, a situs is given by statute to the shares so as to locate them where the bank is located, even though the stockholders be non-resident. But collections cannot be enforced against the corporation unless the statute specially authorizes it. First Nat. Bank *v.* Fancher, 48 N. Y. 524 (1872). As to collection by execution, see Gordon *v.* Mayor, etc., 5 Gill (Md.), 231 (1847); Weld *v.* Bangor, 59 Me. 416 (1871). But a levy of execution on stock can only exist when the statute allows stock to be so taken. Barnes *v.* Hall, 55 Vt. 420 (1883). See also § 480, *supra.* A state may prescribe that resident stockholders shall pay a tax where they reside, and that the corporation shall pay a tax based upon the value of the shares of stock held by non-residents, and that the corporation shall have a lien on the stock of such stockholders for such tax so paid. State *v.* Travelers' Ins. Co., 70 Conn. 590 (1898). In this case the Connecticut statute of 1897 imposing a tax on one and one-half per cent. on the value of stock held by non-resident stockholders in resident corporations was upheld and applied. The court held also that a state may tax shares of stock held by non-residents in domestic corporations, even though the corporation pays a tax on all its property. It also held that although resident stockholders in a domestic corporation are allowed a deduction of $183 per share from a market value of $230 a share of their holdings of stock, leaving the taxable value of the stock $47, a similar deduction may be refused to non-resident stockholders, inasmuch as the statute did not provide for such deduction for the latter, and inasmuch as there was no proof that the non-resident stockholders were citizens of the United States. As to levy under a tax warrant, see McNeal *v.* Mechanics', etc. Assoc., 40 N. J. Eq. 351 (1885). But if the stockholder pays the tax, even under protest, he cannot recover back the money paid. Sowles *v.* Soule, 59 Vt. 131 (1887). In the case of State *v.* Thomas, 26 N. J. L. 181 (1857), the court refused to compel the corporation to pay the tax on stock of non-residents, and said: "It has been decided by this court that the bonds and stocks of corporations in this state held by non-residents are not liable to taxation, though they are clearly within the letter of the act." A state may collect a non-resident stockholder's tax from the corporation and give it a lien therefor on his stock. North Ward Nat. Bank *v.* Newark, 39 N. J. L. 380 (1877); rev'd on another point in 40 N. J. L. 558; but see Raleigh, etc. R. R. *v.* Wake County Com'rs, 87 N. C. 414 (1882). A tax collector cannot levy on and sell

which has paid such tax.[1] Even though a statute states that stock in banks shall be listed by the banks and the tax paid by the banks with a right to recover from its stockholders, yet this does not authorize the assessment of the stock to the bank.[2] The Connecticut statute authorizing the taxation of stock held by non-residents in resident corporation is constitutional, even though a deduction for real estate held by the corporation is allowed the resident stockholders, but not to non-resident stockholders.[3] In New York, where neither resident nor non-resident stockholders in either foreign or domestic corporations, excepting banking corporations, are taxed on their shares of stock, these interstate complications, hardships, and jealousies do not arise. Trover and case lie against a tax collector for selling stock for an illegal tax.[4] Where a New Jersey holding company owns all the stock of a Kentucky railway company and nothing else, the New Jersey stock is not taxable in Kentucky, inasmuch as all the property of the railway is taxed, which under the Kentucky statutes exempts the stock.[5]

stock under the law relative to attachments. Kennedy *v.* Mary Lee, etc. Ry., 93 Ala. 494 (1891). The statute may provide for the sale of stock at the place where the corporation exists, in case the taxes upon such stock are not paid. A purchaser of the outstanding certificates after the assessment has been made takes subject to the tax and tax seizure. Parker *v.* Sun Ins. Co., 42 La. Ann. 1172 (1890). It is clear, where shares of stock are sold under a tax warrant, that the corporation is not obliged to oppose the sale. McNeal *v.* Mechanics' Building, etc. Assoc., 40 N. J. Eq. 351 (1885). Where by statute taxes levied on stock are to be paid by the corporation, such taxes must be paid by the corporation although it becomes insolvent. Boston, etc. Co. *v.* Mercantile, etc. Co., 34 Atl. Rep. 778 (Md. 1896). Cooley, Taxation (2d ed.) 433, clearly upholds the rule that the state may levy a tax on shares of stock and compel the corporation to pay it, citing Maltby *v.* Reading R. R., 52 Pa. St. 140 (1866); Haight *v.* Railroad Co., 6 Wall. 15 (1867); National Bank *v.* Commonwealth, 9 Wall. 353 (1869); U. S. *v.* Railroad Co., 17 Wall. 322 (1872); Minot *v.* Railroad Co., 18 Wall. 206 (1873); Ottawa, etc. *v.* McCaleb, 81 Ill. 556 (1876); New Orleans *v.* Saving, etc. Co., 31 La. Ann. 826 (1879); Baltimore *v.* City Passenger R. R., 57 Md. 31 (1881); St. Albans *v.* National Car Co., 57 Vt. 68 (1884); American Coal Co. *v.* Allegany County, 59 Md. 185 (1882); Barney *v.* State, 42 Md. 480 (1875); McVeagh *v.* Chicago, 49 Ill. 318 (1868); First Nat. Bank *v.* Fancher, 48 N. Y. 524 (1872); Lionberger *v.* Rowse, 43 Mo. 67 (1868); Relfe *v.* Life Ins. Co., 11 Mo. App. 374 (1882).

1 Mercantile, etc. Co. *v.* Mellon, 196 Pa. St. 176 (1900).

2 State *v.* Merchants' Bank, 160 Mo. 640 (1901). A statute taxing property in the hands of a bailee does not make a corporation liable for the tax upon shares of stock, inasmuch as the corporation is not a bailee of such stock. Commonwealth *v.* Chesapeake, etc. Ry., 116 Ky. 951 (1903).

3 Travellers' etc. Co. *v.* Connecticut, 185 U. S. 364 (1902).

4 Sprague *v.* Fletcher, 69 Vt. 69 (1896).

5 Commonwealth *v.* Ledman, 106 S. W. Rep. 247 (Ky. 1907).

§ 567. *Double taxation.*—The most objectionable feature of a tax levied on shares of stock is that almost inevitably it operates to impose a double tax on a part or all of the stockholders.[1] Such a double tax exists where either the corporate realty or personalty or franchise or capital is taxed, and a tax is also levied on the shares of stock without any deduction for the former taxation.[2] There has been some controversy as to the right of a state to levy a double tax on property. Sometimes the state constitution prohibits such taxation.[3] Thus, in Michigan it is held that the constitutional requirement of uniform taxation prevents a tax being levied on stock held by residents in a foreign corporation where the property of the corporation is situated in that state and is taxed by it. Such taxation is double taxation.[4] But, aside from constitutional restrictions, it unquestionably is within the power of the state to levy, not only a double tax, but even a treble or quadruple tax, if it so chooses.[5] The injustice of such taxation, however, generally pre-

1 In Ohio such double taxation is advocated and recommended. In Frazer *v.* Siebern, 16 Ohio St. 614 (1866), the court said that an equitable system of taxation "is best attained in case of a corporation or joint-stock company by taxing the stockholders, the persons who own the property, upon the full value of their shares therein, including, of course, their interest in the franchise or privilege, and in all tangible property owned by the company; and by taxing the corporation also upon the value of such tangible property. The stockholder is thus taxed, as all other individuals who own tangible and intangible property are sometimes unavoidably taxed, once upon all he is worth, and a second time upon that part of his property which is tangible."

2 This is practically the result. In the case of Farrington *v.* Tennessee, 95 U. S. 679, 687 (1877), however, the court said in a dictum: "The capital stock and the shares may both be taxed, and it is not double taxation." See also New Orleans *v.* Houston, 119 U. S. 265, 277 (1886). *Cf.* Ryan *v.* Com'rs, 30 Kan. 185 (1883). A tax on the tangible property and on the capital stock is not double taxation. Second Ward Sav. Bank *v.* Milwaukee, 94 Wis. 587 (1896). A tax on the corporate property and also on the stockholders for their stock is not double the taxation, inasmuch as these are distinct values belonging to different persons. Wilkens Co. *v.* Mayor, etc., 103 Md. 293 (1906).

3 County Com'rs *v.* Farmers' Nat. Bank, 48 Md. 117 (1877), the constitution saying that each person shall pay a tax "according to his actual worth in real or personal property." See also San Francisco *v.* Mackey, 21 Fed. Rep. 539 (1884); Burke *v.* Badlam, 57 Cal. 594 (1881), relative to the California constitution, art. XII, § 1, that "all property shall be taxed in proportion to its value."

4 Stroh *v.* City of Detroit, 131 Mich. 109 (1902).

5 Salem Iron, etc. Co. *v.* Danvers, 10 Mass. 514 (1813), where corporate realty was taxed although the shares of stock were also taxed. See also Belo *v.* Forsyth Com'rs, 82 N. C. 415 (1880). The legislature may tax stock, even though its property is also taxed, thereby resulting in double taxation. Hasely *v.* Ensley, 82 N. E. Rep. 809 (Ind. 1907). In the remarkable

vents its occurrence. The courts also do their utmost to prevent double taxation, and will construe a taxation statute so as to avoid such a result, and sometimes even in opposition to the plain words of the statute itself.[1]

case of Toll Bridge Co. *v.* Osborn, 35 Conn. 7 (1868), it seems that the realty, capital stock, and shares of stock of a corporation were taxed, and that the chief stockholder, a railroad, was taxed on its capital stock and shares of stock, making four or five taxations of the same property. Evidently corporations were not popular in Connecticut in 1868, except for taxation purposes. *Cf.* Jones, etc. Co. *v.* Commonwealth, 69 Pa. St. 137 (1871). See also Cook *v.* Burlington, 59 Iowa, 251 (1882); State *v.* Branin, 23 N. J. L. 484 (1852); State *v.* Bentley, 23 N. J. L. 532 (1852); Memphis *v.* Ensley, 6 Baxt. (Tenn.) 553 (1873); Providence, etc. R. R. *v.* Wright, 2 R. I. 459, 464 (1853), holding that a tax on the stock does not raise a presumption that a municipality is thereby prevented from taxing the corporate realty. See also Hannibal, etc. R. R. *v.* Shacklett, 30 Mo. 550, 560 (1860). Although by the charter a tax is levied on the capital stock, a tax may also be levied on the shares of stock. Memphis *v.* Home Ins. Co., 91 Tenn. 558 (1892). A tax on the bonds which are issued by a corporation does not constitute double taxation although there is also a tax on the franchises of the corporation. Commonwealth *v.* New York, etc. R. R., 150 Pa. St. 234 (1892). Where the stock is not taxable if the tangible property is taxed, the stock may nevertheless be taxed for such part of its value as the capital stock exceeds in value the tangible property. Hyland *v.* Central Iron, etc. Co., 129 Ind. 68 (1891). A tax may be levied on the capital stock even though the shares of stock are also taxed. Durham County *v.* Blackwell, etc. Co., 116 N. C. 441 (1895). The franchise may be taxed although the shares of stock are also taxed, the latter tax being collected also from the corporation. U. S. Electric, etc. Co. *v.* State, 79 Md. 63 (1894). A national bank may be taxed on stock owned by it in other corporations, even though such latter corporations also pay a tax. Pacific Nat. Bank, etc. *v.* Pierce County, 20 Wash. 675 (1899).

[1] Thus, in Illinois, in cases where the capital stock is taxed by the state, the shares of stock are held to be free from taxation. Republic Life Ins. Co. *v.* Pollak, 75 Ill. 292 (1874). See also Lackawanna County *v.* First Nat. Bank, 94 Pa. St. 221 (1880), holding that under the act of March 31, 1870, releasing corporations from all other taxes if they pay one per cent. tax on the par value of the stock, the corporate realty cannot be taxed after such one per cent. has been paid; State *v.* Hannibal & St. J. R. R., 37 Mo. 265 (1866); Jersey City, etc. Co. *v.* Jersey City, 46 N. J. L. 194 (1884); Cheshire, etc. Teleph. Co. *v.* State, 63 N. H. 167 (1884); Valle *v.* Zeigler, 84 Mo. 214 (1884); Tax Cases, 12 G. & J. (Md.) 117 (1841); Provident Inst. *v.* Gardiner, 4 R. I. 484 (1857); Mechanics' Bank *v.* Thomas, 26 N. J. L. 181 (1857); American Bank *v.* Mumford, 26 N. J. L. 478 (1857); State *v.* Tunis, 23 N. J. L. 546 (1852); Smith *v.* Burley, 9 N. H. 423 (1838); Frazer *v.* Siebern, 16 Ohio St. 614 (1866); Savings Bank *v.* Nashua, 46 N. H. 389 (1866), the court saying: "It is a fundamental principle in taxation that the same property shall not be subject to a double tax, payable by the same party, either directly or indirectly; and where it is once decided that any kind or class of property is liable to be taxed under one provision of the statutes, it has been held to follow as a legal conclusion that the legislature

§ 568. *Exemptions from taxation as affecting tax on shares of stock.*—An exemption of shares of stock is a contract protected by that provision of the constitution of the United States which prevents a state from passing a law which will impair the validity of contracts.[1] This provision has frequently been construed and applied in cases involving the taxation of the corporate franchises, capital stock, or tangible property. In the numerous decisions on this subject there appear two classes of cases of exemptions from taxation which affect the taxation of shares of stock. The first class involves the question whether an exemption of the corporate property, franchises, or capital stock from taxation exempts also

could not have intended the same property would be subject to another tax, though there may be general errors in the law which would seem to imply that it was to be taxed a second time." In Michigan, where shares of stock in savings banks are taxed, a reduction being allowed for realty, which is taxed separately, the courts held that no other tax can be levied against the corporation. Lenawee, etc. Bank *v.* Adrian, 66 Mich. 273 (1887). The Kentucky tax statutes are so construed that a corporation need not pay a tax on its property in addition to the tax on the stock. Louisville, etc. Co. *v.* Barbour, 88 Ky. 73 (1888); Commonwealth *v.* St. Bernard Coal Co., 9 S. W. Rep. 709 (Ky. 1888). The Pennsylvania acts are construed so as to prevent double taxation. Pennsylvania Co. etc. *v.* Commonwealth, 15 Atl. Rep. 456 (Pa. 1888). Where a coal company owns all the stock of a railroad company, and taxes have been paid by the railroad on the appraised value of its capital stock, the coal company cannot be taxed on such stock again. Double taxation is legal, but will not be imposed unless the statute clearly requires it. Commonwealth *v.* Fall Brook Coal Co., 156 Pa. St. 488 (1893). A Georgia stockholder in an Alabama corporation may be taxed thereon in Georgia on such stock, even though it amounts to double taxation. Wright *v.* Louisville R. R., 195 U. S. 219 (1904). Where all the property of the corporation is taxed and then a tax is levied on the capital stock, this amounts to a double taxation and will not be upheld unless the statute clearly authorizes such double taxation. Lewiston, etc. Co. *v.* Asotin County, 24 Wash. 371 (1901). Where all the property of a corporation is taxed and its stockholders are also taxed on their stock, this is double taxation, and where there is no statute specifically requiring the taxation of stock, a tax need not be made on stock of domestic corporations which already pay a tax, even though a similar tax is levied upon stock of foreign corporations. Georgia R. & Banking Co. *v.* Wright, 125 Ga. 589 (1906). Even though a statute imposes a tax on the real estate of a corporation, notwithstanding its shares of stock are also taxed, yet if the corporation owns stock in still another corporation it will not be required to pay a tax on the latter stock. Inhabitants, etc. *v.* Livermore, etc. Co., 69 Atl. Rep. 306 (Me. 1907).

1 Farrington *v.* Tennessee, 95 U. S. 679 (1877). See also § 497, *supra.* An exemption of the stock of a railroad company does not exempt stock issued for constructing branch roads of that company, such construction being subsequent to a constitutional provision prohibiting exemptions. Chicago, etc. R. R. *v.* Guffey, 120 U. S. 569 (1887).

the shares of stock from any tax; the second, whether an exemption of the shares of stock from taxation exempts the corporate property, franchises, and capital stock. As regards the former exemption, the effect thereof depends largely on the words used in the statute or charter granting the exemption. The question has given rise to a difference of opinions. In the federal courts, New Jersey, Indiana, and Kentucky, it has been decided that an exemption of the corporation from taxation on one or more of the first three methods of taxation exempts by implication the shares of stock,[1] although the supreme court of the United States has recently held that exemption of the capital stock does not necessarily exempt the stockholders.[2] In Tennessee, North Carolina, and Maryland, and in fact generally, an exemption is strictly construed.[3]

1 State *v.* Branin, 23 N. J. L. 484 (1852); State *v.* Bentley, 23 N. J. L. 532 (1852); Johnson *v.* Commonwealth, 7 Dana (Ky.), 338 (1838); King *v.* Madison, 17 Ind. 48 (1861), holding that an exemption of the capital stock exempts shares of stock. An exemption of the corporation on its property exempts also the shares of stock, and exemption of the shares of stock exempts the corporation. State *v.* Heppenheimer, 58 N. J. L. 633 (1896). An exemption from taxation of the capital of a corporation exempts the shares of stock. Penrose *v.* Chaffraix, 106 La. 250 (1901). An exemption of the capital and personal property of the corporation from taxation exempts the shares of stock. Richardson *v.* City of St. Albans, 72 Vt. 1 (1899). Gordon *v.* Appeal Tax Court, 3 How. 133 (1845), held that an exemption prohibiting any "further tax or burden upon them," the banks, exempted the shares of stock. Again, where the charter provided that "the capital stock of said company shall be forever exempt from taxation, the shares of stock cannot be taxed. . . . Each share is a part of the whole, and, as the whole is exempt from taxation, it follows that each part or share must also be exempt." Tennessee *v.* Whitworth, 22 Fed. Rep. 75 (1884). And the purchaser and successor of a railroad, taking by statute all its rights and privileges, is also exempt in the same manner. Tennessee *v.* Whitworth, 22 Fed. Rep. 81; aff'd, 117 U. S. 139 (1886). An exemption of the corporation exempts it from a tax upon the stock of stockholders, which the company is required to pay irrespective of any dividends or profits payable to the stockholder, since this is substantially a tax on the corporation itself. New Orleans *v.* Houston, 119 U. S. 265 (1881). *Cf.* U. S. *v.* Railroad Co., 17 Wall. 322 (1872). An exemption of shares of stock from taxation is waived by the acceptance of subsequent statutes imposing a tax. Hannibal, etc. R. R. *v.* Shacklett, 30 Mo. 550 (1860); Cooley, Taxation (2d ed.), 212. A city tax applies to the property of a waterworks company, even though the entire capital stock of the company is owned by the city itself. City of Louisville *v.* McAteer, 81 S. W. Rep. 698 (Ky. 1904). An exemption of stock from taxation, if the property of the corporation is taxed, does not refer to corporations which pay taxes on only such part of its property as is situated in the state. Commonwealth *v.* Walsh's Trustee, 106 S. W. Rep. 240 (Ky. 1907).

2 New Orleans *v.* Citizens' Bank, 167 U. S. 371 (1897).

3 Union Bank *v.* State, 9 Yerg.

As regards the second class of exemptions, it seems to be established by the great weight of authority that an exemption of the shares of stock from taxation exempts also, by implication, the corporate franchises, the capital stock, and tangible property from any tax.[1] Where the charter compels a corporation to pay an annual tax on each share of stock "in lieu of all other taxes," the

(Tenn.) 490 (1836), holding that an exemption of the capital stock did not exempt shares of stock. To same effect, Memphis *v.* Farrington, 8 Baxt. (Tenn.) 539 (1876), the court saying: "The capital stock and shares of stock are two distinct properties, and an exemption of the one does not thereby necessarily exempt the other, nor the taxation of the latter operate as a tax on the former, so as to interfere with its exemption from such burdens." A tax may be levied on the shares of stock although the capital stock is exempt. State *v.* Bank of Commerce, 95 Tenn. 221 (1895); Belo *v.* Forsyth Com'rs, 82 N. C. 415 (1880), holding that an exemption of the corporate realty does not exempt the shares of stock; Appeal Tax Court *v.* Rice, 50 Md. 302 (1878); Tax Cases, 12 G. & J. (Md.) 117 (1841). In County Com'rs *v.* Annapolis, etc. R. R., 47 Md. 592 (1877), the court said: "To make out the claim to this exemption from the taking power of the state, so essential to the support of its government, it is incumbent upon corporations to show that the power to tax has been clearly relinquished by the state; and if this has not been done in clear and explicit terms, or by necessary implication, the question whether or not the exemption has been granted must be resolved in favor of the state." Citing Providence Bank *v.* Billings, 4 Pet. 514 (1830); Wilmington R. R. *v.* Reid, 13 Wall. 264 (1871); Philadelphia & W. R. R. *v.* State, 10 How. 376 (1850). But a clear exemption of the shares of stock is a contract which is protected by the United States constitution. State *v.* Baltimore, etc. R. R., 48 Md. 49 (1877). A charter provision, however, that a certain tax shall be paid by the corporation does not prevent a subsequent change in that tax. Delaware Railroad Tax, 18 Wall. 206 (1873). And an exemption by the state has been held not to exempt the shares from taxation by a municipality. Gordon *v.* Mayor, etc., 5 Gill (Md.), 231 (1847).

1 In State *v.* Bank of Commerce, 53 Fed. Rep. 735 (1892); rev'd on another point in 152 U. S. 454, it is held that a provision imposing a tax on each share of stock, "which shall be in lieu of all other taxes," exempts the property of the company as well as the stock from further taxation. Scotland County *v.* Missouri, etc. Ry., 65 Mo. 123 (1877), the court saying: "It is clear that a tax on the property represented by the stock is substantially a tax on the stock." An exemption of shares of stock from "any tax or impost whatsover" exempts the capital stock also by implication. Hancock *v.* Singer Mfg. Co., 62 N. J. L. 289 (1898). See also County Com'rs *v.* Annapolis, etc. R. R., 47 Md. 592 (1877), where the court said: "It is settled by repeated decisions of this court, which we are not disposed to disturb, that the exemption of the shares of the capital stock operates as an exemption of the property of the corporation, or so much of it as the corporation is fairly authorized to hold for the proper exercise of its franchises; and this upon the principle that the shares of the stock in the hands of the shareholders represent the property held by the corporation;" Cape Fear Bank *v.* Edwards, 5 Ired. L. (N. C.) 516 (1845),

stockholders themselves cannot be taxed on their stock.[1] Such an exemption, however, does not prevent the state from levying a tax on the capital stock,[2] and such an exemption is lost by a judicial sale of the franchises of the company.[3] A statute conferring upon a new corporation "all the rights and privileges" of a former corporation does not confer such an exemption.[4] Nor does such exemption continue where the charter is so amended as to change an insurance company into a banking company.[5] Nor is such an exemption good where, after the granting of a charter, but before the first organization meeting, a new constitution is adopted by the state forbidding such exemptions.[6] An exemption of stock does not exempt the property of the corporation where the charter provides against such latter exemption.[7] Exemptions have no effect and are of no avail beyond the boundaries of the state granting them; and accordingly a non-resident stockholder, who is taxed on his stock in the state where he resides, cannot defeat that tax by reason of exemptions enjoyed within the state creating the corporation.[8]

B. TAXATION OF NATIONAL-BANK STOCK.

§ 569. *General rules.*—It is one of the established principles of constitutional law in this country that the instruments of government by the United States shall not be taxed by any state, and also that those of a state shall not be taxed by the United States.

where the charter said: "The said bank shall not be liable to any further tax;" Mayor, etc. *v.* Baltimore & O. R. R., 6 Gill (Md.) 288 (1848); Tax Cases, 12 G. & J. (Md.) 117 (1841); Gordon *v.* Mayor, etc., 5 Gill (Md.), 231 (1847). In Wilmington, etc. R. R. *v.* Reid, 64 N. C. 226 (1870), however, it was held that an exemption of shares of stock does not exempt the corporate franchise from taxation. Raleigh, etc. R. R. *v.* Reid, 64 N. C. 155 (1870). And in State *v.* Petway, 2 Jones, Eq. (N. C.) 396 (1856), it was held that a charter provision that the shares of stock should be taxed a certain amount did not prevent a tax on dividends.

1 Bank of Commerce *v.* Tennessee, 161 U. S. 134 (1896). On a rehearing the decision in this case was modified so as to allow a recovery against holders of new stock, but not as against holders of old stock. Bank of Commerce *v.* Tennessee, 163 U. S. 416 (1896).

2 Shelby County *v.* Union, etc. Bank, 161 U. S. 149 (1896).

3 Mercantile Bank *v.* Tennessee, 161 U. S. 161 (1896).

4 Phœnix F. & M. Ins. Co. *v.* Tennessee, 161 U. S. 174 (1896).

5 Memphis City Bank *v.* Tennessee, 161 U. S. 186 (1896).

6 Planters' Ins. Co. *v.* Tennessee, 161 U. S. 193 (1896).

7 Central R. R. etc. Co. *v.* Wright, 164 U. S. 327 (1896).

8 Appeal Tax Court *v.* Patterson, 50 Md. 354 (1878); Appeal Tax Court *v.* Gill, 50 Md. 377 (1878). See also Railroad Co. *v.* Pennsylvania, 15 Wall. 300 (1872).

Accordingly, bonds issued by the United States government cannot be taxed by any state.[1] So, also, when the old United States Bank was in existence, it was held that neither the bank nor its capital stock could be taxed by a state. But it was also held that, inasmuch as the interest of the stockholders in the bank was different from the franchises, property, capital stock, and the United States bonds held by the bank, such interest of the stockholder could be taxed by a state, and that such taxation would be constitutional and legal.[2] The same rules apply to the present national banks. A state tax on the capital stock of the bank is illegal and void.[3] But a tax on its real estate or on its shares of stock is up-

1 Cooley, Taxation (2d ed.), 84, 85. Formerly government bonds were called stock both in England and in this country. That use of the term, however, has become practically obsolete. See Bank of Commerce *v.* New York, 2 Black, 620 (1862); Weston *v.* Charleston, 2 Peters, 449 (1829).

2 McCulloch *v.* Maryland, 4 Wheat. 316, 436 (1819), Bulow *v.* Charleston, 1 Nott & M. (S. C.) 527 (1819). See also Berney *v.* Tax Collector, 2 Bailey (S. C.) 654 (1831); National Bank *v.* Commonwealth, 9 Wall. 353 (1869), per Miller, J.

3 A state tax upon the franchise or intangible property of a national bank is illegal. Owensboro Nat. Bank *v.* Owensboro, 173 U. S. 664 (1899); First Nat. Bank *v.* Douglas County, 3 Dill. 298 (1873); s. c., 9 Fed. Cas. 100; Collins *v.* Chicago, 4 Biss. 472 (1867); s. c., 6 Fed. Cas. 118; Salt Lake, etc. Bank *v.* Golding, 2 Utah, 1 (1876); Mayor, etc. *v.* First Nat. Bank, 59 Ga. 648 (1877); Bradley *v.* People, 4 Wall. 459 (1866); Bank of Commerce *v.* New York City, 2 Black, 620 (1862), reversing People *v.* Com'rs of Taxes, 23 N. Y. 192 (1861); s. c., 32 Barb. 509, and declaring unconstitutional the New York statutes under which the national banks were taxed. New York has been exceedingly unfortunate in its efforts to tax national banks. After the decision in Bank of Commerce *v.* New York City, 2 Black, 620 (1862), came Bank Tax Case, 2 Wall. 200 (1864), declaring unconstitutional the New York statute of April 29, 1863, for the taxation of national banks, the tax still being on the capital stock. Next came Van Allen *v.* Assessors, 3 Wall. 573 (1865) (reversing Utica *v.* Churchill, 33 N. Y. 161—1865. See also First Nat. Bank *v.* Fancher, 48 N. Y. 524—1872), declaring unconstitutional the New York statute of March 9, 1865, taxing the stockholders in national banks, because the act did not prescribe expressly that the tax should be no greater than the tax on other shares of stock, and because taxes in New York on other corporations were not on shares of stock, but on the capital stock. New York then passed the act of April 23, 1866, which was sustained in People *v.* Com'rs, 4 Wall. 244 (1866). Still later came the case of People *v.* Weaver, 100 U. S. 539 (1879), reversing 67 N. Y. 516, overruling People *v.* Dolan, 36 N. Y. 59 (1867), and declaring void the New York tax of national-bank stock, for the reason that the New York court of appeals construed the New York taxation statute to allow persons taxed on ordinary securities a deduction for debts, while a similar deduction was not allowed to stockholders in banks, state or national. Supervisors *v.* Stanley, 105 U. S. 305 (1881) [see People *v.* Dolan, 36 N. Y. 59—1867], practically modified the preceding case, however, by holding that a stock-

held as legal and enforceable where such tax is substantially the same as on state-bank stock.[1] This is the law, although a large part or all of the bank's capital stock is invested in United States bonds.[2] But even though a tax statute states that the tax is on shares of stock, yet if it is assessed on the corporation itself, and the surplus and undivided profits are considered in figuring the value, it is a tax on the property of the corporation, and if a part of such property consists of United States bonds the tax is illegal.[3] The authority of a state to tax shares of stock in national banks is expressly conferred by the statutes of the United States which create and regulate these banks.[4]

§ 570. *Place in which shares of national-bank stock may be taxed.* —The Revised Statutes of the United States expressly declare that non-resident stockholders in a national bank are to be taxed at the place where the bank is located.[5] Under this statute a non-resident

holder who owed no debts could not complain, and that those who did owe debts were entitled, not to a release from the tax altogether, but only to the extent of what the state ought to have allowed as a deduction. The New York system of taxing national bank stock was reviewed in People *v.* Feitner, 191 N. Y. 88 (1908). States cannot tax national-bank currency. Horne *v.* Green, 52 Miss. 452 (1876). *Cf.* Ruffin *v.* Orange County Com'rs, 69 N. C. 498 (1873); Lilly *v.* Cumberland County Com'rs, 69 N. C. 300 (1873); Com'rs *v.* Elston, 32 Ind. 27 (1869).

1 Austin *v.* Boston, 96 Mass. 359 (1867); First Nat. Bank *v.* Douglas County, 3 Dill. 330 (1874); s. c., 9 Fed. Cas. 84; Stetson *v.* Bangor, 56 Me. 274 (1868).

2 Van Allen *v.* Assessors, 3 Wall. 573 (1865); People *v.* Com'rs, 4 Wall. 244 (1866). See also Home Ins. Co. *v.* New York, 119 U. S. 129 (1886). In taxing the stock no reduction is allowed for bonds held by the corporation. Home Ins. Co. *v.* Board of Assessors, 42 La. Ann. 1131 (1890); Parker *v.* Sun Ins. Co., 42 La. Ann. 1172 (1890).

3 Home, etc. Bank *v.* Des Moines, 205 U. S. 503 (1907).

4 U. S. Rev. Stat., § 5219 (taken from act of June 3, 1864, as amended by act of Feb. 10, 1868). The case of People *v.* Weaver, 100 U. S. 539, 543 (1879), says that the effect of the act of congress, as regards the taxation of national banks, is that congress says to the states: "You may tax the real estate of the banks as other real estate is taxed, and you may tax the shares of the bank as the personal property of the owner to the same extent you tax other moneyed capital invested in your state. It was conceived that by this qualification of the power of taxation equality would be secured and injustice prevented." Wasson *v.* Indianapolis Nat. Bank, 107 Ind. 206 (1886). New shares cannot be taxed until the increase has been approved by the comptroller of the currency. Charleston *v.* People's Nat. Bank, 5 S. C. 103 (1873). A state tax on a national bank giving a lien to the bank on the stock of the stockholders for such tax is not legal where the bank is insolvent. Stapylton *v.* Thaggard, 91 Fed. Rep. 93 (1898). Taxes upon the capital stock of a national bank cannot be collected from the receiver thereof. Gray *v.* Logan County, 7 Okl. 321 (1898).

5 Such was the effect of the amend-

of the state within which the bank is situated can be taxed on his stock only where the bank is located.[1] The state where he resides cannot also tax him on such stock. As regards residents of the state within which the bank is located, the state itself determines where the tax is to be levied.[2] If the state statute requires that the whole tax shall be paid in the city, county, or town where the bank is located, even though some of the stockholders reside in other counties or cities, the statute must be obeyed.[3] Generally, however, the statute requires that stockholders residing in the state shall be taxed at their place of residence on stock owned by them in a national bank within that state.[4] If the statute is silent herein, then the

ment of 1866. Previous to that time there was controversy herein as to the meaning of the act of 1863. See Austin *v.* Boston, 96 Mass. 359 (1867).

1 See McIver *v.* Robinson, 53 Ala. 456 (1875); Williams *v.* Weaver, 75 N. Y. 30 (1878); Kyle *v.* Fayetteville, 75 N. C. 445 (1876); National Bank *v.* Commonwealth, 9 Wall. 353 (1869); Lionberger *v.* Rouse, 9 Wall. 468 (1869).

2 Austin *v.* Aldermen, 7 Wall. 694 (1886). The tax may be levied on resident stockholders in the city, country, or town where they reside. Austin *v.* Boston, 96 Mass. 359 (1867). And the cashier of the bank may be required by statute to send to the clerks of the various towns the names of such stockholders as reside in those towns. Waite *v.* Dowley, 94 U. S. 527 (1876). As to the taxation of national-bank stock in Iowa, see First Nat. Bank *v.* Albia, 52 N. W. Rep. 334 (1892). As to the assessment of bank stock in West Virginia, see Bank of Bramwell *v.* Mercer County Court, 36 W. Va, 341 (1892). Concerning the taxation of national-bank stock in Nevada, see First Nat. Bank *v.* Kreig, 21 Nev. 404 (1893). National-bank stock in Delaware may be taxed by the state. First Nat. Bank *v.* Herbert, 44 Fed. Rep. 158 (1890). As to the taxation of bank stock in Washington, see First Nat. Bank *v.* Hungate, 62 Fed. Rep. 548 (1894). As to the taxation of national-bank stock in Indiana, see First Nat. Bank, *v.* Turner, 154 Ind. 456 (1900). The Kentucky tax on national-bank stock is legal. First Nat. Bank *v.* Stone, 88 Fed. Rep. 409 (1898).

3 National Bank *v.* Commonwealth, 9 Wall. 353 (1869); Tappan *v.* Merchants' Nat. Bank, 19 Wall. 490 (1873); Provident Inst. *v.* Boston, 101 Mass. 575 (1869); McLaughlin *v.* Chadwell, 7 Heisk. (Tenn.) 389 (1872). Craft *v.* Tuttle, 27 Ind. 332 (1866), holds that if a municipality has no power to tax shares in state banks, it cannot tax national-bank shares.

4 Clapp *v.* Burlington, 42 Vt. 579 (1870). See Trustees of Eminence *v.* Deposit Bank, 12 Bush (Ky.), 538 (1877); Farmers' Nat. Bank *v.* Cook, 32 N. J. L. 347 (1867). *Cf.* State *v.* Hart, 31 N. J. L. 434 (1866); State *v.* Haight, 31 N. J. L. 399 (1866). The decision in North Ward Nat. Bank *v.* Newark, 39 N. J. L. 380 (1877), rev'd on another point in 40 N. J. L. 558, however, placed New Jersey among the states which levy the tax in the most approved manner, residents being taxed where they reside, non-residents being taxed at the domicile of the corporation. See also Kyle *v.* Fayetteville, 75 N. C. 445 (1876); Buie *v.* Fayetteville Com'rs, 79 N. C. 267 (1878); Austin *v.* Boston, 96 Mass. 359 (1867); First Nat. Bank *v.* Smith, 65 Ill. 44 (1872); Baker *v.* First Nat. Bank, 67 Ill. 297 (1873);

state statutes regulating the taxation of stockholders in other corporations are to apply to stockholders in national banks situated within the state. A state statute may require a national bank to pay a tax on the stock of non-resident as well as of resident stockholders in the bank.[1] The statute may require the bank to retain from dividends the tax on the shares of stock, such tax being determined by the amount of dividends.[2] The collection of a tax on national-bank stock may be enforced by the same procedure through which taxes on other personal property are collected.[3] A non-resident holder of national-bank stock is not personally liable for a tax thereon, under the New York statute.[4]

§ 571. *The tax must not be greater than that imposed on other "moneyed capital."*—The most difficult, unsettled, and litigated questions connected with the taxation of shares of stock in national banks arise from the meaning and application of that provision of the statutes of the United States requiring that the taxation of national-bank shares of stock shall not be at a higher rate than the taxation of other "moneyed capital" within the state. The term "moneyed capital" as used in the statute authorizing taxation of national-bank stock refers to capital which comes in competition with the business of national banks.[5] The words "moneyed capital" have been construed to mean "not only bonds, stocks, and money loaned, but all credits and demands of every character in favor of the taxpayer."[6] This has been the subject of much con-

Clapp *v.* Burlington, 42 Vt. 579 (1870); Howell *v.* Cassopolis, 35 Mich. 471 (1877). *Cf.* Mintzer *v.* Montgomery County, 54 Pa. St. 139 (1867). For taxation of national-bank stock under the Alabama act, see Maguire *v.* Board of Revenue, 71 Ala. 401 (1882).

1 Merchants', etc. Bank *v.* Pennsylvania, 167 U. S. 461 (1897).

2 Central Nat. Bank *v.* U. S., 137 U. S. 355 (1890). *Cf.* First Nat. Bank *v.* Richmond, 39 Fed. Rep. 309 (1889). The taxation of the capital stock of a national bank against the bank *in solido* is invalid. It may be collected from the bank, but should be assessed against the stockholders. Deductions should also be allowed when allowed on other similar property. Leoti Nat. Bank *v.* Fisher, 45 Kan. 726 (1891).

3 Palmer *v.* McMahon, 133 U. S. 660 (1890). A tax on national-bank stock, to be collected in the first instance from the bank, cannot be collected from the receiver of the bank, the bank being insolvent. Boston *v.* Beal, 51 Fed. Rep. 306 (1892).

4 City of New York *v.* McLean, 170 N. Y. 374 (1902).

5 First Nat. Bank, etc. *v.* Chapman, 173 U. S. 205 (1899).

6 Wasson *v.* Indianapolis Nat. Bank, 107 Ind. 206 (1886); Boyer *v.* Boyer, 113 U. S. 689 (1884). Shares of stock in banks are other moneyed capital, but shares of stock in other corporations are not necessarily so. "Moneyed capital" means money put out by way of loan, discount, etc., or invested in stocks of banks, etc. which put out money by way of loan, discount, etc. Trust companies are different from banks herein. Mercantile

troversy, however; and the decisions go very far in upholding the tax, if substantial justice has been done.[1] Money invested in railroads, manufacturing, mining, or mortgages is not "moneyed capital" competing with national-bank capital, and hence a tax on the latter need not be at the same rate as upon the former.[2] The fact that by statute general stocks can be taxed at only thirty cents on each hundred dollars does not prevent a higher rate on national-bank stock.[3]

The method of taxing shares of national-bank stock need not correspond to that followed in taxing other corporations in the state.[4]

Bank *v.* New York, 121 U. S. 138 (1887), affirming 28 Fed. Rep. 776. A tax on national-bank stock is legal although stock in state and savings banks is not taxed directly, but the corporation itself is taxed in another way. Richards *v.* Rock Rapids, 31 Fed. Rep. 505 (1887). See also Hepburn *v.* School Directors, 23 Wall. 480 (1874). Other moneyed capital means capital employed in banking or loaning, and not in business. Talbott *v.* Silver Bow Co., 139 U. S. 438 (1891).

1 People *v.* Commissioners, 4 Wall. 256 (1866); Adams *v.* Nashville, 95 U. S. 19 (1877). *Re* McMahon, 102 N. Y. 176 (1886), holds that shares of stock in railroads, manufacturing, and other corporations are not "moneyed capital" in the sense in which these terms are used in the act of congress. See also First Nat. Bank *v.* Waters, 7 Fed. Rep. 152 (1881). Provident Inst. *v.* Boston, 101 Mass. 575 (1869), holds that the comparison is to be made with other moneyed capital in the same town or city where the tax is levied. See also People *v.* Moore, 1 Idaho, 504 (1873). Subject to this rule the shares of national banks may be assessed at their value even above par. Hepburn *v.* School Directors, 23 Wall. 480 (1874); People *v.* Commissioners of Taxes, 94 U. S. 415 (1876); s. c., 67 N. Y. 516 (1876), affirming 8 Hun, 536; St. Louis Nat. Bank *v.* Papin, 4 Dill. 29 (1876); s. c., 21 Fed. Cas. 203, the court saying, also, that the assessors may ascertain that value by including "all reserve funds, profits, earnings, and other values" when the intent of the statute is to base the tax "upon an inquiry, *inter alia*, into the actual value of the property of the banks so far as this imparts or confers a value upon the shares." A stockholder cannot enjoin the tax, unless he first pays such part of it as he admits is legal. Rosenberg *v.* Weekes, 67 Tex. 578 (1887). The stock is listed against the stockholder, not against the bank. Miller *v.* First Nat. Bank, 46 Ohio St. 424 (1889). The statute may authorize taxation for years past. State *v.* Simmons, 70 Miss. 485 (1893).

2 Aberdeen Bank *v.* Chehalis County, 166 U. S. 440 (1897). "Moneyed capital means money employed in a business whose object is to make profit by investing such money in securities by way of loan, discount, or otherwise, which from time to time, in the course of business, are reduced again to money and reinvested." Mercantile Nat. Bank *v.* Shields, 59 Fed. Rep. 952 (1894).

3 National Bank *v.* Mayor, etc., 100 Fed. Rep. 24 (1900).

4 Davenport Bank *v.* Davenport, 123 U. S. 83 (1887). While state bank stock may be taxed in a different way from national bank stock, yet if there is a real discrimination against the latter the tax is illegal. San Francisco, etc. Bank *v.* Dodge, 197 U. S. 70 (1905). It is held in California that national-bank stock may be taxed, even though state-bank stock

The material point is that national-banks must not, as a result, be taxed higher than other moneyed investments. If this rule is observed, it is of little consequence whether the tax on national-bank stock is levied and assessed in the same way as other corporations are taxed.

If the state laws allow a deduction to a person taxed on bonds, notes, and similar property for debts due from him to others, a similar deduction must be allowed to stockholders taxed on their shares in a national bank.[1] If the statute does not allow the same

is not taxed, if it is shown that the property is taxed in a different but equivalent way. Crocker *v.* Ascott, 149 Cal. 575 (1906). "There is no reason to suppose that congress cared at all about the mode the states might adopt for the collection of their taxes. A tax imposed on the capital or property of a corporation falls as effectually on the capital of the shareholder represented by his shares as does a tax upon the shares directly; and although, in legal discrimination, a tax upon the former is not a tax upon the latter, practically and substantially taxation of the capital of the corporation is taxation of the capital of the shareholder." A tax on national-bank stock was upheld, though all other stock except bank stock was exempt, the tax being on capital stock, in Mercantile Nat. Bank *v.* New York, 28 Fed. Rep. 776 (1886); aff'd, 121 U. S. 138. The mode of collection need not be the same. The state may compel the bank to pay the tax. National Bank *v.* Commonwealth, 9 Wall. 353, 363 (1869), per Miller, J. But if the assessment is illegal, in that no notice and opportunity is given to the stockholder to appear and resist the tax, it cannot be enforced. Albany City Nat. Bank *v.* Maher, 9 Fed. Rep. 884 (1882). In general, *cf.* Van Allen *v.* Assessors, 3 Wall. 573 (1865); Bradley *v.* People, 4 Wall. 459 (1866); Hubbard *v.* Johnson County, 23 Iowa, 130 (1867); People *v.* Assessors, 29 How. Pr. 371 (1865); Wright *v.* Stelz, 27 Ind. 338 (1866), overruling Whitney *v.* Madison, 23 Ind. 331 (1864), on certain points; Cooley, Taxation (2d ed.), 390. *Contra*, People *v.* Bradley, 39 Ill. 130 (1866). See also Frazer *v.* Siebern, 16 Ohio St. 614 (1866); Smith *v.* First Nat. Bank, 17 Mich. 479 (1869); Van Slyke *v.* State, 23 Wis. 655 (1869); Bagnall *v.* State, 25 Wis. 112 (1869). Where a state and also a local tax are levied on shares of stock in a state bank, and the local tax is declared illegal, the same local tax is illegal as regards shares in national banks. City Nat. Bank *v.* Paducah, 2 Flip. 61 (1877); s. c., 5 Fed. Cas. 755. Even though the property of other corporations is taxed instead of the stock, yet it may be legal to tax stock in national banks. Nevada Nat. Bank *v.* Dodge, 119 Fed. Rep. 57 (1902).

1 Evansville Bank *v.* Britton, 105 U. S. 322 (1881), aff'g 8 Fed. Rep. 867. But a deduction to individuals for United States bonds held by them will not invalidate a tax on the national-bank stock without a deduction for bonds held by the bank. People *v.* Commissioners, 4 Wall. 244 (1866); First Nat. Bank *v.* Ayers, 160 U. S. 669 (1896). In Wasson *v.* Indianapolis Nat. Bank, 107 Ind. 206 (1886), the court held that the deduction allowed to others is fatal to a tax on national-bank shares without that deduction only when it is "material and serious;" and that that depends on the proportion of moneyed capital which is allowed the deduction to that moneyed capital which is not allowed it. If material, the national-bank-share

to the latter, and the courts of the state refuse to allow the deduc-

tax is to be allowed a similar deduction. National-bank stock cannot be taxed at a higher valuation on its actual value than other moneyed property is valued at. Deductions allowed to other moneyed capital must also be allowed on national-bank stock. Whitbeck *v.* Mercantile, etc. Bank, 127 U. S. 193 (1888). A stockholder in a national bank is entitled to the same deductions as a stockholder in a state bank. McHenry *v.* Downer, 116 Cal. 20 (1897). In Ohio the debts of a stockholder in a national bank cannot be deducted from the value at which the stock is taxed. Niles *v.* Shaw, 50 Ohio St. 370 (1893). In Ohio no deduction for the debts of a stockholder is made in the taxation of national-bank stock. Chapman *v.* First Nat. Bank, 56 Ohio St. 310 (1897). Deductions allowed general taxpayers of their debts from credits taxed against them give to national-bank stockholders the right to a similar reduction in the taxation of their stock. Non-resident stockholders are entitled to the same deductions. Mercantile Nat. Bank *v.* Shields, 59 Fed. Rep. 952 (1894). National bank stock is taxed at its par value, under the New Jersey statute, but the taxpayer may claim the same deductions and exemptions as to that stock as he does as to his other personal property. Lippincott *v.* Lippincott, 66 Atl. Rep. 113 (N. J. 1907).

Where a tax on stock is not illegal except in that the assessors have proceeded in a wrong manner, the court will not enjoin its collection unless the plaintiff stockholders pay in such a tax as would have been legal. Frazer *v.* Siebern, 16 Ohio St. 614 (1866); Cummings *v.* Merchants' Nat. Bank, 101 U. S. 153 (1879); Supervisors *v.* Stanley, 105 U. S. 305 (1881); s. c., *sub nom.* Stanley *v.* Supervisors, 121 U. S. 535 (1887), holding that the stockholder cannot recover back the excess of tax where he has not attempted to have the tax remedied; Hills *v.* Exchange Bank, 105 U. S. 319 (1881), reversing National Albany Exch. Bank *v.* Wells, 5 Fed. Rep. 248. In consequence of this escape of the stockholders from taxation, a special statute was passed levying a back tax. See N. Y. Laws, 1883, ch. 341. Such a statute is constitutional. See McVeagh *v.* Chicago, 49 Ill. 318 (1868). The legislature may cure any defects in the levy of taxes in past years, provided such defects could have been so modified before the levy was made. Williams *v.* Supervisors of Albany, 122 U. S. 154 (1887), sustaining ch. 345, Laws of 1883. *Cf.* City Nat. Bank *v.* Paducah, 2 Flip. 61 (1877); s. c., 5 Fed. Cas. 755. A deduction to other moneyed corporations for their real estate must be allowed in taxing national-bank shares. Pollard *v.* State, 65 Ala. 628 (1880), overruling McIver *v.* Robinson, 53 Ala. 456 (1875), and Sumter County *v.* National Bank, 62 Ala. 464 (1878). In general, see also Ruggles *v.* Fond du Lac, 53 Wis. 436 (1881); Miller *v.* Heilbron, 58 Cal. 133 (1881); St. Louis Nat. Bank *v.* Papin, 4 Dill. 29 (1876); Covington, etc. Bank *v.* Covington, 21 Fed. Rep. 484 (1884). A deduction for debts, if allowed to persons taxed generally, must be allowed national-bank stockholders who are taxed on their stock. McAden *v.* Mecklenburg County, 97 N. C. 355 (1887). Deductions are to be allowed the national-bank stockholder for debts due from him to others where the state statute permits its citizens to deduct their debts from the valuation of their personal property. Richards *v.* Rock Rapids, 31 Fed. Rep. 505 (1887); Peavey *v.* Greenfield, 64 N. H. 284 (1887). As regards deductions for surplus funds which are already taxed, see Strafford Nat. Bank *v.* Dover, 58 N. H. 316 (1878). *Cf.* North Ward, etc. Bank *v.* Newark, 39 N. J. L. 380 (1877); rev'd on another

tion, then the tax is illegal. Such was the result of a tax in New York on national-bank stock.[1]

A refusal to allow a deduction to stockholders in national banks similar to a deduction allowed on a tax levied on other "moneyed capital" is held to be a discrimination in contravention of the statute. Special exemptions, however, of certain stocks or other forms of "moneyed capital" do not require that a similar exemption should be made on national-bank stock.[2] Even though the state

point in 40 N. J. L. 558; First Nat. Bank *v.* Peterborough, 56 N. H. 38 (1875). As regards its realty, see Rice County Com'rs *v.* Citizens' Nat. Bank, 23 Minn. 280 (1877). In Indiana the national-bank stockholder may recover back such part of the tax as should have been deducted by reason of his indebtedness. Indianapolis *v.* Vajen, 111 Ind. 240 (1887); Exchange Nat. Bank *v.* Miller, 19 Fed. Rep. 372 (1884).

1 People *v.* Weaver, 100 U. S. 539 (1879). The New York court held that "the effect of the state law is to permit a citizen of New York, who has moneyed capital invested otherwise than in banks, to deduct from that capital the sum of all his debts, leaving the remainder alone subject to taxation, while he whose money is invested in shares of bank stock can make no such deduction." The supreme court of the United States declared the tax on the national-bank shares to be invalid. But the case of Supervisors *v.* Stanley, 105 U. S. 305, 315 (1881), holds that the tax is not void absolutely. A deduction allowed to individuals for national and state securities, but not allowed on national-bank stock, invalidates a tax on the latter. Whitney Nat. Bank *v.* Parker, 41 Fed. Rep. 402 (1890). If the stockholder owed no debts he is not injured; and even if he owes debts he cannot defeat the tax altogether, but is allowed a similar deduction. No discrimination is allowable, although the state taxes banks and nothing else. Gorgas' Appeal, 79 Pa. St. 149 (1875). No discrimination, though a deduction for debts is allowed to those whose property consists of debts due them; but no deduction otherwise. First Nat. Bank *v.* St. Joseph, 46 Mich. 526 (1881). The exemption of all capital which is wholly invested in mining is not a discrimination. Silver Bow County *v.* Davis, 6 Mont. 306 (1887). Exemption from taxation of savings banks, municipal bonds, and shares of stock in all foreign and domestic corporations other than banks does not invalidate a tax on shares of stock in national banks. Mercantile Bank *v.* New York, 121 U. S. 138 (1887); Newark, etc. Co. *v.* Newark, 121 U. S. 163 (1887); Bank of Redemption *v.* Boston, 125 U. S. 60 (1888). No discrimination exists in taxation of national-bank stock in territory where the shares of stock in corporations paying taxes on their property or capital stock are exempted from taxation. Silver Bow County *v.* Davis, 6 Mont. 306 (1887). In Nebraska the owner of national-bank stock, in listing his shares for taxation, is not entitled to deduct his *bona fide* indebtedness from the value of such shares of stock. The decision on the former hearing of the case, reported in 25 Neb. 468, is overruled. Bressler *v.* Wayne County, 32 Neb. 834 (1891). National-bank shares in Massachusetts are taxed at their actual value, and the bank may petition for a reduction of the tax. National-bank of Commerce *v.* New Bedford, 155 Mass. 313 (1892).

2 Thus, a special contract exemption of a few state bonds from taxa-

statute taxing national-bank stock does not allow such deductions as should be allowed, yet if the proper deductions may be figured out, the stockholders cannot enjoin the tax unless they offer to pay the amount which should be paid.[1] A statute taxing national-bank stock for prior years and imposing a penalty and requiring the bank to pay for all the stockholders, imposes a burden not borne by other moneyed capital in the state, and is illegal.[2]

Again, the national bank act cannot be evaded by an unfair assessment of the shares in national banks as compared with the assessment of other moneyed capital. It is a well-known fact and an understood matter in nearly all localities that no kinds of property are valued at their actual selling worth in making the valuation for taxation purposes. Consequently if other moneyed capital is valued in the assessment rolls at a certain proportion of the actual value, and national-bank stock at a higher proportion, the tax is illegal and cannot be collected.[3]

tion will not exempt the national bonds. Lionberger *v.* Rouse, 9 Wall. 468 (1869); Hepburn *v.* School Directors, 23 Wall. 480 (1874), where an exemption of mortgages, judgments, and contracts to sell land were immaterial therein. See also Adams *v.* Nashville, 95 U. S. 19 (1877); Supervisors *v.* Stanley, 105 U. S. 305, 317 (1881); *Re* McMahon, 102 N. Y. 176 (1886); McLaughlin *v.* Chadwell, 7 Heisk. (Tenn.) 389 (1872); Boyer *v.* Boyer, 113 U. S. 689 (1885); Everitt's Appeal, 71 Pa. St. 216 (1872); Albany, etc. Bank *v.* Maher, 19 Blatchf. 175 (1882). See also Richmond *v.* Scott, 48 Ind. 568 (1874); Mercantile Nat. Bank *v.* New York, 28 Fed. Rep. 776, 785 (1886).

1 People's, etc. Bank *v.* Marye, 191 U. S. 272 (1903).

2 Covington *v.* First Nat. Bank, 198 U. S. 100 (1905).

3 Pelton *v.* National Bank, 101 U. S. 143 (1879), the court saying that "any system of assessment of taxes which exacts from the owner of the shares of a national bank a larger sum in proportion to their actual value than it does from the owner of other moneyed capital valued in like manner does tax them at a greater rate within the meaning of the act of congress." Where, however, the assessors assess ordinary securities at three-fifths of their actual value, and assess bank stock at its full actual value, and such method of unequal assessment is contrary to the constitution of the state, the court will relieve the stockholders only upon payment by them of such a tax as would have been legal. Cummings *v.* Merchants' Nat. Bank, 101 U. S. 153 (1879); Supervisors *v.* Stanley, 105 U. S. 305 (1881). When the national-bank stock is assessed too low, the fact that another bank is assessed still lower will not invalidate the tax against the former. People *v.* Assessors, 2 Hun, 583 (1874); aff'd, 67 N. Y. 521. In First Nat. Bank *v.* Treasurer, 25 Fed. Rep. 749 (1885), where ordinary moneyed capital was assessed at six-tenths of its actual value, while shares in national banks were assessed at a higher proportion of the real value, the collection thereof was enjoined upon the complainant paying the tax admitted to be due. As to the pleadings, see National Bank *v.* Kimball, 103 U. S. 732 (1880). Lower valuation of other property has been held to be immaterial. Wagoner *v.*

§ 572. *The bank may bring suit to restrain an illegal tax on its stockholders.*—There has been some doubt as to whether a national bank could bring suit to restrain an illegal tax on its stockholders. Ordinarily a corporation cannot do so. Each stockholder must protect his own interests. But where, as in the case of national banks, the tax is paid by the bank itself, and collected by it from its stockholders, if the latter refuse to pay the bank or recognize its payment as legal, many suits would result. Accordingly, in order to avoid a multiplicity of suits, it is now well established that the bank itself may file a bill in equity to prevent and enjoin the collection of an illegal tax on its stockholders.[1] A suit to declare in-

Loomis, 37 Ohio St. 571 (1881). As regards taxation of national banks, a custom of assessing property at fifty per cent. of its value is not proved by a few examples. Engelke *v.* Schlenker, 75 Tex. 559 (1890). If, as a matter of fact, personal property and capital of individuals escape taxation, and little effort is made to tax such capital, then a tax on national-bank stock cannot be enforced. If such stock is assessed at two-thirds of its actual value, and other personal property at one-half their value, the assessment is illegal. First Nat. Bank *v.* Lindsay, 45 Fed. Rep. 619 (1891).

[1] Quoted and approved in Knopf *v.* First Nat. Bank, 173 Ill. 331 (1898); City Nat. Bank *v.* Paducah, 2 Flip. 61 (1877); s. c., 5 Fed. Cas. 755, where the court said: "The bank is so far the trustee of the stockholders and the custodian of the dividends that it is entitled to maintain the bill. It might be subjected to great annoyance by stockholders who denied the legality of the tax, and gave the bank notice that it would pay at the peril of being sued by them. It is certainly no hardship to permit the whole question to be litigated in a single action." This case holds that an injunction against the collection of the illegal tax will be granted. In general, see also Albany City Nat. Bank *v.* Maher, 20 Blatchf. 341 (1882); North Ward Nat. Bank *v.* Newark, 40 N. J. L. 558 (1878). *Cf.* Dows *v.* Chicago, 11 Wall. 108 (1870); Tappan *v.* Merchants' Nat. Bank, 19 Wall. 490 (1873); Pelton *v.* National Bank, 101 U. S. 143 (1879); Cummings *v.* National Bank, 101 U. S. 153 (1879). *Contra*, First Nat. Bank *v.* Meredith 44 Mo. 500 (1879). See also Union Nat. Bank *v.* Chicago, 3 Biss. 82 (1871); s. c., 24 Fed. Cas. 615. As to the rule in New York, see People *v.* Wall Street Bank, 39 Hun, 525 (1886); People *v.* Coleman, 41 Hun, 344 (1886). The same rule does not apply to a corporation which brings suit to prevent the levy upon and sale of a non-resident stockholder's stocks for non-payment of his tax. Waseca Co. Bank *v.* McKenna, 32 Minn. 468 (1884). The case of Farmers' Nat. Bank *v.* Cook, 32 N. J. L. 347 (1867), denies the right of the bank to bring the action, and says: "The corporation is not the agent of the stockholders for any such purpose." A national bank may file a bill to restrain the imposition of a tax on stock, the bank having to pay the tax. But the injunction against collection of the tax is granted only as to the excess of tax. Whitney Nat. Bank *v.* Parker, 41 Fed. Rep. 402 (1890). The bank cannot file a bill in the federal court unless the tax involved is over $2,000. Sioux Falls Nat. Bank *v.* Swenson, 48 Fed. Rep. 621 (1892). A national bank may bring suit to relieve its stockholders from an excessive tax. Citizens', etc. Bank *v.* Columbia

valid a tax levied on national-bank stock must be in equity.[1] The New York court of appeals hold, however, that a suit in equity does not lie at the instance of a national bank to enjoin the collection of taxes on the stock of the bank, excepting in a case involving fraud or illegal discrimination or classification.[2] Where a bank pays taxes on the shares of its stock and claims that the tax is illegal it may maintain a suit to recover back the tax without joining the stockholders.[3] Where a national bank has paid an illegal tax on its stock and charges the same to its stockholders, a stockholder may recover it back from the municipality so collecting the tax.[4] Even though a bank which in accordance with the statute has paid taxes in behalf of its stockholders, has not deducted the same from dividends as it should have done, a stockholder who has paid his tax cannot hold the bank liable for his proportion of the taxes not collected by the bank from other stockholders.[5]

C. OTHER METHODS OF TAXING CORPORATIONS.

§ 572a. *General principles.*—A state may tax corporations, and the rate of taxation may be greater or less than or equal to the rate at which individuals are taxed.[6] Where, however, other property is

County, 23 Wash. 441 (1900). A national bank may appear and appeal from a tax which it is compelled to pay in behalf of its stockholders. First Natl. Bank *v.* City of Independence, 123 Iowa 482 (1904).

1 Lindsay *v.* First Nat. Bank, 156 U. S. 485 (1895).

2 Mercantile, etc. Bank *v.* Mayor, etc., 172 N. Y. 35 (1902). A national bank cannot maintain an injunction against the collection of taxes on its stock unless some ground of equity jurisprudence is involved, and cannot maintain such a suit where the stockholders do not, and where the bank has nothing to do with the tax unless they desire to pay it. People's, etc. Bank *v.* Marye, 107 Fed. Rep. 570 (1901); aff'd, 191 U. S. 272.

3 State Nat. Bank *v.* City of Memphis, 116 Tenn. 641 (1906).

4 Guaranty T. Co. *v.* City of New York, 108 N. Y. App. Div., 192 (1905).

5 Kennedy *v.* Citizens' Nat. Bank, 128 Iowa 561 (1905).

6 It is constitutional to tax corporations without taxing individuals. Singer Mfg. Co. *v.* Wright, 33 Fed. Rep. 121 (1887); State R. R. Tax Cases, 92 U. S. 575 (1875). *Cf.* Railroad Tax Cases, 13 Fed. Rep. 722 (1882); Santa Clara Co. *v.* Railroad, 18 Fed. Rep. 385; s. c., 118 U. S. 396 (1885). A tax on railroads may be legal, although the assessment is for eighty per cent. of the value, while on other property in the state the assessment is sixty per cent. Chamberlain *v.* Walter, 60 Fed. Rep. 788 (1894). It is legal for a state to impose a larger tax on domestic corporations having their principal places out of the state than upon those having their principal places of business within the state. Blue Jacket, etc. Co. *v.* Scherr, 40 S. E. Rep. 514 (W. Va. 1901). The Kentucky statute imposing a tax on corporations exercising any special franchise not allowed by law to natural persons does not apply to a tobacco warehouse company. Louisville, etc. Co. *v.* Commonwealth, 49 S. W. Rep. 1069 (Ky. 1899).

assessed at one-fifth its actual value, but street railway property at its full value, this is depriving the street railway company of the equal protection of the law.[1] The method of assessing taxes upon corporations varies of course in the different states.[2] Where the constitution requires property to be taxed at its worth, the assessors in taxing bank stock cannot put together the capital stock, surplus fund and undivided profits and then deduct one-fourth in order to arrive at the value of the stock. They must ascertain the market or actual value.[3] A state may legally distribute the taxes paid by a railroad on its rolling-stock and personalty among the counties traversed by the railroad.[4]

Where a company is really located in a city and does all its business there, but its articles of incorporation state its principal place of business as being in an adjacent town, the sole object being to evade taxation, the court will hold that for taxation purposes its principal place of business is in such city.[5] Where the capital stock

1 Raymond *v.* Chicago, etc. Co., 207 U. S. 20 (1907).

2 A tax on a gas company on gross receipts and on dividends by way of license for the right to act as a corporation is not a tax upon the property or corporate franchises, but is a license fee. Jersey City Gas-Light Co. *v.* United Gas, etc. Co., 46 Fed. Rep. 264 (1891).

3 Schley *v.* Montgomery County Com'rs., 67 Atl. Rep. 250 (Md. 1907).

4 Columbus Southern Ry. *v.* Wright, 151 U. S. 470 (1894), the court holding that the rolling-stock, choses in action, etc., of a railroad have their situs at the domicile or place of business of the company, but the legislature may change this situs for purposes of taxation.

5 Milwaukee Steamship Co. *v.* Milwaukee, 83 Wis. 590 (1892). Where the actual place of business of a corporation is at one place, but its nominal place of business is fixed elsewhere in order to evade taxation, the actual place of business is the place where the company will be taxed under the Michigan statutes. Detroit Transp. Co. *v.* Board of Assessors, 91 Mich. 382 (1892), distinguishing the New York cases. Where a corporation does all its business and has all its property in a town other than the town named as its principal place of business, the latter town cannot tax it. Portsmouth Tp. *v.* Cranage S. S. Co., 111 N. W. Rep. 749 (Mich. 1907). See also Galveston, etc. Ry. *v.* Gonzales, 151 U. S. 496 (1894), relative to domicile and residence for purposes of jurisdiction of the federal courts. In regard to a corporation being taxed in another place in the state from the place where its principal office is located, see also *Re* McLean, 66 Hun, 122 (1892), aff'd, 138 N. Y. 158. It must be the principal place or places of business for the purposes of taxation and service of process; and in New York under somewhat similar statutes it is held that the certificate is conclusive as to this. Western Transp. Co. *v.* Scheu, 19 N. Y. 408 (1859). A domestic corporation will not be allowed to deny that it has a place of business in the state. Chapman *v.* Doray, 89 Cal. 52 (1891). Generally, the statutes prescribe that a corporation shall be taxed where its principal office or place of business is located. People *v.* McLean, 17 Hun, 204 (1879); aff'd, 80 N. Y. 254; Pelton *v.* Northern Transp. Co., 37 Ohio St.

is invested in patent-rights there is a difference of opinion as to whether it may be taxed by the state.[1] A state may compel corporations to pay taxes for years past.[2] A state may impose a stamp tax

450 (1882); Baltimore *v.* Baltimore, etc. Ry., 57 Md. 31 (1881); Western Transp. Co. *v.* Scheu, 19 N. Y. 408 (1859); Glaize *v.* South Carolina R. R., 1 Strobh. (S. C.) 70 (1846), holding that a corporation may have a special or constructive residence extending to the territorial limits of the jurisdiction which granted its charter for purposes of taxation.

1 In Pennsylvania it is not taxable. Commonwealth *v.* Westinghouse Electric, etc. Co., 151 Pa. St. 265 (1892). The corporate franchise may be taxed, although substantially all the capital stock is invested in patent-rights. People *v.* Knight, 174 N. Y. 475 (1903). In ascertaining the value of capital stock for taxation stock issued for patents may be considered as worth par. People *v.* Kelsey, 101 N. Y. App. Div. 325 (1905); aff'd, 181 N. Y. 512. A state may tax capital stock issued for letters patent, the issue for patents in this case being the entire capital stock of $2,000,000 except $2,500 which was issued for cash. American, etc. Co. *v.* State, etc., 70 N. J. L. 172 (1903). Where the entire capital stock is invested in patent-rights and the business of the company is granting licenses to use the same, the value of such patent-rights is a part of the capital to be taxed in New York. People, etc. *v.* Knight, 174 N. Y. 475 (1903), rev'g 67 N. Y. App. Div. 333 (1901). In Holt *v.* Indiana Mfg. Co., 80 Fed. Rep. 1 (1897), it appears that the corporation enjoined state officials from levying a tax on capital stock which represented patent-rights and nothing else. The capital stock of a corporation cannot be taxed by a state where it has been issued for the right to make, use, or license certain inventions covered by patents, there having been no apparatus or tangible property received for the stock. This is on the principle that a patent-right cannot be taxed by a state. Commonwealth *v.* Philadelphia Co., 157 Pa. St. 527 (1893). Compare People *v.* Campbell, 138 N. Y. 543 (1893). The New Jersey annual tax is legal, although nearly the entire capital stock of the company was issued for patents. State *v.* State Board, 61 N. J. L. 461 (1898). Where the stock is issued in payment for the exclusive right to use certain patented articles within certain territory, it is not invested in patent-rights so as to be exempt from taxation by reason of the acts of congress. Commonwealth *v.* Central, etc. Tel. Co., 145 Pa. St. 121 (1891); Commonwealth *v.* Brush, etc. Co., 145 Pa. St. 147 (1891). In the case of Crown, etc. Co. *v.* State, 87 Md. 687 (1898), the court held that patent-rights owned by the corporation might be included in an estimate of its property for the purpose of ascertaining the taxable value of its shares of stock.

2 McVeagh *v.* Chicago, 49 Ill. 318 (1868). An attempt of the state to make a railroad corporation pay $1,250,000 back taxes, not levied under an alleged mistaken view of the law by former state officials, failed in Commonwealth *v.* Pennsylvania Co., 145 Pa. St. 266 (1892). A statute taxing national-bank stock for prior years and imposing a penalty and requiring the bank to pay for all the stockholders, imposes a burden not borne by other moneyed capital in the state, and is illegal. Covington *v.* First Nat. Bank, 198 U. S. 100 (1905). Where the charter provides for "a tax not exceeding twenty-five cents per annum per share on each share of the capital stock whenever the annual profits thereof shall exceed six per cent.," the legislature may compel the company to pay such tax, and to pay

on sales of stock made in the state.[1] But a statute imposing a tax of two cents per share on all sales of stock, irrespective of the par value of such stock, is unconstitutional.[2] A tax on transfers of stock does not apply to an original issue of stock.[3] It is constitutional for a state to tax railroad stock without taxing stock in other corporations.[4]

A tax on the capital stock based upon the amount of dividend declared cannot be evaded by distributing profits without declaring a dividend. But a stock dividend may not come within the tax statute.[5] The fact that a company has declared a dividend

it for twenty-five years past, during which time the company had evaded payment. State *v.* Seaboard, etc. R. R., 52 Fed. Rep. 450 (1892).

1 Hatch *v.* Reardon, 204 U. S. 152 (1907). A state may tax sales and transfers of certificates of stock, even though made by non-residents, the transaction being in the state. People *v.* Reardon, 184 N. Y. 431 (1906).

2 People, etc. Farrington *v.* Mensching, 187 N. Y. 8 (1907).

3 People *v.* Duffy, etc. Co., 122 N. Y. App. Div. 336 (1907).

4 Kidd *v.* Alabama, 188 U. S. 730 (1903).

5 Lehigh, etc. Co. *v.* Commonwealth, 55 Pa. St. 448 (1867); Commonwealth *v.* Pittsburg, etc. Ry., 74 Pa. St. 83 (1873). See State *v.* Franklin Bank, 10 Ohio, 91 (1840); People *v.* Home Ins. Co., 92 N. Y. 328 (1883). Where taxes are based upon dividends, the tax must be paid, even though a dividend is declared nearly equal to the capital stock, it being shown that the value of the stock after the declaration of the dividend was practically par, and hence that the dividend was not a distribution of the capital stock. Commonwealth *v.* Western Land, etc. Co., 156 Pa. St. 455 (1893). Where a company has in its treasury stock in another company, and distributes it among its stockholders, this is a dividend. Allegheny *v.* Pittsburgh, etc. Ry., 179 Pa. St. 414 (1897). Where a consolidation of three corporations is made by increasing the capital stock of one, and issuing the increased stock to the stockholders of all three corporations in the proportion agreed upon, this is not a stock dividend, even though the aggregate capital stock was $400,000, but by the consolidation is $1,000,000. Allegheney *v.* Federal, etc. Ry., 179 Pa. St. 424 (1897). Where a company leases its property to another company at a nominal rental, and the stockholders of the first company transfer their stock to the second company in exchange for stock of the latter, no dividend is involved, and a tax on dividends of the first corporation does not attach. Allegheny *v.* Pittsburgh, etc. Ry., 179 Pa. St. 414 (1897). Where the dividends declared during the year were partly earned during prior years, the latter portion are not taxable under the Pennsylvania statute taxing the capital stock according to the dividends. Commonwealth *v.* Brush, etc. Co., 145 Pa. St. 147 (1891). Where all the shares are reduced in par value from $50 to $38, and the $12 difference is paid to the stockholder in cash, this is a reduction of capital stock and not a dividend, and cannot be taxed as a dividend. Commonwealth *v.* Central Transp. Co., 145 Pa. St. 89 (1891). A tax upon the receipts of a railroad is not a tax upon dividends. Com'rs, etc. *v.* Buckner, 48 Fed. Rep. 533 (1891). A dividend declared and ordered deposited to the order of the stockholders, and so held until

does not show that the capital stock has a value subject to taxation under the New York statute.[1] A corporation claiming that it is taxed too much cannot enjoin collection unless it offers to pay the amount it admits to be due.[2] The court will, under the New Jersey statute, enjoin a corporation from doing business if it does not pay taxes levied upon it.[3] A purchaser of a railroad at foreclosure sale cannot revive an action begun by the mortgagor, after the giving of the mortgage, to enjoin the collection of taxes.[4] Where taxes are based on the aggregate value of all the shares of stock, unissued stock should not be considered, even though ten per cent. has been paid on the subscription to the latter.[5]

In ascertaining the actual value of capital stock for taxation, the price at which the stock is selling is not taken as the actual value where the market value is due to speculation and market influences.[6]

the further order of the court, is legal, and the amount cannot be taxed as belonging to the bank. Pollard *v.* First Nat. Bank, 47 Kan. 406 (1891). Profits applied to betterments are not "dividends earned" within the meaning of a statute imposing taxation. State *v.* Comptroller, 54 N. J. L. 135 (1891). See also § 534, *supra.* Where all the stockholders are officers, and, instead of dividends, the corporation distributes its profits by large salaries, there is danger that upon the death of one of them others may continue the payment of such salaries to themselves, even though they are executors of the deceased officers' estate. Matter of Schaefer, 65 N. Y. App. Div. 378 (1901); aff'd, 171 N. Y. 686. Where the stockholders contribute a surplus and afterwards distribute it again, this is not a dividend within the meaning of a tax statute. People *v.* Knight, 96 N. Y. App. Div. 120 (1904).

1 People *v.* Barker, 141 N. Y. 251 (1894).

2 Smith *v.* Rude, etc. Co., 131 Ind. 150 (1892). See also § 572, notes, *supra.* An injunction is not the proper remedy to attack a tax erroneously laid on the capital stock. Jones *v.* Rushville Nat. Gas Co., 135 Ind. 595 (1893).

3 *Re* Electro-Pneumatic Transit Co., 51 N. J. Eq. 71 (1893).

4 Keokuk, etc. R. R. *v.* Scotland County, 152 U. S. 318 (1894).

5 Boston, etc. R. R. *v.* Commonwealth, 157 Mass. 68 (1892). Even though a gas company issues stock without the consent of a state board, as required by statute, yet this is no defense to a tax levied on the corporation based on the amount of its capital stock, including such tax. Attorney General *v.* Massachusetts, etc. Co., 179 Mass. 15 (1901). The whole capital stock may be taxed under a city charter, although only a part of it has been paid in. Shelby County, etc. Co. *v.* Shelbyville Trustees, 91 Ky. 578 (1891). Funds accumulated by a bank and carried on the books under the head of profit and loss may not be "surplus," yet may be subject to taxation as an accretion to capital. Leather, etc. Bank *v.* Treat, 128 Fed. Rep. 262 (1904).

6 Commonwealth *v.* Philadelphia, etc. R. R. 145 Pa. St. 74 (1891). The statute of 1891 in Pennsylvania for taxing corporations according to the value of their capital stock is a tax on the property, franchises, bonds, money, and assets of the corporation, all of which are considered in arriving at the tax, and the in-

A tax on the value of the capital stock is a tax on the property in which that capital is invested, and hence if a portion of the property is beyond the limits of the state, and thus exempt from taxation in the state, that portion of the capital stock cannot be taxed.[1] Bonds of a domestic corporation held by non-residents are not taxable by the state creating the corporation.[2] A statute by which

debtednes should also be considered. Various decisions on this statute are given in Commonwealth *v.* N. Y. etc. R. R., 188 Pa. St. 169 (1898); Commonwealth *v.* Manor, etc. Co., 188 Pa. St. 195 (1898); Commonwealth *v.* Beech Creek R. R., 188 Pa. St. 203 (1898); Commonwealth *v.* Fall Brook R. R., 188 Pa. St. 199 (1898); Commonwealth *v.* Ontario, etc. Ry., 188 Pa. St. 205 (1898). In Louisiana the corporation may sue to reduce or annul taxation of the shares of stock. The value of the stock may be ascertained from various sources, including that of stock for which it has been exchanged. Planters', etc. Co. *v.* Assessor, 41 La. Ann. 1137 (1889). Where all the stockholders sell their stock at a certain time, the price received may be the basis for the taxation of the corporate property. Winnepiseogee, etc. Co. *v.* Gilford, 67 N. H. 514 (1894). In the case of Chicago, etc. Co. *v.* State Board of Equalization, 112 Fed. Rep. 607 (1901), the court, in speaking about the unreliability of quotations of stock as a basis for its intrinsic value, said (p. 612): "The court knows by experience and observation that railroad properties, when sold as an entirety, almost without exception, yield nothing to the stockholder, although the stock may have been sold in share lots upon the stock exchange for years previously at advanced figures. The court knows, also, from observation, that these stock quotations are frequently advanced by contending interests for control, or by short interests in the market, such as ran the Northern Pacific within a year to quotations almost tenfold its real value. The court also knows from observation that the speculative public, dealing in stock sales, and making its quotations, are governed largely by the prospect of present dividends, and not by any general conception of permanent earning capacity. These, and other considerations that could be mentioned, make stock quotations an *indicia*, but an unstable *indicia*, of the real value of the capital stock as an entirety."

1 Delaware, etc. R. R. *v.* Pennsylvania, 198 U. S. 341 (1905), holding also that a tax on a corporation on its capital stock based on a valuation, which includes property situated out of the state and not to be returned, is taking property without due process of law, in violation of the United States Constitution.

2 Railroad Co. *v.* Jackson, 7 Wall. 262 (1868); State Tax on Foreign-held Bonds, 15 Wall. 300 (1872); Davenport *v.* Mississippi, etc. R. R., 12 Iowa, 539 (1861); Commonwealth *v.* Chesapeake, etc. R. R., 27 Gratt. 344 (1876); People *v.* Eastman, 25 Cal. 603 (1864), where the same principle was applied between counties in the same state. *Contra*, Maltby *v.* Reading, etc. R. R., 52 Pa. St. 140 (1866). As to the rule where part of the capital stock is used out of the state, see Commonwealth *v.* Standard Oil Co., 101 Pa. St. 119 (1882); State Treasurer *v.* Auditor-General, 46 Mich. 224 (1881); People *v.* Equitable, etc. Co., 96 N. Y. 387 (1884). The Pennsylvania system of taxing against corporations all bonds issued by them and owned by citizens of the state, and compelling the corporation to pay the tax and deduct it from the interest on the

Pennsylvania requires a New York railroad corporation doing business in Pennsylvania to pay to the latter a part of coupons due to residents of Pennsylvania, such coupons being by their terms payable in New York, is void.[1] In Kentucky a railroad cannot be taxed to aid in paying a municipal subscription to its construction.[2] "A license fee is understood to be a charge for the privilege of carrying on a business or occupation, and is not the equivalent or in lieu of a property tax." Hence a license fee exacted for cars on a street railroad does not prevent other forms of taxation.[3] The franchise to build and operate a street railway is subject to taxation. A license fee may be imposed on the railway, although, under its franchise, it is also bound to pay other taxes annually.[4] The taxation of unincorporated associations is considered elsewhere.[5] Where a railroad company of one state is consolidated with companies of other states, the consolidated company is considered, for the purposes of taxation, to be a corporation of each state to the extent that its property is in that state. It is taxed in the state on the capital stock of the company which it absorbed.[6] The word "franchise" has been construed to mean the entire property, tangible and intangible,

bonds, is constitutional. Bell's Gap R. R. *v.* Pennsylvania, 134 U. S. 232 (1890). Where an express company, being an unincorporated stock association, has twelve million dollars surplus and invests it in outside securities, and then deposits the securities with a trust company in New York, and then makes a bond dividend, the bonds to be payable only out of such securities, and the creditors of the company to have recourse to such securities, a tax cannot be levied thereon in Kentucky. Coulter *v.* Weir, 127 Fed. Rep. 897 (1904).

1 New York, etc. R. R. *v.* Pennsylvania, 153 U. S. 628 (1894), rev'g 150 Pa. St. 245. Where a state, by charter granted to a railroad company, limits the taxation to a certain amount, it cannot afterwards compel the company to deduct from coupons due on bonds owned by residents a part of such coupons, and pay that part to the state. New York, etc. R. R. *v.* Pennsylvania, 153 U. S. 628 (1894).

2 Louisville, etc. R. R. *v.* Commonwealth, 89 Ky. 531 (1890).

3 Brooklyn City R. R. *v.* New York, 199 U. S. 48 (1905).

4 New Orleans, etc. Co. *v.* New Orleans, 143 U. S. 192 (1892).

5 See ch. XXIX, *supra*.

6 Ohio, etc. R. R. *v.* Weber, 96 Ill. 443 (1880); Chicago, etc. Ry. *v.* Auditor-General, 53 Mich. 79 (1884); Railroad Co. *v.* Vance, 96 U. S. 450 (1877). In this case a railroad corporation of Indiana which had been recognized by an act of the Illinois legislature as a corporation of that state was held for taxes upon the capital and franchises of a road leased by it in Illinois and assessed to the lessor company, but charged to the lessee company and to be collected from it. Quincy R. R. Bridge Co. *v.* Adams County, 88 Ill. 615 (1878), where a bridge company originally incorporated by two states, and consolidated by articles which were confirmed by the legislature of one of them (Illinois), was held to be a corporation of that state for purposes of taxation. An incorporating fee is not imposed on the whole consolidated capital under the New York statute. People *v.* New

when so intended in a taxation statute.[1] A state may tax a franchise of the corporation at its full value, although it taxes tangible property at less than the full value.[2] The franchise to be a corporation exists only in the state creating it and hence a tax statute relative to domestic corporations cannot be construed as allowing deductions for a part of the franchise which is exercised outside of the state.[3] A statute by which a corporation which fails to return its property for taxation, is bound by the assessment thereafter made without opportunity to object to the same, except for fraud or corruption, is unconstitutional as depriving the corporation of its property without due process of law.[4] An adjudication as to an assessment or tax for one year is not *res judicata* as to subsequent years if the value or the assessors have changed.[5]

§ 572b. *Exemptions from taxation.*—A state, if not restricted by its constitution, may exempt the property of a corporation from taxation. Such an exemption constitutes a contract between the state and the corporation, which cannot be repealed or changed by subsequent legislation, unless the right to alter or repeal it has been reserved by the state.[6] Exemptions from taxation, however,

York, etc. R. R., 129 N. Y. 474 (1892). The state may constitutionally charge a large fee as a condition of granting a charter. Edwards *v.* Denver, etc. R. R., 13 Colo. 59 (1889).

1 Adams Express Co. *v.* Kentucky, 166 U. S. 171 (1897). A clause that a lessee shall pay all taxes was construed to cover a franchise tax in the case of Thomas *v.* Cincinnati, etc. Ry., 93 Fed. Rep. 587 (1889). The franchises of a bank, namely, the corporate franchise to do banking business, may be taxed. The value of the shares of stock may be considered in fixing the value of the franchise. Bank of California *v.* City, etc., 142 Cal. 276 (1904). A New Jersey holding corporation whose entire assets consist of stock in a New York corporation, and whose entire income is derived from such stock, is not subject to a license or franchise tax in New York. People *v.* Kelsey, 101 N. Y. App. Div. 205 (1905).

2 Coulter *v.* Louisville, etc. R. R., 196 U. S. 599 (1905).

3 American Glue Co. *v.* Commonwealth, 81 N. E. Rep. 302 (Mass. 1907).

4 Central of Georgia Ry. *v.* Wright, 207 U. S. 127 (1907).

5 People *v.* Lundel, 157 N. Y. 513 (1899), distinguishing People *v.* Carter, 119 N. Y. 557 (1890). See also Liquidating Commissioners *v.* Marrero, 106 La. 130 (1902); City of Lowell *v.* Middlesex County, 152 Mass. 372 (1890); Am. & Eng. Ency. of Law (2d ed.), pp. 694, 701. A judgment against state officials as to the validity of corporate taxes is not *res judicata* binding on a county in the state. Bank of Kentucky *v.* Kentucky, 207 U. S. 258 (1907).

6 See § 568, *supra*. An exemption of a railroad from taxation, except when the dividends exceed eight per cent., is a contract protected by the federal constitution. Mobile & Ohio R. R. *v.* Tennessee, 153 U. S. 486 (1894). An exemption from state taxation is a contract between the state and the corporation which cannot be impaired by a subsequent statute. Such exemption, however, will not be ex-

are not favored by the courts, and are strictly limited to the terms

tended to branch lines thereafter constructed. Wilmington, etc. R. R. *v.* Alsbrook, 146 U. S. 279 (1892). In Commissioners, etc. *v.* Baltimore, etc. Co., 99 Md. 481 (1904), the court construed the Maryland statute exempting the personal property of corporations from taxation, where the shares of stock were taxed. See, in general, Tomlinson *v.* Branch, 15 Wall. 460 (1872); Home of the Friendless *v.* Rowse, 8 Wall. 430 (1869); Wilmington R. R. *v.* Reid, 13 Wall. 264 (1871); Mobile, etc. R. R. *v.* Moseley, 52 Miss. 127 (1876); Jefferson Bank *v.* Skelley, 1 Black, 436 (1861), where the charter provided for the payment of six per cent. of the bank's profits in lieu of taxes; Livingston County *v.* Hannibal, etc. R. R., 60 Mo. 516 (1875), where, however, an exemption from county taxes was held not to include a school tax which originated after the charter was granted; St. Joseph *v.* Hannibal, etc. R. R., 39 Mo. 476 (1867), holding that an exemption from county taxation will not prevent taxation by a city. A contract between the state and a railroad, that the latter shall pay a certain tax and no more, is not repealable by the state. State Board *v.* Morris, etc. R. R., 49 N. J. L. 193 (1886). Though a charter may be repealable, yet an amendment giving an exemption from taxation may be irrepealable, since the latter may be a contract and not a franchise. State Board *v.* Morris, etc. R. R., 49 N. J. L. 193 (1886). A bonus to the state on increase of capital stock cannot apply to previous charters having charter right to increase. Commonwealth *v.* Erie, etc. Transp. Co., 107 Pa. St. 112 (1884); Railroad Cos. *v.* Gaines, 97 U. S. 698 (1878), holding that a new corporation invested with the powers and privileges of, and subject to the obligations of the charter of, another corporation, does not take an exemption from taxation. To same effect, Railroad Co. *v.* Commissioners, 103 U. S. 1 (1880); Dauphin, etc. Ry. *v.* Kennerly, 74 Ala. 583 (1883). But see East Tennessee, etc. R. R. *v.* Pickerd, 24 Fed. Rep. 614 (1885); Delaware Railroad Tax, 18 Wall. 206 (1873); Dartmouth College *v.* Woodward, 4 Wheat. 518 (1819); Providence Bank *v.* Billings, 4 Pet. 514 (1830); Binghamton Bridge, 3 Wall. 51 (1865); Humphreys *v.* Pegues, 16 Wall. 244 (1872); Pacific R. R. *v.* Maguire, 20 Wall. 36 (1873); North Missouri R. R. *v.* Maguire, 20 Wall. 46 (1873); People *v.* Soldiers' Home, etc., 95 Ill. 561 (1880); University *v.* People, 99 U. S. 309 (1878), holding void a statute limiting a general exemption previously conferred to property in immediate use by a corporation; Farrington *v.* Tennessee, 95 U. S. 679 (1877); Railway Co. *v.* Philadelphia, 101 U. S. 528 (1879); Hoge *v.* Railway Co., 99 U. S. 348 (1878); Dodge *v.* Woolsey, 18 How. 331 (1855), holding that the adoption of a new constitution declaring that corporate property shall be taxed will not be allowed to impair the contract; Mobile, etc. R. R. *v.* Kennerly, 74 Ala. 566 (1883); Richmond *v.* Richmond, etc. R. R., 21 Gratt. (Va.) 604 (1872), holding also that an exemption of corporate property in a city from taxation, which conflicts with the charter of the city previously granted, is not unconstitutional if the city has remaining ample means of taxation to meet its needs; Commonwealth *v.* Fayette R. R., 55 Pa. St. 452 (1867), holding that, where power to alter or repeal the exemption is reserved, the exercise of the power is no impairment of the contract; State *v.* Miller, 30 N. J. L. 368 (1863), holding that the repeal may be made by a general law; State *v.* Commissioners of Taxation, 37 N. J. L. 240 (1874), holding that, where a general exemption from taxation is granted to a corporation without reserving the power to alter or repeal it, and there is a provision

of the exemption. Thus an exaction of a money consideration from

for a special mode of assessing its property, it may consent to another mode of assessment without surrendering or altering its exemption from general taxation; East Tennessee, etc. R. R. *v.* Pickerd, 24 Fed. Rep. 614 (1885); Temple Grove Seminary *v.* Cramer, 98 N. Y. 121 (1885), holding that an incorporated academy does not waive or forfeit its exemption from taxation by reason of having leased its building for a boarding-house during vacations; Elizabethtown, etc. R. R. *v.* Elizabethtown, 12 Bush (Ky.), 233 (1876), holding that an exemption of railroad property from taxation precludes any imposition of taxes by the state, whether for state or local purposes. In Mott *v.* Pennsylvania R. R., 30 Pa. St. 9 (1858), a sale of a railroad and canal by the state on terms exempting the vendee from future taxes was enjoined. The exemption was held to be unconstitutional. County Com'rs *v.* Woodstock Iron Co., 82 Ala. 151 (1886), holding that an exemption of private corporations from taxation made by a general law was not a contract, but only a legislative bounty, subject to be repealed.

The act by which the exemption from taxation is made must be clear and unequivocal; the intent to confer the immunity must be beyond reasonable doubt. Ohio, etc. Trust Co. *v.* Debolt, 16 How. 416 (1853); Delaware Railroad Tax, 18 Wall. 206 (1873); North Missouri R. R. *v.* Maguire, 20 Wall. 46 (1873); Mobile, etc. R. R. *v.* Kennedy, 74 Ala. 566 (1883), holding that a reasonable doubt is to be construed against the exemption; Dauphin, etc. Ry. *v.* Kennerly, 74 Ala. 583 (1883); Richmond *v.* Richmond, etc. R. R., 21 Gratt. (Va.) 604 (1872). An exemption of a corporation from taxation upon payment of a fixed annual tax on the capital stock is not voidable. State *v.* Butler, 86 Tenn. 614 (1888). A particular mode of taxation may be changed under the reserved right to amend the charter. Detroit St. Rys. *v.* Guthard, 51 Mich. 180 (1883). See also Bank of Republic *v.* Hamilton County, 21 Ill. 53 (1858); Mayor, etc. *v.* Twenty-third Street R. R., 113 N. Y. 311 (1889). A specific rate of taxation prescribed in the charter raises no implication of a legislative contract to impose no further burdens by way of taxation. Iron City Bank *v.* Pittsburgh, 37 Pa. St. 340 (1860). A constitutional prohibition as to exemptions from taxation does not apply to railroad corporations, they being quasi-public. Yazoo, etc. R. R. *v.* Levee Com'rs, 37 Fed. Rep. 24 (1888). A charter exemption from all taxation upon payment of a certain tax is legal. Franklin County Court *v.* Deposit Bank, 87 Ky. 370 (1888). An exemption from taxation which is a gift may be repealed. Philadelphia *v.* Pennsylvania Hospital, 134 Pa. St. 171 (1890). An exemption from taxation may be repealed under the reserved right to amend, etc. Wagner, etc. Institute *v.* Philadelphia, 132 Pa. St. 612 (1890). An exemption from all other taxation is an exemption from local as well as state taxation. People *v.* Coleman, 121 N. Y. 542 (1890). A railroad may give up its exemption from state taxation and still retain its exemption from county taxation. State *v.* Hannibal, etc. R. R., 101 Mo. 136 (1890). A railroad that is divided by the legislature with the consent of the stockholders does not lose its exemptions. Louisville, etc. R. R. *v.* Commonwealth, 89 Ky. 531 (1890). An exemption from taxation is not a franchise. Hence *quo warranto* does not lie to oust the corporation from such exemption. International, etc. Ry. *v.* State, 75 Tex. 356 (1889). The decision of the state court that an exemption does not apply to certain property is not an impairment of a contract. St. Paul, etc. Ry *v.* Todd

a street railway as a condition of a franchise does not exempt it from further taxation.[1] An amendment exempting a corporation from taxation may be repealed, there being no consideration for the contract.[2] Moreover, under a reservation of power to alter, amend or repeal the charter, the legislature may take away an exemption from taxation.[3]

Where a corporation whose property is exempt from taxation is merged into or consolidated with another, the question of whether the exemption from taxation passes with its property to the lessee, vendee, or consolidated company is a question which turns largely

County, 142 U. S. 282 (1892). Where a contract of exemption from taxation between a state and a waterworks company is declared unconstitutional by the highest court of the state, there is no impairment of the contract by subsequent legislation which assumes the old contract to have been invalid. New Orleans *v.* New Orleans, etc. Works, 142 U. S. 79 (1891). In Citizens' Bank *v.* Board of Assessors, 54 Fed. Rep. 73 (1893), an exemption from taxation was held to apply to extensions of the original charter. Although the charter provides that the real and personal property of the company shall be taxed the same as that of individuals, this does not exempt the capital stock from taxation. State *v.* Simmons, 70 Miss. 485 (1893). An exemption from taxation does not pass to a company that buys out the company which is exempt. Commonwealth *v.* Nashville, etc. Co., 93 Ky. 430 (1892). A company to generate and sell electric power is not a manufacturing company as regards taxation. Commonwealth *v.* Northern, etc. Co., 145 Pa. St. 105 (1891); Commonwealth *v.* Brush, etc. Co., 145 Pa. St. 147 (1891). An exemption of manufacturing corporations from taxation was construed to exempt merely such of their property as was invested in manufacturing, in Commonwealth's Appeal, 129 Pa. St. 346 (1889); Commonwealth *v.* Mahoning Rolling-Mill Co., 129 Pa. St. 360 (1889). Where, subsequently to the incorporation of a company, a general act reserves to the legislature the right to amend or repeal any and all charters, the legislature may repeal any amendments to the charter, so far as such amendments are passed after the general act, where the amendments do not expressly waive the legislative right of amendment or repeal, unless the amendment is worded "saving, whenever that power was exerted, all rights previously vested." An exemption from taxation may be repealed under the reserve power. (Approving Tomlinson *v.* Jessup, 15 Wall. 454—1872, and Railroad Co. *v.* Maine, 96 U. S. 499—1877.) Creditors stand upon the same footing in this respect. Louisville Water Co. *v.* Clark, 143 U. S. 1 (1892). A contract of a lessee to pay taxes upon the real and personal property, franchises, capital stock, or gross receipts does not bind the lessee to pay taxes on dividends. Jersey City Gaslight Co. *v.* United Gas. Imp. Co., 58 Fed. Rep. 323 (1893). An exemption of a corporation may not exempt also its timber lands. Todd County *v.* St. Paul, etc. Ry., 38 Minn. 163 (1888). See also, on this subject, § 501, *supra*, and § 639, *infra*.

1 Metropolitan, etc. Co. *v.* New York, 199 U. S. 1 (1905).

2 Manistee, etc. Co. *v.* Commissioner of Railroads, 118 Mich. 349 (1898).

3 Commissioners, etc. Co. *v.* Bancroft, 203 U. S. 112 (1906). Louisville Water Co. *v.* Clark, 143 U. S. 1 (1892); Pearsall *v.* Great Northern Ry., 161 U. S. 646, 663 (1896).

on the words granting the exemption.[1] Even though a railroad company is by its charter exempt from taxation, yet if it merges with other corporations in an entirely new corporation after the adoption of the constitution which reserves the right to the legislature to amend or repeal charters, the legislature may repeal such exemption.[2] A railroad company reorganized under a special act of the legislature without a new company being chartered, does not lose a statutory exemption from taxation.[3]

Where a consolidation is effected after the adoption of constitutional provisions prohibiting the legislature from exempting the property of corporations from taxation, the consolidated company is looked upon as a new corporation, which is not entitled to exemptions from taxation possessed by the companies of which it is composed.[4]

1 An exemption from taxation pertains to the franchise as a corporation, and does not pass with the sale of the franchise to operate the road. Chesapeake, etc. Ry. *v.* Miller, 114 U. S. 176 (1885); Memphis R. R. *v.* Com'rs, 112 U. S. 609 (1884); Tomlinson *v.* Branch, 15 Wall. 460 (1872); Branch *v.* Charleston, 92 U. S. 677 (1875); Central R. R. *v.* Georgia, 92 U. S. 665 (1875), reversing s. c., 54 Ga. 401; Chesapeake, etc. R. R. *v.* Virginia, 94 U. S. 718 (1876); Delaware Railroad Tax, 18 Wall. 206 (1873). See also cases in preceding note, and § 897, *infra*. A charter exemption of a street railway company from assessment for paving does not pass to a purchaser of its property, even though the sale is made under authority of a statute authorizing the transfer of "the estate, property, rights, privileges and franchises." Moreover if the new company is incorporated under the general act which requires it to pave, it cannot receive such exemption by reason of any such purchase. Rochester Ry. *v.* Rochester, 205 U. S. 236 (1907); aff'g 182 N. Y. 116. Where by statute, "all rights" of a railway are to pass to another, an exemption from taxation passes. Atlantic, etc. R. R. *v.* Allen, 15 Fla. 637 (1876). An exemption will not be extended to the property of other corporations consolidated with it. Philadelphia, etc. R. R. *v.* Maryland, 10 How. 376 (1850); Chesapeake, etc. R. R. *v.* Virginia, 94 U. S. 718 (1876); Delaware Railroad Tax, 18 Wall. 206 (1873). See also Wait, Insolv. Corp. 381. An exemption of railroad lands from taxation may pass to a railroad purchasing the same. Stevens County *v.* St. Paul, etc. Ry., 36 Minn. 467 (1887). Consolidation in Missouri destroys exemption from taxation. Keokuk, etc. R. R. *v.* County Court, 41 Fed. Rep. 305 (1890). A consolidated company under the Missouri statutes relative to railroads meeting at the state line is a new corporation, and the old one is dissolved. An exemption from taxation of the old corporation is thereby lost. State *v.* Keokuk, etc. R. R., 99 Mo. 30 (1889). Although an exemption from taxation is to pass to a consolidated company, yet this is a gratuity to the new company and may be repealed. Wilmington, etc. R. R. *v.* Alsbrook, 110 N. C. 137 (1892); aff'd, 146 U. S. 279.

2 Northern, etc. Ry. *v.* Maryland, 187 U. S. 258 (1902).

3 Powers *v.* Detroit, etc. Ry., 201 U. S. 543 (1906).

4 Memphis, etc. R. R. *v.* Berry, 112 U. S. 609 (1884); St. Louis, etc. R. R. *v.* Berry, 113 U. S. 465 (1885); Chesapeake, etc. R. R. *v.* Miller, 114 U. S.

Consolidation, being a dissolution of the old companies, destroys an exemption of one of them from taxation.[1]

If the franchises and property of a corporation be transferred by a sale in foreclosure, an exemption from taxation does not accompany the transfer. The exemption is a personal privilege and not a franchise.[2] The federal courts will follow a state decision to the effect that the statutes of that state have repealed an exemption which is repealable legally.[3] A statute exempting the property of a corporation from being taxed does not prevent the taxation of land held by it merely for convenience and not necessary to its operation.[4]

176 (1885). Where the legislature ceded to a company to be formed "all the right, interest, and privileges of whatever kind" of a defunct railroad company, it was held that an exemption from taxation conferred on the old company was not vested in the new one. Railroad Co. *v.* Georgia, 98 U. S. 359 (1878). In this case the restriction upon granting exemptions was in a statute instead of a constitutional provision.

1 Keokuk, etc. R. R. *v.* Missouri, 152 U. S. 301 (1894), reviewing the cases on this subject of dissolution, and holding that the presumption is always against the dissolution. Where, in consolidating, new certificates of stock are issued, a new board of directors elected, and the constituent companies cease their functions, the old companies are thereby dissolved and a new company is formed, even though the name of the new company is the same as one of the old companies. Hence exemptions from taxation existing under the old charters cease where a new constitution enacted prior to such consolidation prescribes that the property shall be taxed in proportion to its value. Yazoo, etc. Ry. *v.* Adams, 180 U. S. 1 (1901), aff'g 77 Miss. 194.

2 Morgan *v.* Louisiana, 93 U. S. 217 (1876); Louisville, etc. R. R. *v.* Palmes, 109 U. S. 224 (1883); Wilson *v.* Gaines, 103 U. S. 417 (1880), where the transfer was under proceedings to enforce a statutory lien of a state; Arkansas Midland R. R. *v.* Berry, 44 Ark. 17 (1884). See also Picard *v.* East Tennessee, etc. R. R., 130 U. S. 637 (1889), and cases *supra*. Where the exemption is to all the property of a railroad its franchise is included. Wilmington R. R. *v.* Reid, 13 Wall. 264 (1871). As to whether an exemption from taxation is a franchise or privilege, see Keokuk, etc. R. R. *v.* Missouri, 152 U. S. 301, 311 (1894). In a mortgage foreclosure a new corporation taking over the property does not succeed to an exemption from taxation, even though it is given by statute all the "franchise rights and privileges" of the old corporation. Lake Drummond, etc. Co. *v.* Commonwealth, 103 Va. 337 (1905). Where a railroad is foreclosed an exemption from taxation does not pass to the purchaser at the foreclosure sale, even though the statutes give to such purchaser all the rights, immunities, privileges, etc., of the former company. Baltimore, etc. Ry. *v.* Ocean City, 89 Md. 89 (1899).

3 Com'rs of Wicomico County *v.* Bancroft, 203 U. S. 112 (1906); rev'g 135 Fed. Rep. 977.

4 State *v.* Commissioners, 23 N. J. L. 510 (1852); State *v.* Collectors, 25 N. J. L. 315 (1855). In these cases lands owned by a railroad and occupied by dwellings for employees, car and locomotive works, coal mines, etc., were held to be subject to taxation. See also Toll-bridge Co. *v.* Osborn, 35 Conn. 7 (1868), where lands held for wharves by a bridge company by authority of law were held taxable

Where a corporation owns property in excess of an amount specified and limited by the charter, an exemption from taxation does not apply to such excess.[1] In general, an exemption from taxation by the state is not an exemption also from municipal taxation for local purposes,[2] nor from assessments for improvements,[3] nor from a license fee.[4] Unless there is a statute expressly authorizing the taxation of real estate acquired by a waterworks company under the power of eminent domain, or by purchase in lieu thereof, it cannot be taxed.[5] Under the Massachusetts constitution requiring proportional taxes, it would be illegal to exempt stock from taxation, upon its paying at the rate of three mills on each dollar of the fair value of the stock.[6]

§ 572c. *Taxation of foreign corporations.*—Any state may tax foreign corporations doing business within its borders.[7]

as real estate—a provision in its charter that all its property should be considered personal property and be divided into shares being construed to relate to the property of the stockholders as represented by the shares; *Re* Swigert, 119 Ill. 83 (1886), holding that a railroad exemption did not exempt its elevator. In ascertaining, under the New Jersey taxation statute, whether one-half of the capital is employed in the state in manufacturing, the capital employed in disposing of the manufactured product in the state is included. *Re* Consolidated Electric Storage Co., 26 Atl. Rep. 983 (N. J. 1893). For cases passing upon the exemption of manufacturing corporations from taxation in Pennsylvania, see Commonwealth *v.* Keystone Bridge Co., 156 Pa. St. 500 (1893); Commonwealth *v.* J. B. Lippincott Co., 156 Pa. St. 513 (1893); Commonwealth *v.* Thackara Mfg. Co., 156 Pa. St. 510 (1893); Commonwealth *v.* Pottsville Iron, etc. Co., 157 Pa. St. 500 (1893); Commonwealth *v.* Juniata Coke Co., 157 Pa. St. 507 (1893); Commonwealth *v.* National Oil Co., 157 Pa. St. 516 (1893).

1 Seashore House, etc. *v.* City of Atl. City, 48 Atl. Rep. 242 (N.J. 1900).

2 Elizabethtown, etc. R. R. *v.* Elizabethtown, 12 Bush (Ky.), 233 (1876); Roosevelt Hospital *v.* Mayor of New York, 84 N. Y. 108 (1881), where real estate exempted from state taxation was held to be subject to assessment by a city for the construction of a sewer. *Cf.* Applegate *v.* Ernst, 3 Bush (Ky.), 648 (1868), where a tax by a county upon a railroad to obtain money to pay a county subscription for the purpose of completing the road was held to be unlawful. An exemption from local taxation is not an exemption from state taxation. Wilkes Barre, etc. Bank *v.* Wilkes Barre, 148 Pa. St. 601 (1892).

3 New Jersey, etc. R. R. *v.* Jersey City, 42 N. J. L. 97 (1880). An exemption from taxation does not apply to assessments for improvements. Illinois Cent. R. R. *v.* Mattoon, 141 Ill. 32 (1892).

4 An exemption of the capital stock from taxation is not an exemption from a license fee, inasmuch as a tax means a tax on property, while a license fee is a form of tax on occupations. State *v.* Citizens' Bank, 52 La. Ann. 1086 (1899).

5 Milford, etc. Co. *v.* Town of Hopkinton, 192 Mass. 491 (1906).

6 *Re* Opinion of the Justices, 84 N. E. Rep. 499 (Mass. 1908).

7 Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. 566 (1870); s. c., Oliver *v.* Liverpool, etc. Co., 100 Mass. 531 (1868). The capital stock of a for-

A state may impose on foreign insurance companies a tax equal to the tax levied by the state creating the foreign corporation on

eign corporation is not within the state and hence cannot be taxed. The tangible property in the state may be taxed. Foster, etc. Co. *v.* Caskey, 66 Kan. 600 (1903). Goods in New York for sale, also money on deposit in New York, also other property in the state, form the proper basis for taxation of such part of the capital stock of foreign corporations as is employed in the state. Taxation for such part of the capital stock as sales in New York bear to all the sales is unjust, since many sales may be by sample. People *v.* Wemple, 133 N. Y. 323 (1892). A tax on foreign manufacturing corporations to the extent of the business which they do in the state is constitutional and enforceable. People *v.* Wemple, 131 N. Y. 64 (1892). The New York statute taxing foreign corporations doing business in the state on the same basis as domestic corporations is constitutional. Horn Silver, etc. Co. *v.* New York, 143 U. S. 305 (1892). The New York tax upon the business of all foreign and domestic corporations doing business in the state is a tax on the right to be a corporation and to do busines, and is not a tax upon the franchise, even though the tax is measured by the dividends declared. The tax is legal although the corporation owns United States bonds. Home Ins. Co. *v.* New York, 134 U. S. 594 (1890). Where foreign corporations are required to report stock, bonds, etc., owned by residents for taxation, it need report only such as its books disclose, and is not to be held liable further. Commonwealth *v.* N. Y. etc. R. R., 145 Pa. St. 57 (1891). *Cf.* Commonwealth *v.* American, etc. Teleph. Co., 129 Pa. St. 217 (1889). Foreign Corporations doing business in New Jersey are subject to taxation. State *v.* Berry, 52 N. J. L. 308 (1890). Where a parent corporation of Massachusetts owns stock in a branch corporation of New York and collects royalties, etc., from the latter, the parent corporation is not subject to taxation in New York. People *v.* American, etc. Teleph. Co., 117 N. Y. 241 (1889). Debts due to a foreign corporation from residents cannot be taxed in Louisiana. Barber, etc. Co. *v.* New Orleans, 41 La. Ann. 1015 (1889). The New York statute levying a tax on foreign corporations doing business in the state, the tax being upon "the amount of capital stock employed within the state," is legal, and a New Jersey corporation is liable to taxation for maintaining a sales agency and office and bank account in New York City, even though its factories, books of account, etc., are in other states. Southern Cotton Oil Co. *v.* Wemple, 44 Fed. Rep. 24 (1890).

The Pennsylvania statute imposing a quarter of a mill license tax on the capital stock of foreign corporations having an office in the state, and prohibiting such offices unless the tax is paid, the act applying to all foreign corporations except insurance companies, is constitutional. A state may exclude or impose conditions upon foreign corporations unless they are engaged in interstate or foreign commerce, or are employed by the government. Pembina Min. Co. *v.* Pennsylvania, 125 U. S. 181 (1888); Blackstone Mfg. Co. *v.* Blackstone, 79 Mass. 488 (1859); State *v.* Lathrop, 10 La. Ann. 402 (1855); State *v.* Fosdick, 21 La. Ann. 434 (1869); Tatem *v.* Wright, 23 N. J. L. 429 (1852); State *v.* Western Union Tel. Co., 73 Me. 518 (1882); Commonwealth *v.* Gloucester Ferry Co., 98 Pa. St. 105 (1881); Norfolk, etc. R. R. *v.* Commonwealth, 114 Pa. St. 256 (1886); Commonwealth *v.* Milton, 12 B. Mon. (Ky.) 212, 218 (1851); Boston Loan Co. *v.* Boston, 137 Mass. 332 (1884); Singer Mfg. Co.

corporations foreign to the latter state.[1] Where a railroad corporation is incorporated by the United States, a state cannot tax its franchises; it may tax the tangible property, but not the franchise.[2] Where an assessment of taxes against a railroad company has been affirmed by the supreme court, *mandamus* may be used to compel payment of them, if there is no other adequate remedy.[3] The tax

v. County Com'rs, 139 Mass. 266 (1885); Att'y-Gen. *v.* Bay State, etc. Co., 99 Mass. 148 (1868); Commonwealth *v.* Texas, etc. R. R., 98 Pa. St. 90 (1881), holding, however, that a corporation created by the United States congress is not a foreign corporation within the revenue act of Pennsylvania; Commonwealth *v.* Gloucester, etc. Ferry Co., 98 Pa. St. 105 (1881); People *v.* Equitable Trust Co., 96 N. Y. 387 (1884), holding that a tax may be imposed upon the business done by a foreign corporation in New York, but not upon its property in other states, nor upon its franchise. A foreign corporation doing business in and taxed in New York is not entitled to a deduction for its debts. People *v.* Barker, 141 N. Y. 118 (1894). Otherwise as to domestic corporations. People *v.* Barker, 141 N. Y. 196 (1894). Under the New York act in arriving at the basis of taxation of corporations, the commissioners are bound to take the statements under oath of the corporate officers, except that they may call for further information. People *v.* Barker, 139 N. Y. 55 (1893). A foreign corporation is not liable to taxation in New York, where its business is conducted in another state, and all the parties interested in it and its officers reside in another state, and all its contracts made, and its product manufactured, sold and delivered in another state; and where it transacts none of its corporate business in the state, but merely has an office there, with a salaried agent, as a convenient place to discuss with patrons questions preliminary to the making of contracts, the contracts themselves being executed out of the state, and the company having no bank account in the state. People *v.* Campbell, 139 N. Y. 68 (1893). For the New York act which applies to foreign corporations, see Parker Mills *v.* Commissioners, 23 N. Y. 242 (1861); People *v.* Horn, etc. Co., 105 N. Y. 76 (1887). They are to be taxed where their principal offices in the state are situated. People *v.* McLean, 17 Hun, 204 (1879); aff'd, 80 N. Y. 254. A corporation chartered by the federal government is not such a foreign corporation as is obliged to pay a license fee under the Pennsylvania statutes. Commonwealth *v.* Texas, etc. R. R., 98 Pa. St. 90 (1881). Unless a statute otherwise provides, a lien upon corporate property for state taxes attaches in preference to pre-existing judgments or decrees; it has been held that a sale under a judgment or decree will not avoid such a lien. Osterburg *v.* Union Trust Co., 93 U. S. 424 (1876).

1 Home Ins. Co. *v.* Swigert, 104 Ill. 653 (1882); Phila. Fire Assoc. *v.* New York, 119 U. S. 110 (1886).

2 California *v.* Pacific R. R., 127 U. S. 1, 40 (1888). A county ordinance requiring a railroad chartered by the United States to take out a license is void. San Benito County *v.* Southern Pac. R. R., 77 Cal. 518 (1888).

3 Person *v.* Warren R. R., 32 N. J. L. 441 (1868); Silverthorn *v.* Warren R. R. 33 N. J. L. 173 (1868). And the party making return to an alternative *mandamus* must show that he has complied with the order to the extent of his ability; want of funds is not a sufficient return where it is the result of the voluntary act of the party.

lien on a railroad may by delay be rendered subordinate to a mortgage.[1] The New York statute requiring foreign corporations before doing business in that state to pay a certain license tax is constitutional.[2] The inheritance tax in New York on stock applies to stock in a consolidated railroad corporation of New York and Massachusetts, but the valuation will be such part of the actual value as the value of the corporate property in the state bears to the whole property.[3]

§ 572d. *Taxation must not interfere with interstate commerce.*— "It is not and cannot be doubted that each state of the Union may tax all property, real and personal, within its borders, belonging to persons or corporations, although employed in interstate or foreign commerce, provided the rights and powers of the national government are not interfered with."[4] A state statute taxing a corporation having interstate property may levy the tax not only on the tangible property within the state, but on such portion of the earning power of the property as the property in the state bears towards the whole property. This is not interfering with interstate commerce by levying a tax for the privilege of transacting such commerce.[5] A state through which a railroad runs may require, upon the consolidation of the company with companies in other states so as to make an interstate railroad, the payment of a tax on the whole consolidated capital stock.[6] But a state cannot tax corporations so as to interfere with interstate commerce. The Pennsylvania license fee which all foreign corporations keeping an office in the state are required to pay, with a few exceptions, is unconstitutional as regards a foreign railroad corporation which owns a railroad in the state, such railroad being part of an interstate system of railroads.[7] The supreme court of the United States will not question a decision of the supreme court of a state that a license tax was imposed on domestic business only, even though it was imposed on a foreign corporation doing both interstate and domestic

1 Cooper *v.* Corbin, 105 Ill. 224 (1883); Parsons *v.* East, etc. Co., 108 Ill. 380 (1884).

2 New York State *v.* Roberts, 171 U. S. 658 (1898).

3 Matter of Cooley, 186 N. Y. 220 (1906). Kingsbury *v.* Chapin, 82 N. E. Rep. 700 (Mass. 1907). An Australian corporation which has offices in London and weekly directors' meetings and stockholders' meetings in London where its general accounts are kept, may be subject to the English income tax levied on persons residing therein. De Beers, etc. *v.* Howe, [1905] 2 K. B. 612.

4 Western Union Tel. Co. *v.* Taggart, 163 U. S. 1 (1896).

5 Adams Express Co. *v.* Ohio State Auditor, 166 U. S. 185 (1897).

6 Ashley *v.* Ryan, 153 U. S. 436 (1894).

7 Norfolk, etc. R. R. *v.* Penn, 136 U. S. 114 (1890).

business.[1] A state may require a foreign corporation to pay a tax on its capital stock as a privilege of doing business in the state, and this is not a restriction or regulation of interstate commerce. The statute is not applicable to a corporation engaged entirely in interstate commerce, but applies to a corporation which has a place of business in the state for other purposes, as well as interstate commerce.[2] A state may levy a tax on the capital stock of a foreign sleeping-car company, which runs its cars through the state, the tax being on such part of the capital stock as the number of miles which its cars run in the state bears to the whole number of miles which its cars run in all the states.[3]

A tax on interstate telegraph messages is unconstitutional.[4] But a state may tax a foreign telegraph company engaged in interstate telegraph business, the tax being graded according to the amount and value of the company's property in the state measured by miles, and the tax being in place of taxes levied directly on the property. Such a tax is a franchise tax.[5] A city, under authority of a statute, may compel an interstate telegraph company to pay an annual license of $500 for the privilege of doing business in such city. This is a tax, and is not a condition or restriction on the privilege of doing business in the state.[6] A license fee which is exorbitant is an interference with interstate commerce and is void.[7] A state cannot prohibit the agents of foreign express companies from doing

1 Armour, etc. Co. *v.* Lacy, 200 U. S. 226 (1906).

2 Attorney General *v.* Electric, etc. Co., 188 Mass. 239 (1905). A state may require a foreign corporation to pay a license fee graduated according to its capital stock before doing business in the state. Such license tax may be annual and is not a tax on interstate commerce, even though imposed on the business, and even though only a part of the capital stock is employed in the state. American, etc. Co. *v.* People, 34 Colo. 240 (1905).

3 Pullman's Car Co. *v.* Penn, 141 U. S. 18 (1891), the court holding that a tax on the capital stock on account of the property owned is a tax on the property itself. A similar decision was made concerning a tax on the capital stock of a foreign telegraph company, the capital stock being valued at the aggregate value of all its shares of stock, and the proportion of its lines within the state to those outside of it being the basis of taxation. Massachusetts *v.* Western Union Tel. Co., 141 U. S. 40 (1890).

4 Western Union Tel. Co. *v.* Alabama, 132 U. S. 472 (1889).

5 Postal Tel. Cable Co. *v.* Adams, 155 U. S. 688 (1895). The Post Road Act of Congress of 1866 does not prevent a state taxing an interstate telegraph company on the value of its property and franchises in the state. Such value may be ascertained by taking such part of the value of the entire system as the part of the system in the state bears to the entire system. State *v.* Western Union Tel. Co., 165 Mo. 502 (1901).

6 Postal Tel. Cable Co. *v.* Charleston, 153 U. S. 692 (1894).

7 Postal Tel. Cable Co. *v.* New Hope, 192 U. S. 55 (1904); Postal Tel. Cable Co. *v.* Taylor, 192 U. S. 64 (1904).

business in the state, except upon obtaining a license. Such a law is an interference with interstate commerce.[1] A tax may be levied, based on the gross receipts, and, if the road is but partly in the state, on a proportion of the gross receipts determined by a mode prescribed by statute.[2] A state may tax a railroad on business that passes out of the state into another state and back into the first state again.[3] Various other decisions on taxation in its bearings upon interstate commerce are given in the notes below.[4]

1 Crutcher *v.* Kentucky, 141 U. S. 47 (1891).

2 Maine *v.* Grand Trunk, etc. Ry., 142 U. S. 217 (1891). The gross receipts of a telegraph company are not a legal basis for valuing its franchise. Western, etc. Co. *v.* City of Omaha, 103 N. W. Rep. 84 (Neb. 1905), the court holding, however, that the right to do telegraph business in the state by reason of the Post Road Act of Congress did not exempt such intangible right from state taxation. But see Galveston, etc. Co. *v.* Texas, 210 U. S. 217 (1908).

3 Lehigh Valley R. R. *v.* Penn, 145 U. S. 192 (1892).

4 A tax on sleeping-car companies may be illegal as interfering with interstate commerce. State *v.* Woodruff, etc. Co., 114 Ind. 155 (1888). A state tax on interstate railroad earnings is unconstitutional. Fargo *v.* Michigan, 121 U. S. 230 (1887); Phila. etc. Co. *v.* Pennsylvania, 122 U. S. 326 (1887); Delaware, etc. Canal Co. *v.* Commonwealth, 17 Atl. Rep. 175 (Pa. 1888); Northern Pac. Ry. *v.* Raymond, 5 Dak. 356 (1888). A state may tax a foreign telegraph company on such a proportion of its capital as its lines in the state bear to all of its lines; but the state cannot enjoin the operation of the telegraph until the tax is paid. Western Union Tel. Co. *v.* Massachusetts, 125 U. S. 530 (1888); Erie Ry. *v.* New Jersey, 31 N. J. L. 531 (1864), holding that a state tax upon foreign corporations transporting passengers and freight through the state, graduated by the number of passengers and weight of the goods, is in violation of that clause of the United States constitution giving congress the right to regulate commerce between the states; Indiana *v.* American Exp. Co., 7. Biss. 227 (1876); s. c., 13 Fed. Cas. 24, where a tax upon transportation through a state was held to be an interference with interstate commerce and unconstitutional. So held also of a tax upon locomotives, cars, etc., of a foreign railroad company in Minot *v.* Philadelphia, etc. R. R., 2 Abb. (U. S.) 323 (1870); s. c., 17 Fed. Cas. 458; aff'd, 13 Wall. 206. As to an interstate bridge, see Anderson *v.* Chicago, etc. R. R., 117 Ill. 26 (1886). Pullman cars operated wholly within the state may be taxed as a privilege. Gibson County *v.* Pullman, etc. Co., 42 Fed. Rep. 572 (1890). A foreign corporation's rolling stock used in interstate commerce is not taxable by the state. Bain *v.* Richmond, etc. R. R., 105 N. C. 363 (1890). Interstate express companies may be taxed on the business which they do within the state. Pacific Express Co. *v.* Seibert, 44 Fed. Rep. 310 (1890); aff'd, 142 U. S. 339. As to telegraph companies, see also Western Union Tel. Co. *v.* Lieb, 76 Ill. 172 (1875); Western Unoin Tel. Co. *v.* Mayer, 28 Ohio St. 521 (1876). As to fees required of foreign corporations before doing business in the state, see §§ 696–700, *infra*. An express company may be taxed on its gross receipts, although it pays a part thereof to a railroad, and the railroad is taxed again on the same. A statute against double taxation does not apply to this. Commonwealth *v.* U. S. Express Co., 157 Pa. St. 579 (1893).

§ 572e. *Inheritance and income taxes.*—During the past fifteen years the various states of the Union, in their eager search for new modes of taxation, in order to meet the lavish expenditures of state and municipal governments, have found a rich source of income in an inheritance tax levied upon the wealth of the dead. Indeed, so fruitful and easy is this mode of taxation, it is being adopted throughout the Union and will soon become almost universal. Pennsylvania led the way some sixty years ago.[1] The Pennsylvania inheritance tax law, like the New York law, does not require payment of the tax at once where the property is left to trustees for a life estate and a remainder to certain persons who may survive.[2] The New York tax on inheritances attaches to shares of stock held by residents in foreign corporations.[3] In valuing for collateral inheritance tax purposes the stock of a consolidated interstate railroad company, the value should be on a basis of such part of the property as is within the state.[4] The fact that a non-resident's certificates of stock in foreign corporations are in New York state does not render them subject to taxation in that state.[5] The New York inheritance tax applies to stock in domestic corporations although held by non-residents at the place of their residence, but does not apply to bonds issued by domestic corporations and held by non-residents at the place

The New Jersey annual tax of one-tenth of one per cent. of the capital stock is not unconstituional as interfering with interstate commerce, even as affecting a bridge company which operates a bridge connecting two states. Lumberville, etc. Co. *v.* State Board of Assessors, 55 N. J. L. 529 (1893). An express company may be compelled to pay a license fee wherever it does business. Osborne *v.* State, 33 Fla. 162 (1894). A state may tax the rolling-stock of a foreign corporation in the proportion which the number of miles within the state bears to the whole number of miles of the road, even though the rolling-stock is used in interstate traffic. Board of Assessors *v.* Pullman's Palace Car Co., 60 Fed. Rep. 37 (1894).

1 See the brief yet comprehensive and clear statement of the history of inheritance taxation statutes in Magoun *v.* Illinois T. & Sav. Bank, 170 U. S. 283 (1898), upholding the Illinois statute on this subject. The tax for that state varies according to the size of the estate, and in case it is over $50,000 the tax is six per cent.

2 *In re* Coxe's Estate, 193 Pa. St. 100 (1899).

3 *Re* Merriam, 141 N. Y. 479 (1894). As to the constitutionality of a progressive inheritance tax, see Guthrie on the Fourteenth Amendment, p. 122, and cases cited in note 1 on that page. In estimating the value of stocks under the inheritance tax law the stock exchange prices therefor may be taken as the basis. Walker *v.* People, 192 Ill. 106 (1901). *Cf.* Chicago, etc. Co. *v.* State Board of Equalization, 112 Fed. Rep. 607 (1901). In estimating the value of stock under an inheritance tax statute, the earning capacity, good-will, and income of the corporation may be considered. Matter of Brandreth, 28 Misc. Rep. 468 (1899); s. c., 169 N. Y. 437.

4 Kingsbury *v.* Chapin, 82 N. E. Rep. 700 (Mass. 1907). Matter of Cooley, 186 N. Y. 220 (1906).

5 *Re* James, 144 N. Y. 6 (1894); *Re* Whiting, 150 N. Y. 27 (1896).

of their residence.[1] This statute covers bonds owned by a non-resident, but kept in a safe-deposit vault in New York, excepting United States bonds. The statute also covers certificates of stock of domestic corporations owned by non-residents, but deposited in New York.[2]

A gift of stock, the donee to have the possession and management of the same, but the donor to have the income during his life, makes the donee trustee until the death of the donor, and hence such gift is taxable under the New York statutes as a transfer to take effect on his death.[3] The collateral inheritance tax is a lien on stock owned by a citizen of Connecticut in a New York corporation.[4] Under the Massachusetts statute imposing a tax on inheritances, stock owned by a citizen of New York in a Massachusetts corporation is subject to such tax, and even though the New York executor has transferred such stock, yet upon ancillary administration being taken out in Massachusetts the title of the New York executor is subordinate to the title of the ancillary administration. The court said that the statute assumed that in such cases a local administrator or executor would be appointed.[5]

Where an English company allows the American executor of the estate of a deceased American stockholder to transfer the stock to himself as executor on the company's books without paying the English succession tax, the company is liable to the English government for such tax. The court held that such is the law, although the statutes do not expressly render the company liable for the tax.[6] The

1 *Re* Bronson, 150 N. Y. 1 (1896). Stock in a domestic corporation is subject to the inheritance tax, although owned by a non-resident. Matter of Fitch, 160 N. Y. 87 (1899). Shares of stock held by a resident of England in a New Jersey corporation are subject to the inheritance tax of New Jersey. Neilson *v.* Russell, 69 Atl. Rep. 476 (N. J. 1908).

2 *Re* Whiting, 150 N. Y. 27 (1896).

3 Matter of Cornell, 170 N. Y. 423 (1902). A sale of stock in consideration of an annuity is not subject to the New York inheritance tax. Matter of Edgerton, 35 N. Y. App. Div. 125 (1898); aff'd, 158 N. Y. 671. A gift of stock in June by a man in failing health who dies in July is in contemplation of death and is subject to the inheritance tax of Illinois, whether it is considered a gift *causa mortus*, or a gift *inter vivos*. *Re* Benton's Estate, 84 N. E. Rep. 1026 (Ill. 1908).

4 Matter of Fitch, 39 N. Y. App. Div. 609 (1899).

5 Greeves *v.* Shaw, 173 Mass. 205 (1899). Stock in a consolidated interstate railroad holding a charter in Massachusetts and also in New York is subject to the Massachusetts inheritance tax. Moody *v.* Shaw, 173 Mass. 375 (1899).

6 Attorney-General *v.* New York, etc. Co., [1898] 1 Q. B. 205; aff'd, H. of L. [1899] A. C. 62. In this case the court, in holding that an English corporation was liable for an inheritance tax on shares of stock which it had allowed to be transferred on its books by American executors of the estate of a deceased American owning such stock, said: "The American will, as regards these English assets, had no validity whatever in this country, nor

state in ascertaining the value of stock in order to fix an inheritance tax thereon, cannot compel the corporation to produce its books and papers.[1]

In England an income tax is collected.[2] Even though an English holding company owns the entire capital stock of a German company and controls its entire business, yet the profits of the German company are not considered profits of the English company under the income tax law, except so far as they are actually received by the English company. The German company is not a mere alias or trustee or agent for the English company.[3] In this country an income tax might legally be levied by a state, but cannot be imposed by the federal government.[4]

had the American executors any right under it to receive the testator's assets here. Until they had taken out representation to their testator in this country, they were pure strangers to the English assets. This American will, to the knowledge of all parties, was never to come into operation as a will in this country; the American executors were never to become executors in this country, it being the express intention of all parties that they should not."

1 State *v.* Carpenter, 129 Wis. 180 (1906).

2 Where there is a parent company with minor companies abroad, and dividends are paid abroad to stockholders there without the money going to England, the English income tax does not apply to such moneys. Bartholomew Brewing Co. *v.* Wyatt, [1893] 2 Q. B. 499. Where an insurance company having a capital stock divides every five years its surplus among its policy-holders, such surplus is "annual profits or gains" and is subject to the English income tax, although the company is an American corporation. Equitable, etc. Soc. *v.* Bishop, [1900] 1 Q. B. 177, aff'g [1899] 2 Q. B. 439. Even though an English corporation owns ninety-five per cent. of the stock of an American corporation, yet the separate identity of the two corporations continues, and the income of the American corporation cannot be taxed in England as the income of the English corporation. Kodak Limited *v.* Clark, [1902] 2 K. B. 450.

3 Gramophone, etc., Ltd. *v.* Stanley, 95 L. T. Rep. 461 (1906). For the purposes of income tax, a Cape Colony corporation resides in England, if a majority of its directors reside in England and the important business of the company is transacted in England, except the actual mining operations. De Beers, etc. Mines, Ltd. *v.* Howe, 95 L. T. Rep. 221 (1906).

4 Pollock *v.* Farmers' L. & T. Co., 158 U. S. 601 (1895); s. c., 157 U. S. 429.

CHAPTER XXXV.

FORMS OF ACTIONS AND MEASURE OF DAMAGES WHERE A STOCKHOLDER HAS BEEN DEPRIVED OF HIS STOCK.

§ 573. *Pleading and practice in actions relative to stock.*—When an owner of stock who is out of possession brings an action for its recovery, or for the recovery of the certificate, or for damages for the detention or conversion of either the stock or the certificate, it is important to determine what action will lie, in what court the action is to be prosecuted, and what is the measure of damages. Similar questions arise when suits are brought for breach of contract to subscribe for stock, or of contracts to sell and convey stock. There are certain well-settled rules as to the form of action in these cases which are deduced from the older common-law pleading and practice. These rules, even in the code states, where the old actions have been abolished in name, are still partially applicable. Some knowledge, therefore, of the procedure at common law in stock cases is necessary.[1]

§ 574. *Assumpsit.*—An action of *assumpsit*, or *indebitatus assumpsit* at common law, lies against a corporation for unjustly refusing to register a transfer, or for refusing to issue a certificate to one entitled to it.[2] So, also, *assumpsit* lies for breach of contract to

1 On this subject the author refers for more particular information, to the excellent work, Andrews' Stephen's Pleadings, especially chapter II.

2 Rex *v.* Bank of England, 2 Doug. 524 (1780); Kortright *v.* Buffalo Commercial Bank, 20 Wend. 91 (1838); Arnold *v.* Suffolk Bank, 27 Barb. 424 (1857); Wyman *v.* American Powder Co., 62 Mass. 168 (1851); Sargent *v.* Franklin Ins. Co., 25 Mass. 90 (1829);

return borrowed bank stock on demand.[1] But *mandamus* is not a proper remedy in these cases, and it generally will not lie to compel a corporation to transfer stock.[2] The form of a complaint or declaration in an action by a pledgor against a pledgee for the conversion of the stock held in pledge may be in tort or in *assumpsit*, but not in both.[3] A corporation may sue in *assumpsit* its treasurer who has illegally issued excessive stock and converted the proceeds to his own use.[4] *Assumpsit* may not lie against a corporation for not fulfilling its contract in regard to treasury stock.[5] In a suit by a remainderman to recover from a corporation the value of stock which the corporation had transferred to the life tenant absolutely and which had been lost, the statute of limitations does not begin to run until the death of the life tenant, even though the trust was created in 1854 and the life tenant died in 1898.[6]

§ 575. *Trespass on the case.*—An action of trespass on the case may be brought against the corporation for a denial to a stock holder of a certificate of stock,[7] and an action on the case lies for a

Hayden *v.* Middlesex Turnp. Co., 10 Mass. 397 (1813); Pinkerton *v.* Manchester, etc. R. R., 42 N. H. 424 (1861); Hill *v.* Pine River Bank, 45 N. H. 300 (1864). *Cf.* Foster *v.* Essex Bank, 17 Mass. 479 (1821); Eastern R. R. *v.* Benedict, 76 Mass. 212 (1857). *Assumpsit* does not lie against a corporation for refusal to register a transfer of stock. Action on the case is the remedy. Telford, etc. Co. *v.* Gerhab, 13 Atl. Rep. 90 (Pa. 1888).

1 McKenney *v.* Haines, 63 Me. 74 (1873).

2 See § 390, *supra.*

3 Stevens *v.* Hurlbut Bank, 31 Conn. 146 (1862). See also § 475, *supra.*

4 Rutland R. R. *v.* Haven, 62 Vt. 39 (1889).

5 An agreement between the corporation and some of its stockholders, by which the latter contribute a part of their stock as treasury stock, on condition that they shall continue to be directors and officers for a certain time, is illegal under a statute requiring such officers to be elected annually by the stockholders, and hence even if the corporation accepts the stock and sells it and does not retain such persons in their offices, they cannot hold it liable in damages, nor in claim and delivery, nor for conversion, nor on contract. Glass *v.* Basin, etc. Co., 31 Mont. 21 (1904). Even though a promoter by agreement made with a foreign corporation, before the incorporation of a mining company, was to have one share of stock for his services for every ten shares which he obtained subscriptions for, and the company accepted the subscriptions, yet he cannot hold it liable for the value of the stock to be received by him as commissions where he merely demanded it by letter and the company offered to deliver it after suit was brought. Teeple *v.* Hawkeye, etc. Co., 114 N. W. Rep. 906 (Iowa, 1908).

6 Wooten *v.* Wilmington, etc. R. R., 128 N. C. 119 (1901). Even though the corporation allows the life tenant to sell the stock outright, yet if the remainderman does not sue within the period of limitations, after knowledge of the facts, the corporation is not liable. Yeager *v.* Bank of Kentucky, 106 S. W. Rep. 806 (Ky. 1908).

7 Bank of Ireland *v.* Evans's Charities, 5 H. L. Cas. 389 (1855); Rex *v.* Bank of England, 2 Doug. 524 (1780);

conversion of shares of stock.[1] The appropriate remedy of a purchaser against a corporation for refusal to register a transfer to himself is an action on the case, wherein the measure of damages is the value at the time of refusal to transfer.[2] A transferee's action upon the case for damages, instead of in trover for conversion, against the corporation for refusal to register the transfer, entitles him to nominal damages only, unless he proves special damage.[3] A count in case may be joined with one in trover.[4] Trover and case lie against a tax collector for selling bank stock for an illegal tax.[5]

§ 576. *Trover.*—It is a very generally accepted rule that trover will lie for the conversion of shares of stock,[6] and in certain cases

Davis *v.* Bank of England, 2 Bing. 393 (1824); Coles *v.* Bank of England, 10 Ad. & E. 437 (1839); Gray *v.* Portland Bank, 3 Mass. 364, 381 (1807); North America Building Assoc. *v.* Sutton, 35 Pa. St. 463 (1860); Webster *v.* Grand Trunk Ry., 3 L. Can. Jur. 148 (1859); s. c., 2 L. Can. Jur. 291 (construing the judicature act, 12 Vict., cap. 38, § 87); Protection Life Ins. Co. *v.* Osgood, 93 Ill. 69 (1879); Baker *v.* Wasson, 53 Tex. 150 (1880); see s. c., 59 Tex. 140. Smith *v.* Poor, 40 Me. 415 (1855); Catchpole *v.* Ambergate, etc. Ry., 1 El. & B. 111 (1852); Daly *v.* Thompson, 10 M. & W. 309 (1842). *Cf.* Swan *v.* North British, etc. Co., 7 H. & N. 603 (1862); Kortright *v.* Buffalo Commercial Bank, 20 Wend. 91 (1838). For an action of tort with a count in contract for refusal to transfer, see Bond *v.* Mount Hope Iron Co., 90 Mass. 505 (1868).

1 Daggett *v.* Davis, 53 Mich. 35 (1884); Bank of America *v.* McNeil, 10 Bush (Ky.), 54 (1873); Parsons *v.* Martin, 77 Mass. 111 (1858); Nabring *v.* Bank of Mobile, 58 Ala. 204 (1877). A complaint which, after stating that shares of stock had been pledged to defendant, avers that "defendant, in consideration of the premises, then and there undertook and promised to plaintiff" to hold the stock only as pledgee, but that, in violation of its promise, defendant sold and converted the stock to its own use, without giving plaintiff notice of the sale, and in which plaintiff seeks to recover as damages the full value of the shares alleged to have been converted, though informal, is good as a complaint in case. Sharpe *v.* Birmingham Nat. Bank, 87 Ala. 644 (1888). This case discussed also the difference between *assumpsit* and case in such an action.

2 German Union, etc. Assoc. *v.* Sendmeyer, 50 Pa. St. 67 (1865); Morgan *v.* Bank of North America, 8 Serg. & R. (Pa.) 73 (1822); Presbyterian Cong. *v.* Carlisle Bank, 5 Pa. 345 (1847).

3 McLean *v.* Charles Wright Med. Co., 96 Mich. 479 (1893). See also § 585, *infra*.

4 Nabring *v.* Bank of Mobile, 58 Ala. 204 (1877).

5 Sprague *v.* Fletcher, 69 Vt. 69 (1896).

6 Herrick *v.* Humphrey, etc. Co., 103 N. W. 685 (Neb. 1905); Hine *v.* Commercial Bank, etc., 119 Mich. 448 (1899); Ayres *v.* French, 41 Conn. 142 (1874); Payne *v.* Elliot, 54 Cal. 339 (1880); Kuhn *v.* McAllister, 1 Utah, 273 (1875); s. c. *sub nom.* McAllister *v.* Kuhn, 96 U. S. 87 (1877); Bank of America *v.* McNeil, 10 Bush (Ky.), 54 (1873); Boylan *v.* Huguet, 8 Nev. 345 (1873); Morton *v.* Preston, 18 Mich. 60 (1869); Jarvis *v.* Rogers, 15 Mass. 389 (1819); s. c., 13 Mass. 105, a case where trover was held to lie for the

the party guilty of the conversion may be arrested.[1] Trover is the favorite remedy when the stockholder has been unjustly deprived of his stock; and it is nowhere denied, except in Pennsylvania,[2]

value of Mississippi scrip, representing one hundred and fifty thousand acres of land. Anderson *v.* Nicholas, 28 N. Y. 600 (1864); Freeman *v.* Harwood, 49 Me. 195 (1859); Connor *v.* Hillier, 11 Rich. L. (S. C.) 193 (1857); Sturges *v.* Keith, 57 Ill. 451 (1870); Budd *v.* Multnomah Street Ry., 12 Oreg. 271 (1885); s. c., 15 Oreg. 413. *Cf.* Atkins *v.* Gamble, 42 Cal. 86, 100 (1871); Maryland F. Ins. Co. *v.* Dalrymple, 25 Md. 242, 267 (1866). The action for conversion lies, even though the plaintiff uses the term "shares of stock" and "certificates of stock" interchangeably. Godfrey *v.* Pell, 49 N. Y. Super. Ct. 226 (1883). A party whose stock has been converted may sue for damages instead of following the stock. Moore *v.* Baker, 4 Ind. App. 115 (1892). For the allegations in an action for the conversion of a bond, see Saratoga, etc. Co. *v.* Hazard, 55 Hun, 251 (1889); aff'd, 121 N. Y. 677. Where defendant purchased stock for the plaintiff and accounted therefor, but refused to account for dividends received while he held the stock, the defendant is guilty of conversion. Shaughnessy *v.* Chase, 7 N. Y. St. Rep. 293 (1887). There are many cases in the lower courts of New York on this subject. A refusal to return a pledge after payment is a conversion. See Roberts *v.* Berdell, 52 N. Y. 644 (1873); s. c., 15 Abb. Pr. (N. S.) 177. As to conversion of railway shares in a foreign country, see Northern Ry. *v.* Carpentier, 13 How. Pr. 222 (1856).

1 Trover and arrest lie for conversion of certificates of stock. Barry *v.* Calder, 48 Hun, 449 (1888); aff'd, 111 N. Y. 684. As to arrest for conversion, replevin thereby being waived, see Chappel *v.* Skinner, 6 How. Pr. 338 (1851); Person *v.* Civer, 29 How. Pr. 432 (1865), rev'g 28 How. Pr. 139; Niver *v.* Niver, 43 Barb. 411 (1864); Dubois *v.* Thompson, 1 Daly, 309 (1863); Cousland *v.* Davis, 4 Bosw. 619 (1859). In Butts *v.* Burnett, 6 Abb. Pr. (N. S.) 302 (1869), involving the arrest of a broker who had sold the pledge before the note was due, the court said: "It is very questionable, I think, whether a demand after a default in payment of the debt for which property is pledged as security will render a refusal to deliver the pledged property a tortious conversion of it. No doubt the pledgor can redeem upon a tender of the debt, or he may recover the difference between the value of the pledge and the debt. But to lay the foundation for an action for conversion, I am of opinion that an offer and demand must be made on the day, and is not sufficient if made after the day on which the debt has become payable." See also § 457, *supra.* Where an agent writes the stockholder's name on the back of the certificate of stock, and disposes of it without authority, he is guilty of conversion and may be arrested. Reigner *v.* Spang, 5 N. Y. App. Div. 237 (1896). A pledgee of bonds may maintain an action for conversion thereof, and may cause the arrest of a re-pledgee who has disposed of such bonds. Blanck *v.* Nelson, 39 N. Y. App. Div. 21 (1899).

2 Sewall *v.* Lancaster Bank, 17 S. & R. (Pa.) 285 (1828); Neiler *v.* Kelley, 69 Pa. St. 403 (1871). Trover does not lie in Pennsylvania by one joint speculator against the other for stock which the former hands to the latter to use as collateral in their speculations, even though the latter sold the stock and lost the proceeds in speculations. Martin *v.* Megargee, 212 Pa. St. 558 (1905).

that this form of action is proper. But even there, for the conversion of a certificate of stock, trover will lie.[1] For the maintenance of the action of trover there must be title in the plaintiff to the subject of the action, and an actual conversion by the defendant. If either of these elements is wanting the action will not lie.[2] Thus, trover will not lie for the conversion of a certificate where the title to the shares is divested.[3] Conversion is based on *detinet* and not on *cepit,* and the plaintiff is bound to show an existing right to immediate possession, and hence if the parties were engaged in a joint venture, and the defendant had pledged the stock in accordance therewith, the action does not lie.[4] Trover cannot be maintained by a vendor of stock even though he claims that he was fraudulently induced to sell, inasmuch as he is no longer the owner of the stock and is not entitled to possession thereof.[5] In a suit for conversion of stock the plaintiff need not allege that she ever had possession of the stock or that it was taken from her possession or control.[6]

And, upon the other hand, withholding possession of a certificate of stock cannot amount to a conversion of the stock itself so long as a certificate is not indorsed; but it may amount to a technical conversion of the certificate.[7] A transfer of a certificate of stock in

1 Biddle *v.* Bayard, 13 Pa. St. 150 (1850); Neiler *v.* Kelley, 69 Pa. St. 403 (1871); Sewall *v.* Lancaster Bank, 17 Serg. & R. (Pa.) 285 (1828). *Cf.* Aull *v.* Colket, 2 W. N. Cas. 322 (1875). So in Michigan. Daggett *v.* Davis, 53 Mich. 35 (1884). In trover the goods ought to be set out with some degree of certainty of description; but the same certainty is not required as in detinue and replevin, damages being recovered in trover, the very articles in detinue and replevin. Neiler *v.* Kelley, 69 Pa. St. 403 (1871).

2 Quoted and approved in German-American Bank *v.* Brunswig, 107 Mo. App. 401 (1904).

3 Broadbent *v.* Farley, 12 C. B. (N. S.) 214 (1862). Trover does not lie against a person to whom stock is given to sell and use the proceeds to start in business. Borland *v.* Stokes, 120 Pa. St. 278 (1888). Where several shareholders mutually agree to contribute a number of shares each, to be sold for the benefit of the corporation, one of them cannot, after the rest have contributed their proportion, refuse to allow his shares to be sold as agreed; and if the corporation takes them under the agreement and sells them, he cannot have an action of trover. Conrad *v.* La Rue, 52 Mich. 83 (1883). In trover for a certificate of stock, the acceptance by the plaintiff of the certificate ends the suit, and nothing further can be recovered. Collins *v.* Lowry, 78 Wis. 329 (1890).

4 Byrne *v.* Weidenfeld, 113 N. Y. App. Div. 451 (1906).

5 Newman *v.* Mercantile T. Co., 189 Mo. 423 (1905).

6 Farwell *v.* Boody, 112 N. Y. App. Div. 493 (1906).

7 Daggett *v.* Davis, 53 Mich. 35 (1884). *Cf.* Morton *v.* Preston, 18 Mich. 60 (1869). Where an administrator sells stock pledged to the deceased in his lifetime as security for a loan of money, and receives the proceeds and properly accounts to the estate, this is not a conversion of the shares, and the pledgor cannot have

the usual form may constitute a transfer of the right to bring suit for the conversion of such stock.[1] It is well established that a refusal of a corporation to register a transfer in the name of one entitled to the stock is a conversion of the shares.[2] In New York a transferee may try his right to registry in a suit for dividends,[3] but not after commencing a suit for conversion.[4] Where the corporation has been held liable for conversion, it cannot then tender the stock back to the stockholder and avoid the payment of the damages.[5] A failure or

an action of trover. If any action lies it is for money had and received. Von Schmidt *v.* Bourn, 50 Cal. 616 (1875). For an example of an insufficient complaint in trover for shares, in that there was no sufficient averment of a conversion or of facts from which a conversion might be inferred, see Edwards *v.* Sonoma Valley Bank, 59 Cal. 136 (1881); and see also Cumnock *v.* Newburyport Sav. Inst., 142 Mass. 342 (1886).

1 Mahaney *v.* Walsh, 16 N. Y. App. Div. 601 (1897).

2 Allen *v.* American Building, etc. Assoc., 49 Minn. 544 (1892); North America Building Assoc. *v.* Sutton, 35 Pa. St. 463 (1860); West Branch, etc. Canal Co.'s Appeal, 81* Pa. St. 19 (1870); Baltimore, etc. Ry. *v.* Sewell, 35 Md. 238 (1871); McMurrich *v.* Bond Head Harbor Co., 9 U. C. Q. B. 333 (1852). Trover lies against a corporation for the wrongful conversion of stock where it illegally refuses a transfer of the same. Herrick *v.* Humphrey, etc. Co., 103 N. W. Rep. 685 (Neb. 1905). Trover lies against a corporation at the instance of a purchaser of certificates of stock for refusal to transfer the stock on the books of the company. Ralston *v.* Bank of California, 112 Cal. 208 (1896). But see New London Nat. Bank *v.* Lake Shore, etc. Ry., 21 Ohio St. 221, 232 (1871). The corporation may interplead in certain cases. See § 387, *supra.* In suing for damages for conversion against the corporation for depriving a person of his stock, the latter need not tender the certificates. Carpenter *v.* American Bldg. etc. Assoc., 54 Minn. 403 (1893). Where the transferee of certificates of stock in a bank presents them to the cashier of the bank for transfer, and the cashier and a director delay transfer until a debt of the transferrer to the bank becomes due, and then in behalf of the bank levy an attachment on the stock for such debt, the transferee may hold the bank and the cashier and such director liable in trover for conversion of the stock, and it is no defense that the transfer of the certificate was made to defraud creditors. Hine *v.* Commercial Bank, etc., 119 Mich. 448 (1899). Where the purchaser of a certificate of stock sends it to the corporation for transfer, and the secretary replies that the corporation has a lien on the stock, the corporation is not liable for a conversion of the stock, no demand for the return of the certificate being shown. Cummins *v.* People's, etc. Assoc., 61 Neb. 728 (1901).

3 Robinson *v.* Nat. Bank of New Berne, 95 N. Y. 637 (1884).

4 Hughes *v.* Vermont Copper Min. Co., 72 N. Y. 207 (1878).

5 Carpenter *v.* American Bldg. etc. Assoc., 54 Minn. 403 (1893). The purchaser may hold the corporation liable in damages for conversion for a refusal to transfer the stock on books. His damage is the value of the stock at the time of demand with interest to the date of trial, and after suit is commenced the corporation cannot stop it by offering to transfer. Dooley *v.* Gladiator, etc. Co., 109 N. W. Rep. 864 (Iowa 1906). Where after suit for conversion defendant returns

refusal by the corporation to issue a certificate to an original subscriber, when by the terms of the contract of subscription it ought to be issued, may be treated as a conversion.[1] So, also, in certain cases, a failure to deliver stock according to a contract for delivery,[2] or to return borrowed stock on demand, or at the time when by agreement it ought to be returned,[3] and an unauthorized sale of stock by a pledgee in violation of the terms of the contract of bailment,[4] or by a broker in violation of his contract,[5] are examples of conversion of stock. In Oregon it is said that any interference subversive of the right of the owner of stock to enjoy and control it is a conversion.[6] A suit for conversion of stock by a pledgee, with a demand for judgment for the difference between the amount due on the debt and the value of the stock, plus dividends, without asking for a redemption

the stock to the plaintiff and the plaintiff accepts it, he can recover only nominal damages. Owen *v.* Williams, 89 Pac. Rep. 778 (Col. 1906).

1 See § 61, *supra.*

2 Huntingdon, etc. Coal Co. *v.* English, 86 Pa. St. 247 (1878); North *v.* Phillips, 89 Pa. St. 250 (1879); Noonan *v.* Ilsley, 17 Wis. 314 (1863); Pinkerton *v.* Manchester, etc. R. R., 42 N. H. 424 (1861). Trover lies against a vendor for the conversion of stock, even though the certificate was not transferred. Mahaney *v.* Walsh, 16 N. Y. App. Div. 601 (1897). A person entitled to stock on a contract cannot maintain trover for failure to deliver. Reid *v.* Caldwell, 114 Ga. 676 (1902).

3 McKenney *v.* Haines, 63 Me. 74 (1873); Fosdick *v.* Greene, 27 Ohio St. 484 (1875); Forrest *v.* Elwes, 4 Ves. Jr. 492 (1799). Where a person loans stock to another to borrow money upon, conversion does not lie for a failure to return the stock. Barrowcliffe *v.* Cummins, 66 Hun, 1 (1892). Where bonds are loaned to use temporarily upon an agreement to return them when called for, and the member of the firm to whom they are delivered uses them for his own purposes, he converts them. Birdsall *v.* Davenport, 43 Hun, 552 (1887). Where a stockholder in an insolvent corporation turns over his stock to another person to deposit under a reorganization agreement, the latter agreeing to pay the assessment on the stock and to deliver to the stockholder the new securities upon repayment of such assessment, and he refuses so to do thereafter, he is guilty of a conversion and of a fraud upon the stockholder. Miller *v.* Miles, 58 N. Y. App. Div. 103 (1901); aff'd, 171 N. Y. 675.

4 Maryland F. Ins. Co. *v.* Dalrymple, 25 Md. 242, 267 (1866); Freeman *v.* Harwood, 49 Me. 195 (1859); Fisher *v.* Brown, 104 Mass. 259 (1870). An illegal sale of the pledge by pledgee is a conversion, and a complaint for such conversion will not be construed as a complaint for breach of contract. Smith *v.* Hall, 67 N. Y. 48 (1876), distinguishing Austin *v.* Rawdon, 44 N. Y. 63 (1870). For refusal of pledgee to return property, the action of pledgor may be in tort or contract. International Bank *v.* Monteath, 39 N.Y. 297 (1868). See also notes pp. 1584, 1585, *supra.* Conversion lies for an unauthorized sale of stock and also for dividends received thereon. Shaughnessy *v.* Chase, 7 N. Y. St. Rep. 293 (1887).

5 See ch. XXV, *supra.* Sadler *v.* Lee, 6 Beav. 324 (1843).

6 Budd *v.* Multnomah Street Ry., 12 Oreg. 271 (1885); s. c., 15 Oreg. 413.

of the stock or transfer thereof, is at law and not in equity.[1] Trover will not lie by a trustee, on stock which stands in the name of the *cestui que trust,* against a person taking title from a co-trustee. A suit in equity is the proper remedy.[2] Where a certificate of stock is supposed to be burned, but is afterwards found, a conversion for refusal to deliver dates from the time when it is found.[3] Proof of demand is necessary in order to support the action of trover, where the defendant came into lawful possession of the stock and had an interest in it.[4] A settlement between a principal and his agent is no bar to a subsequent suit by the principal against the agent for conversion of stock where the principal was not aware of the facts when he made the settlement.[5] Even though the corporation allows the life tenant to sell the stock outright, yet if the remainderman does not sue within the period of limitations, after knowledge of the facts, the corporation is not liable.[6]

§ 577. *Detinue and replevin.*—The common-law action of detinue will lie for the recovery of a certificate of stock unlawfully detained.[7] In this action the judgment is conditional, either to restore the thing detained, or pay the value and damages for the detention. The more modern action of replevin or its equivalent will doubtless lie for the recovery of a certificate, the same as for any other tangible personal property. Replevin lies by an admin-

1 Brightson *v.* Claflin Co., 108 N. Y. App. Div. 284 (1905). Where damages are claimed in an action for conversion of stock, it is not necessary to allege the value of the stock. Humphreys *v.* Minnesota Clay Co., 94 Minn. 469 (1905). In a suit to recover certain stock even though the plaintiff alleges conversion and asks judgment for the value of the stock, yet if he makes the corporation a party defendant, and also all the parties interested in the stock, and the court decrees a cancellation of the outstanding certificate, and the issue of a new one to plaintiff, the defeated party cannot complain that the judgment should have been for money damages. Crawford *v.* Ft. Dodge, etc. Co. 125 Iowa 658 (1904).

2 Onondaga, etc. Co. *v.* Price, 87 N. Y. 542 (1882); s. c., in a court of equity, as White *v.* Price, 39 Hun, 394 (1886); aff'd, 108 N. Y. 661 (1888).

3 McDonald *v.* Mackinnon, 104 Mich. 428 (1895).

4 Moynahan *v.* Prentiss, 10 Colo. App. 295 (1897).

5 Ballard *v.* Beveridge, 171 N. Y. 194 (1902).

6 Yeager *v.* Bank of Kentucky, 106 S. W. Rep. 806 (Ky. 1908).

7 Williams *v.* Peel River, etc. Co., 55 L. T. Rep. 689 (1886); Williams *v.* Archer, 5 C. B. 318 (1847), where it was held that detinue lay to recover two hundred and fifty scrip certificates; Peters *v.* Heyward, Cro. Jac. 682 (1624), where detinue was allowed for a bond detained. As to replevin in *cepit* for bonds wrongfully received in pledge from a pledgee, see Thompson *v.* St. Nicholas Nat. Bank, 113 N. Y. 325 (1889); aff'd, 146 U. S. 240. Concerning the nature of stock and a certificate of stock, and as to whether trover or replevin will lie, see 1 University Law Rev. 218 (1894).

istrator to recover a certificate of stock which he had illegally pledged as administrator.[1]

§ 578. *Money had and received—Claim and delivery.*—A pledgor whose stock has been wrongfully sold by the pledgee, in violation of the contract of bailment, may have an action against the pledgee for money had and received.[2] An action of claim and delivery does not lie to recover shares of stock.[3]

§ 579. *Bill in equity.*—A bill in equity may be maintained by a *bona fide* purchaser of stock against the corporation to compel a transfer of the stock upon the corporate books.[4] A bill in equity may be filed also to relieve a stockholder from an unauthorized forfeiture;[5] to rescind a subscription obtained by fraud;[6] to compel a specific performance of an agreement to sell stock;[7] to remedy a purchase, sale or transfer of stock induced by fraud;[8] and to redeem stock held in pledge.[9] Where stock has been illegally forfeited or fraudulently transferred the claimant may maintain a bill in equity against the corporation and the holder of the certificates to have the stock restored.[10] A preliminary injunction against transferring stock is also frequently granted.[11] An injunction against a pledgee

1 Parks *v.* Mockenhaupt, 133 Cal. 424 (1901).

2 Von Schmidt *v.* Bourn, 50 Cal. 616 (1875); Marsh *v.* Keating, 1 Bing. N. C. 198 (1834). *Cf.* Jones *v.* Brinley, 1 East, 1 (1800); Rex *v.* St. John Maddermarket, 6 East, 182 (1805). In an old case a contrary rule is laid down. Nightingal *v.* Devisme, 5 Burr. 2589 (1770). In a suit for profits received by defendant as agent for plaintiff in buying and selling stock, the value of the stock need not be alleged with any particular definiteness. Herrlich *v.* McDonald, 80 Cal. 460 (1889). Where a corporation repudiates a pledge of stock made by its treasurer, it cannot sue the pledgee for the money received by the pledgee upon a sale of the stock by the latter. Holden *v.* Metropolitan Nat. Bank, 151 Mass. 112 (1890); s. c., 138 Mass. 48.

3 Bell *v.* Bank of California, 94 Pac. Rep. 889 (Cal. 1908).

4 See § 391, *supra.*

5 See § 134, *supra.*

6 See §§ 155, 156, *supra.*

7 See § 338, *supra.*

8 See § 356, *supra.*

9 See § 475, *supra.*

10 New York, etc. Co. *v.* Great Eastern Tel. Co., 69 Atl. Rep. 528 (N. J. 1908).

11 Heck *v.* Bulkley, 1 S. W. Rep. 612 (Tenn. 1886), holding also that a violation of the injunction is a bar to damages upon a dissolution of it. The preliminary injunction, being an equitable remedy, is not granted if only legal relief is sought by the action. See McHenry *v.* Jewett, 90 N. Y. 58 (1882). A principal who is suing an agent to obtain shares of stock may enjoin the agent from transferring the same *pendente lite.* Chedworth *v.* Edwards, 8 Ves. Jr. 46 (1802). Where a proposed consolidation is attacked by a stockholder, a preliminary injunction, granted so as not to render useless the whole suit in case it is successful, will not be disturbed by the court of appeals. Young *v.* Rondout, etc. Co., 129 N. Y. 57 (1891). Where a stockholder has delivered his stock to the directors to be divided into smaller certificates, and the directors claim

disposing of stock owned by a certain party, or an attachment upon the interest of that party, does not prevent the pledgee selling the stock if such stock really belonged to the wife of that party.[1] A stockholder whose stock has been wrongfully pledged may enjoin the corporation from allowing a transfer by the pledgee who has applied for the same, and the pledgor need not allege that the pledgee took with notice. It is for the pledgee to intervene and prove that the pledge was *bona fide*.[2] A court will enjoin a party from voting upon or disposing of his stock in a corporation *pendente lite* where the plaintiffs show that they transferred the stock to the defendant on the latter's agreement not to sell the same, except with the consent of the former, and that when he did sell the stock three-fourths of the proceeds should belong to the former, and it appearing further that the defendant had given the stock to his sister without consideration.[3] Where an injunction against the sale of stock is dissolved the damages recoverable on the bond may include a decline in the price at which the stock might have been sold.[4] A bill in equity is the proper remedy

that it was agreed that a part of the stock should be sold for the benefit of the corporation, the stockholder may have a preliminary injunction against such sale pending his suit to compel delivery of the stock. Bedford *v.* American, etc. Co., 51 N. Y. App. Div. 537 (1900). A stockholder cannot prevent other stockholders from selling their stock on the ground that the purchaser may manage the company to the detriment of minority stockholders; and the fact that the plaintiff's stock was on deposit with the trust company and that he cannot get the stock and thus accept the order to purchase his stock also, is no ground for an injunction. Ingraham *v.* National Salt Co., 72 N. Y. App. Div. 582 (1902); appeal dismissed 172 N. Y. 644. A corporation by the action of its board of directors and consent of all its stockholders may agree that a certain percentage of its profits shall be paid annually to a person for services already rendered by him. In a suit by him to enforce such agreement and asking an injunction against any sales of stock, except with notice of such agreement, stockholders are necessary parties defendant. Such an agreement is not an exclusion of future boards of directors from the management of the company. Dupignac *v.* Bernstrom, 76 N. Y. App. Div. 105 (1902).

1 Fourth Nat. Bank, etc. *v.* Crescent, etc. Co., 52 S. W. Rep. 1021 (Tenn. 1897).

2 Reynolds *v.* Touzalin Imp. Co., 62 Neb. 236 (1901). In a suit by a stockholder against a foreign corporation to enjoin alleged illegal sales of property the court has power to enjoin the sale of property within the jurisdiction and also to enjoin resident directors from illegally selling the property, but cannot enjoin the corporation from exercising its charter powers generally. Moneuse *v.* Riley, 40 N. Y. Misc. Rep. 110 (1903).

3 Weston *v.* Goldstein, 39 N. Y. App. Div. 661 (1899).

4 Slack *v.* Stephens, 19 Colo. App. 538 (1904). If an attachment on stock is vacated the depreciation in its value between the time when it was levied and the time when it was vacated is collectible under the undertaking given in the attachment proceeding. McCarthy *v.* Boothe, 2 Cal. App. 170 (1905). See also § 363, *supra*.

to obtain possession of certificates of stock.[1] A bill in equity filed by a partner to hold his co-partners and third persons liable for a misappropriation of stock owned by the firm cannot be sustained where it is not alleged that the third persons knew of such misappropriation at the time of such misappropriation.[2] In a suit by a claimant of stock to obtain the stock from another person, the corporation is a proper but not a necessary party.[3] In a suit by a stockholder to hold a corporation liable for his stock and dividends, by reason of its allowing a transfer by an unauthorized agent of the stockholder, the subsequent owners of the stock are not necessary parties.[4] A suit

1 This rule of law has frequently been applied in actions by a pledgor to obtain from a pledgee the stock which has been pledged. The rule itself is well established. White *v.* Price, 39 Hun, 394 (1886); aff'd, 108 N. Y. 661; Hasbrouck *v.* Vandervoort, 4 Sandf. 74 (1850); Bryson *v.* Rayner, 25 Md. 424 (1866); Conyngham's Appeal, 57 Pa. St. 474 (1868); Koons *v.* First Nat. Bank, 89 Ind. 178 (1883). Where a stockholder transfers the certificate on the back to a person, and leaves it in his own safe-deposit box, and writes a letter to such person directing him to distribute it among a list of charitable corporations, but no list is attached, the latter takes no title, and the executors may compel him to transfer the certificate to them. Bliss *v.* Fosdick, 76 Hun, 508 (1894). In the case of Lamb, etc. Co. *v.* Lamb, 119 Mich. 568 (1899), where a party claiming to be the real owner of stock filed a bill to compel the holder of such stock to deliver up the same, but it appeared that the defendant had already disposed of the stock before the commencement of the suit, the court refused to grant relief, even though it further appeared that the defendant had other stock in the same corporation equal in amount to the stock in issue. In a suit to recover stock an injunction is more readily granted than in a suit to recover other kinds of personal property. Currie *v.* Jones, 138 N. C. 189 (1905). A suit in equity does not lie to recover the value of bonds which a depository refuses to give up, even though the bonds are not dealt with on the market and are obligations of a corporation which has been foreclosed. The remedy is trover or replevin. Sawyer *v.* Atchison, 129 Fed. Rep. 100 (1904).

2 Wall *v.* Old Colony, etc. Trust Co., 174 Mass. 340 (1899). Where in a partnership dissolution it is adjudged that one of the partners is entitled to certain stock, and in the event of the others failing to transfer it, he shall have its value, he is entitled to a transfer unless the others are unable to transfer it. Reilly *v.* Freeman, 109 N. Y. App. Div. 4 (1905); aff'd, 184 N. Y. 610.

3 Williamson *v.* Krohn, 66 Fed. Rep. 655 (1895); Johnson *v.* Kirby, 65 Cal. 482 (1884). *Cf.* Rogers *v.* Van Nortwick, 45 Fed. Rep. 513 (1891). In a suit between stockholders as to the title to stock the corporation is a proper party defendant, but is a nominal party, and is not considered in determining whether the suit is removable to the United States court. Higgins *v.* Baltimore, etc. R. R., 99 Fed. Rep. 640 (1900). And see §§ 338, 356, 361, *supra.*

4 St. Romes *v.* Levee, etc. Co., 127 U. S. 614 (1888). In this case the bill of a claimant of stock against the company to hold it liable for allowing a transfer of the stock in fraud of his rights was barred by laches, the suit having been brought thirty-five years after the cause of action had accrued. *Cf.* § 392, *supra.*

by the purchaser of a certificate of stock to compel delivery may be brought at the place where the certificate is, and absent defendants may be served by publication.[1] In a suit against a corporation to compel it to issue stock to the plaintiff or else pay the value thereof, the proper form of judgment is an order to issue the stock. A money judgment should be entered only after proof of the corporation's failure to comply with the main order.[2]

Where a pledgee brings suit to obtain possession of the pledge, which had been wrongfully diverted, and during the suit the pledge becomes worthless, a supplemental complaint may be served alleging that fact and demanding the value of the pledge at the time demand was made therefor.[3] Where stock is deposited with one trust company as additional security for a mortgage given to another trust company, and upon default the former company refuses to deliver the stock, and the latter trust company then commences a suit in equity to compel the former trust company to deliver the stock, and during that suit the stock declines in value, a bondholder secured by such mortgage cannot hold liable the trust company holding the stock, on account of the decline in value, inasmuch as the suit in equity determined all questions, including the amount of damage.[4] Where for fifty years a claimant of stock takes no proceedings to obtain it, and during that time other persons claim the stock and have possession of it and have received dividends upon it, laches is a bar to a suit by the former to recover the stock.[5]

1 Ryan *v.* Seaboard, etc. R. R., 83 Fed. Rep. 889 (1897). A suit in equity does not lie in the United States court in Nevada, at the instance of a resident of that state, to recover stock owned by non-residents in an Arizona corporation where service upon them is made only upon the publication. The stock is not within that district, within the meaning of the federal statute. McKane *v.* Burke, 132 Fed. Rep. 688 (1904). See also cases in § 363, *supra.*

2 Consolidated, etc. Co. *v.* Huff, 62 Kan. 405 (1901). Where a transaction is adjudged to be a loan and not a sale, and the defendant is ordered to return the stock, it is error to add an alternative money judgment for the value of the stock. Fanny Rawlings Min. Co. *v.* Tribe, 29 Colo. 302 (1902).

3 Central T. Co. *v.* West India, etc. Co., 109 N. Y. App. Div. 517 (1905).

4 Bracken *v.* Atlantic T. Co., 167 N. Y. 510 (1901). Where stock is tied up by an injunction which is afterwards vacated, and in the meantime the stock depreciates in value, the loss can be recovered from the enjoining party if the stocks could and would have been sold before the depreciation if they had not been so tied up. But if such stocks are in pledge, and the pledgor does not pay the loan while the stocks are so tied up, no damages can be recovered. Fourth Nat. Bank, etc. *v.* Crescent, etc. Co., 52 S. W. Rep. 1021 (Tenn. 1897). See also §§ 363, 388, *supra.*

5 Livingston *v.* Proprietors', etc., 15 Fed. Cas. 691 (1879); s. c., 16 Blatchf. 549.

§ 580. *Pleading under the codes.*—In general, a pleading under the code is not a safe pleading, unless it conforms substantially to the rules of pleading at common law. Some verbiage may be omitted, but the relief granted by the various common-law actions cannot be obtained even under the code without the necessary averments entitling the plaintiff to that relief. It is the allegation of the facts, and not the method of alleging them, that constitutes a sufficient pleading under the code.[1]

§ 581. *The measure of damages—(a) The first rule — Value how shown when there is no market value.*—Great difficulty has been experienced in determining what shall be the measure of damages for the conversion of stock. As the manner and conditions of the conversion vary, so also will the measure of damages vary from nominal damages to the highest value of the stock with dividends and interest, and also any special damages which the plaintiff can establish. In general, the courts incline to the rule that the true measure of damages is the value of stock at the time of conversion,[2]

[1] Burrall *v.* Bushwick R. R., 75 N. Y. 211 (1878). *Cf.* Tockerson *v.* Chapin, 52 N. Y. Super. Ct. 16 (1885). In Nevada there is a statutory action of claim and delivery. Bercich *v.* Marye, 9 Nev. 312 (1874). See Webster *v.* Grand Trunk Ry., 3 L. Can. Jur. 148 (1859); s. c., 2 L. Can. Jur. 291, for a construction of that provision of the judicature act (12 Vict., c., 28, § 87) which governs actions of this nature in the Canadian provinces. In Kuhn *v.* McAllister, 1 Utah, 273 (1875), it is held that the language used in the pleadings in these actions is not material, or that the language is that of one form of action or another, or of no form, but that the question is whether the facts entitle the plaintiff to recover. A declaration in an action for the wrongful conversion of the shares of the capital stock of a corporation is sufficient for the purposes of pleading if it states the ultimate facts to be proven. The circumstances which tend to prove those facts may be used for the purpose of evidence, but they have no place in the pleadings. McAllister *v.* Kuhn, 96 U. S. 87 (1877), affirming Kuhn *v.* McAllister, 1 Utah, 273 (1875). As to a misjoinder of causes of action under the California code, where the plaintiff sues to recover certain stock, see Johnson *v.* Kirby, 65 Cal. 482 (1884). Upon the question of what is, in New York, a sufficient pleading in an action to compel delivery of stock, see Burrall *v.* Bushwick R. R., 75 N. Y. 211 (1878). See also 2 Chitty, Pleadings, p. 618; Lowell, Transfers, § 11.

[2] *Re* Bahia, etc. Ry., L. R. 3 Q. B. 584 (1868); Williams *v.* Archer, 5 C. B. 318 (1847); Tempest *v.* Kilner, 3 C. B. 249 (1846); Shaw *v.* Holland, 15 M. & W. 136 (1846); Pott *v.* Flather, 5 Railw. & Can. Cas. 85 (1847); Davidson *v.* Tulloch, 6 Jur. (N. S.) 543 (1860); Wells *v.* Abernethy, 5 Conn. 222 (1824); O'Meara *v.* North American Min. Co., 2 Nev. 112 (1866); Ormsby *v.* Vermont Copper Min. Co., 56 N. Y. 623 (1874); Pinkerton *v.* Manchester, etc. R. R., 42 N. H. 424 (1861); McKenney *v.* Haines, 63 Me. 74 (1873); Sturges *v.* Keith, 57 Ill. 451 (1870); Noonan *v.* Ilsley, 17 Wis.

or a reasonable time after.[1] By the phrase "the value of the stock" is usually to be understood the market value.[2] The fact that the shares of stock have no known market value will not prevent recovery, where the actual value is ascertainable, in an action to recover damages. The value may be proven by showing the value

314 (1863); Bull *v.* Douglas, 4 Munf. (Va.) 303 (1814); Enders *v.* Board of Public Works, 1 Gratt. (Va.) 364 (1845); White *v.* Salisbury, 33 Mo. 150 (1862); Connor *v.* Hillier, 11 Rich. L. (S. C.) 193 (1857); Eastern R. R. *v.* Benedict, 76 Mass. 212 (1857); Boylan *v.* Huguet, 8 Nev. 345 (1873); Bercich *v.* Marye, 9 Nev. 312 (1874); Sargent *v.* Franklin Ins. Co., 25 Mass. 90 (1829); Fisher *v.* Brown, 104 Mass. 259 (1870); Wyman *v.* American Powder Co., 62 Mass. 168 (1851); North *v.* Phillips, 89 Pa. St. 250 (1879); Huntingdon, etc. Coal Co. *v.* English, 86 Pa. St. 247 (1878); Neiler *v.* Kelley, 69 Pa. St. 403 (1871); Randall *v.* Albany City Nat. Bank, 1 N. Y. St. Rep. 592 (1886); Douglas *v.* Merceles, 25 N. J. Eq. 144 (1874). See also Eicholz *v.* Fox, 12 Phila. (Pa.) 382 (1878); Larrabee *v.* Badger, 45 Ill. 440 (1867); Barned *v.* Hamilton, 2 Railw. & Can. Cas. 624 (1841). *Cf.* Moody *v.* Caulk, 14 Fla. 50 (1872); Orange, etc. R. R. *v.* Fulvey, 17 Gratt. (Va.) 366 (1867); Jefferson *v.* Hale, 31 Ark. 286 (1876); Third Nat. Bank *v.* Boyd, 44 Md. 47 (1875); Thomas *v.* Sternheimer, 29 Md. 268 (1868). The measure of damages to a customer by reason of a broker illegally selling his stock, the broker having become bankrupt, is the value of the stock on the day of filing the petition in bankruptcy, the exact time of the sale not being ascertainable *In re* Graff, 117 Fed. Rep. 343 (1902). The measure of damages in trover for conversion of stock is the value at the time of the conversion with interest from that date. Durham *v.* Commercial Nat. Bank, 45 Ore. 385 (1904).

1 Colt *v.* Owens, 90 N. Y. 368 (1882); Baker *v.* Drake, 53 N. Y. 211 (1873); s. c., 66 N. Y. 518 (1876); Gruman *v.* Smith, 81 N. Y. 25 (1880); Douglas *v.* Merceles, 25 N. J. Eq. 144 (1874); Brewster *v.* Van Liew, 119 Ill. 554 (1886); Budd *v.* Multnomah Street Ry., 15 Oreg. 413 (1887). Upon what is reasonable time herein in transactions on the stock exchanges, see Stewart *v.* Cauty, 8 M. & W. 160 (1841); Field *v.* Lelean, 6 Hurl. & N. 617 (1861). In a suit by a person against another for selling stock, in which they were jointly interested, and converting the proceeds, the measure of damage is the highest value of the stock between the time of conversion and a reasonable time for replacing it, if the purchase price has not been paid, but if it has been paid, then the highest value between the time of conversion and the time of bringing the suit, if the suit is brought within a reasonable time, with dividends and interest on the dividends. Doyle *v.* Burns, 123 Iowa 488 (1904).

2 The measure of damages for the conversion of corporate stock, is the fair market value of the stock at the time of the conversion. Hagar *v.* Norton, 188 Mass. 47 (1905). By the "market value of stock" is meant the actual price at which it is commonly sold. That price may be fixed by sales of the stock in market at or about a given time. If no sales can be shown on the precise day, recourse may be had to sales before or after the day, and for that inquiry a reasonable range in point of time is allowable. Douglas *v.* Merceles, 25 N. J. Eq. 144 (1874). *Cf.* Stewart *v.* Cauty, 8 M. & W. 160 (1841); Sturges *v.* Keith, 57 Ill. 451 (1870); Seymour *v.* Ives, 46 Conn. 109 (1878). The measure of damages for non-delivery

of the property and business of the corporation,[1] less the amount of the liabilities.[2] Where there have been no sales of stock the opinion

of stock at a certain date is presumptively the par value. The defendant is obliged to prove differently if this price is incorrect. Harris's Appeal, 12 Atl. Rep. 743 (Pa. 1888). If there is no market value of stock, proof of a few sales is competent. Brown *v.* Lawton, 6 N. Y. Supp. 137 (1889).

1 Quoted and approved in Cabble *v.* Cabble 111 N. Y. App. Div. 426, 433 (1906).

2 Vail *v.* Reynolds, 118 N. Y. 297 (1890); Patterson *v.* Plummer, 10 N. Dak. 95 (1901). Where there is no market value to stock its value may be shown by showing the value of the property of the corporation as compared with the liabilities. Beaty *v.* Johnston, 66 Ark. 529 (1899). In determining the value of stock which has no market value, the actual value of the assets of the corporation is considered, but not the good-will, where the company never did a profitable business. Even though the assets are subsequently sold, yet, if the sale was a forced sale, the price realized is not admissible to prove such actual value. Feige *v.* Burt, 124 Mich. 565 (1900). In estimating the value of stock under an inheritance tax statute, the earning capacity, good-will and income of the corporation may be considered. Matter of Brandreth, 28 Misc. Rep. 468 (1899); s. c., 169 N. Y. 437. Where the stock has no market value, the value of the property of the corporation in excess of its debts is admissible. McDonald *v.* Danahy, 196 Ill. 133 (1902). The value of stock may be ascertained by comparing the corporate assets with the liabilities. Nelson *v.* First Nat. Bank, 69 Fed. Rep. 798 (1895). The value of stock may be shown "by proof of the value of the property and business of the corporation, its good-will and dividend-earning capacity." State *v.* Carpenter, 51 Ohio St. 83 (1894). The value of stock in a company which owns land and nothing else may be shown by proving the value of the land. Collins *v.* Denny, etc. Co., 41 Wash. 136 (1905). The value may be ascertained by the corporate contracts and business and dividends, etc. Butler *v.* Wright, 103 N. Y. App. Div. 463 (1905); rev'd on another point in 186 N. Y. 259. A jury may be warranted in finding that one thousand shares of six per cent. preferred stock is worth seventy-five thousand dollars. Julia *v.* Critchfield, 137 Fed. Rep. 969 (1905); aff'd, 147 Fed. Rep. 65. The value of bonds which have no market value may be proved by proving the value of the property. Industrial, etc. *v.* Tod, 180 N. Y. 215 (1904). If there is no market value, the value may be shown by the assets and liabilities. Goodwin *v.* Wilbur, 104 Ill. App. Rep. 45 (1902). Where the vendee pays for bonds, but the vendor does not deliver, the measure of damages is not necessarily the market value of the bonds, but they may be shown to be worth more or less than the market value. If there is no market value the real value can be proved by other facts. Henry *v.* North American, etc. Co., 158 Fed. Rep. 79 (1907). The value of the stock may be determined "from all the facts and circumstances of the case." McCloy *v.* Cox, 12 Ind. App. 27 (1895). "In the absence of better evidence, the market value of all the property of the corporation may be shown, with the view to arriving at the proportional value of the shares in controversy." Hewitt *v.* Steele, 118 Mo. 463 (1893). Where there is no market value, value may be shown by past dividends, the value of the corporate assets, and the price of individual sales not under compulsion. If there is no market value, it is presumed to be worth par. Brinkerhoff-Farris, etc. Co. *v.* Home Lumber

of the treasurer as to what would be a fair market price is admis-

Co., 118 Mo. 447 (1893). The value of stock may be shown by its dividend-paying qualities. Greer *v.* Lafayette County Bank, 128 Mo. 559 (1895). The actual value of the tangible property of the corporation cannot be resorted to, to ascertain the value of the stock, if there is any better evidence of the value of stock. State *v.* Sattley, 131 Mo. 464 (1895). Where stock has no market value its actual value may be shown, and proof may be given of the value of the corporate assets and dividends paid, and the character and permanency of the business, and the control of the stock, and other circumstances. A sale of a single share of stock which carries the control does not fix the market value, but a sale two years prior may be shown. If there is no evidence the par value is presumed to be the actual value. Moffitt *v.* Hereford, 132 Mo. 513 (1896). The value of the stock for four years afterwards, without a showing as to the relative condition of the company on the two dates, is not admissible. Jones *v.* Ellis, 68 Vt. 544 (1896). The fact that there is no market value for stock does not show that the stock is without value. Pabst, etc. Co. *v.* Montana, etc. Co., 19 Mont. 294 (1897). The value may be proved by other sales. Kuhn *v.* McKay, 7 Wyo. 42 (1897). In ascertaining the value of stock in a corporation owning undeveloped property, where the stock has no market value, particular sales, prices, and options on the stock may be shown. Moynahan *v.* Prentiss, 10 Colo. App. 295 (1897). In ascertaining the value of stock for the purposes of taxation, the amount paid in on the stock may be taken as the value if there have been no sales of the stock, and if there is no other evidence as to its value. Commonwealth *v.* People's, etc. Co., 183 Pa. St. 405 (1898). "In actions for conversion of personal property, such as these shares are, the damages are not limited to the market value of the stock. Its actual value, to be determined under all the circumstances, such as the dividend-making capacity, the good-will, etc., is the measure of damages." Freon *v.* Carriage Co., 42 Ohio St. 30, 38 (1884). In Hitchcock *v.* McElrath, 72 Cal. 565 (1887), the court allowed evidence to be given showing the market value of all the property of the corporation, there being no other method of ascertaining the value of the stock. See also McGuffey *v.* Humes, 85 Tenn. 26 (1886). The value of stock may be shown by showing the value of the property of the corporation, the amount of capital stock, and the amount of debts. It may be shown, also, by proving how much could be borrowed on the stock at the place where the company's headquarters were. Smith *v.* Traders' Nat. Bank, 82 Tex. 368 (1891). See also Simpkins *v.* Low, 54 N. Y. 179 (1873). Where a vendor of stock in a corporation which has a franchise, but nothing else, is entitled to two thousand shares of full-paid stock at a later date, according to the contract of sale, his measure of damges for failure of the vendee to deliver the two thousand shares is nominal damages, where there was no market or actual value for the stock. Barnes *v.* Brown, 130 N. Y. 372 (1892). The value of stock may be shown by the value of its assets, where there is no known market value. Redding *v.* Godwin, 44 Minn. 355 (1890). The president and managing agent renders his corporation liable for a bonus of stock in another corporation which he gives secretly and corruptly to the agent of the latter corporation in order to get a contract for the former corporation. Grand Rapids, etc. Co. *v.* Cincinnati, etc. Co., 45 Fed. Rep. 671 (1891), holding the former corporation liable for the par value of the stock, inasmuch as it was the original issue of that stock. Not the nominal

sible.[1] Where stock has a regular market value its value cannot be proved by showing the value of its property or assets.[2] The question of what was the market value at the time of the conversion is generally a question for the jury;[3] and it may be shown by tables of prices current published in the newspapers or otherwise at the time of the conversion, and these may be read in evidence.[4] But market quotations are evidence of the value of stock only when such quotations are based on actual sales. Where there have been no sales, evidence of a bid for the stock is not admissible, unless it is shown under what circumstances the bid was made, and whether it was in good faith and with intent to fulfill.[5] In valuing an obscure stock for inherit-

but the true value of the shares is what the plaintiff is entitled to recover. Bull *v.* Douglas, 4 Munf. (Va.) 303 (1814); Enders *v.* Board of Public Works, 1 Gratt. (Va.) 364 (1845). Where a railroad is sold to be paid for in bonds, a failure to deliver the bonds enables the vendor to recover their par value from the vendee. Texas Western Ry. *v.* Gentry, 69 Tex. 625 (1888).

1 Aldrich *v.* Bay State, etc. Co., 186 Mass. 489 (1904). The value of stock which is owned by a family may be shown by the testimony of persons connected with the business and having personal knowledge of its affairs, and its value may be based on the probable market value on liquidation, and experts having no knowledge of the corporate affairs may not testify on hypothetical questions. Cabble *v.* Cabble, 111 N. Y. App. Div. 426 (1906). See Gilboa *v.* Kimball, 69 Atl. Rep. 765 (R. I. 1908).

2 Spinks *v.* Clark, 147 Cal. 439 (1905).

3 1 Sedgw. Damages (7th ed.), 585, and cases cited; Dos Passos, Stockbrokers, 801. See Cameron *v.* Durkheim, 55 N. Y. 425 (1874); Fowler *v.* New York Gold Exch. Bank, 67 N. Y. 138 (1876); Harris *v.* Tumbridge, 83 N. Y. 92 (1880), and notes *supra.* Where there is no evidence that the stock is worthless, the question of value should be submitted to the jury; the rule of damages in a case for fraud as to representations as to the value of the stock being the difference between the value of the stock as represented, and what it was in fact worth. Maxted *v.* Fowler, 94 Mich. 106 (1892).

4 Cliquot's Champagne, 3 Wall. 114 (1865); Whelan *v.* Lynch, 60 N. Y. 469 (1875). A price-current or market report is admissible in certain cases to prove the fluctuations and value of stock. Seligman *v.* Rogers, 113 Mo. 642 (1893). In North Carolina the market reports of such newspapers as the commercial world relies upon as to the value of stocks are admissible as evidence of the market value. Moseley *v.* Johnson, 144 N. C. 274 (1907).

5 Wildes *v.* Robinson, 50 N. Y. App. Div. 192 (1900). In estimating the value of stocks under the inheritance tax law the stock exchange prices therefor may be taken as the basis. Walker *v.* People, 192 Ill. 106 (1901). In the case of Chicago, etc. Co. *v.* State Board of Equalization, 112 Fed. Rep. 607 (1901), the court, in speaking about the unreliability of quotations of stock as a basis for its intrinsic value, said (p. 612): "The court knows by experience and observation that railroad properties when sold as an entirety, almost without exception, yield nothing to the stockholder, although the stock may have been sold in share lots upon the stock exchange for years previously at advanced figures. The court knows also, from observation, that these stock quotations

ance tax purposes small sales are not proof of the actual value.[1] Where stock has no market value a *bona fide* sale may be proved.[2] In a suit for conversion of stock proof of the par value is insufficient.[3]

A conversion arises at the time when the stockholder, being entitled to the immediate possession or delivery of the stock or the certificate, makes a demand for it which is refused.[4] Accordingly, where a demand has been made and refused, the measure of damages is the value of stock on the day of the demand and refusal.[5]

are frequently advanced by contending interests for control, or by short interests in the market, such as ran the Northern Pacific within a year to quotations almost tenfold its real value. The court also knows from observation that the speculative public, dealing in stock sales, and making its quotations, are governed largely by the prospect of present dividends, and not by any general conception of permanent earning capacity. These, and other considerations that could be mentioned, make stock quotations an *indicia*, but an unstable *indicia*, of the real value of the capital stock as an entirety."

1 Matter of Curtice, 111 N. Y. App. Div. 230 (1906); aff'd, 185 N. Y. 543.

2 Humphreys *v.* Minnesota, etc. Co., 94 Minn. 469 (1905).

3 Warren *v.* Stikeman, 84 N. Y. App. Div. 610 (1903). See 111 S. W. Rep. 817.

4 Blair Co. *v.* Rose, 26 Ind. App. 487 (1901).

5 So when stock held as collateral is improperly sold by the pledgee, the value on the day when the pledgor pays his debt and demands his stock is to be taken. Fisher *v.* Brown, 104 Mass. 259 (1870). In Freeman *v.* Harwood, 49 Me. 195 (1859), shares of stock standing in the name of the defendant as collateral security for a debt which had been paid were sold for non-payment of an assessment and bought by defendant. It was held that the defendant was liable in trover for the value of the shares at the time of the sale, with interest, and all dividends received thereon, deducting the amount of the assessment and the expenses of the sale. In Sturges *v.* Keith, 57 Ill. 451 (1870), it is held that where the demand and refusal constitute the conversion, or afford presumptive evidence of it, the date of such demand and refusal is the proper time for estimating the value. Again, where the corporation wrongfully refuses to register a transfer and to issue a certificate, the measure of damages is the value of the stock on the day when the transfer was demanded and refused. Wyman *v.* American Powder Co., 62 Mass. 168 (1851); Eastern R. R. *v.* Benedict, 76 Mass. 212 (1857); West Branch, etc. Canal Co.'s Appeal, 81* Pa. St. 19 (1870); Baltimore Ry. *v.* Sewell, 35 Md. 238 (1871); McMurrich *v.* Bond Head Harbor Co., 9 Up. Can. Q. B. 333 (1852), where it is said that while the rule as announced above is the proper one, yet, when the jury allows a larger sum, the question of the measure of damages not having been pressed at the argument, the court will not reduce the verdict. So also where there is a failure to return borrowed stock on demand, or according to the terms of the bailment, the value on the day of demand, or on the day when the stock ought by contract to have been returned, is the measure of damages. McKenney *v.* Haines, 63 Me. 74 (1873); Fosdick *v.* Greene, 27 Ohio St. 484 (1875); Day *v.* Perkins, 2 Sandf. Ch. 359 (1845). *Cf.* Cortelyou *v.* Lansing, 2 Caines' Cas. 200 (1805); West *v.* Wentworth, 3 Cow. 82 (1824); Clark *v.* Pinney, 7 Cow. 681 (1827); Wilson *v.* Mathews, 24 Barb. 295 (1857); 2 Sedgwick, Damages

Where the pledgee of stock wrongfully sells it, the injured party may recover the highest market price between the time of notice of sale and a reasonable time within which he might have bought the stock elsewhere.[1] In a suit against a corporation for refusal to transfer stock on its books, "the rule of damages is the highest intermediate value of the stock between the time of conversion and a reasonable time after the owner has received notice of the conversion to enable him to replace the stock."[2] A bondholder who has agreed

(7th ed.), 141, 365, n. In an old case, where borrowed stock was not returned, the plaintiff was allowed to recover the value at the time of the transfer to the borrower, no account being taken of an increase in value. Forrest *v.* Elwes, 4 Ves. Jr. 492 (1799). See also McKenney *v.* Haines, 63 Me. 74 (1873). In McArthur *v.* Seaforth, 2 Taunt. 258 (1810), it was held that, upon the failure to replace stock, the measure of damages was the price on the day of such failure or the price on the day of the trial, at plaintiff's option. Upon a failure to deliver stock according to contract or on demand, the value at the time of the demand is the value to be taken. Noonan *v.* Ilsley, 17 Wis. 314 (1863); Pinkerton *v.* Manchester, etc. R. R., 42 N. H. 424 (1861); North *v.* Phillips, 89 Pa. St. 250 (1879); Huntingdon, etc. Coal Co. *v.* English, 86 Pa. St. 247 (1878). *Cf.* Pott *v.* Flather, 5 Railw. & Can. Cas. 85 (1847); Barned *v.* Hamilton, 2 Railw. & Can. Cas. 624 (1841); Shaw *v.* Holland, 15 Mees. & W. 136 (1846); Tempest *v.* Kilner, 2 C. B. 300 (1845); s. c., 3 C. B. 249 (1846); Gainsford *v.* Carroll, 2 Barn. & C. 624 (1824). Williams *v.* Peel River, etc. Co., 55 L. T. Rep 689 (1886), holds that suit for damages for wrongful detention lies against a party who has wrongfully obtained possession of stock, and that the measure of damages, where the defendant afterwards abandons his claim, is the intervening fall in the value of the stock. Bankers of trustees wrongfully sold out stock and applied the proceeds to their own purposes. The measure of their liability is the amount paid in replacing the stock. Sadler *v.* Lee, 6 Beav. 324 (1843). As to damages in cases of trust, see Story's Eq. (13th ed.), §§ 1263, 1264.

1 Wright *v.* Bank of Metropolis, 110 N. Y. 237 (1888); Galigher *v.* Jones, 129 U. S. 193 (1889), the court saying in the latter decision that the measure of damages is "the highest intermediate value of the stock between the time of its conversion and a reasonable time after the owner has received notice of it to enable him to replace the stock." For an illegal sale the pledgor may recover the "highest price which his stock reached within a reasonable time after its illegal sale by defendants." Smith *v.* Savin, 141 N. Y. 315 (1894), where five weeks were held to be reasonable, the pledgor not having discovered the sale for some time. The measure of damages in a suit against a pledgee for selling stock illegally is the highest market price between the time of default and a reasonable time after notice to the pledgor. *In re* Swift, 114 Fed. Rep. 947 (1902).

2 And a general allegation of damage is sufficient, inasmuch as the plaintiff is entitled to nominal damages anyway. Blair Co. *v.* Rose, 26 Ind. App. 487 (1901). Where the corporation illegally refuses a transfer it is liable for the value of the stock at the time of the demand and refusal. Bank of Culloden *v.* Bank of Forsyth, 120 Ga. 575 (1904). The purchaser may hold the corporation liable in damages for conversion for a refusal

to sell his bonds to a reorganizer in exchange for new bonds and stock may sue for the value of the new bonds and stock if the reorganizer refuses to perform, and the measure of damages is the highest value of the new bonds for a reasonable time after the breach of contract.[1]

The New York court of appeals, after many variations, has settled on the rule that "in the absence of special circumstances, in an action for conversion of personal property as well as one for failure to deliver it in performance of a contract, where consideration has been received, the value of the property at the time of such conversion or default, with interest, is the measure of compensation." [2] Where directors have issued stock to themselves at a price less than the market price, they may be held liable at the instance of a stockholder suing for the benefit of the corporation, for the difference between the price they paid, and the price of the stock when it was issued to them. The highest market price since that day for small amounts of stock is no basis for the measure of damages.[3] Where promoters are liable to the corporation for stock illegally issued to them, the stock is to be valued not by the first sale, but by its value after it acquired a recognized market value, with interest from that date.[4] In a suit by one promoter against another for breach of contract for failing to organize a corporation and issue to the plaintiff certain paid-up stock, the possible value of the stock, which was never issued, is no basis for the measure of damages.[5]

to transfer the stock on books. His damage is the value of the stock at the time of demand with interest to the date of trial, and after suit is commenced the corporation cannot stop it by offering to transfer. Dooley *v.* Gladiator, etc. Co., 109 N. W. Rep. 864 (Iowa 1906).

1 Turner *v.* Jackson, 63 S. W. Rep. 511 (Tenn. 1899).

2 Barnes *v.* Brown, 130 N. Y. 372 (1892).

3 Shaw *v.* Holland, [1900] 2 Ch. 305.

4 East Tennessee, etc. Co. *v.* Leeson, 183 Mass. 37 (1903), being the same case as Hayward *v.* Leeson, 176 Mass. 310.

5 Eisenmayer *v.* Leonardt, 148 Cal. 596 (1906). Where by contract between promoters one was to give the other a certain amount of preferred stock in a company to be organized, and he fails to do so because he has not caused the corporation to issue any preferred stock, the former is liable in damages for such value as the preferred stock would have had if it had been issued. Crichfield *v.* Julia, 147 Fed. Rep. 65 (1906). Where by a promoter's contract one of them was to construct a pipe line for water for a city and for irrigation, and the stock was to be divided between them, and he does not proceed, the measure of damages will include the amount expended by the other after the contract was made and in reliance upon it, but not damages for the stock, because that would be for anticipated profits, which are uncertain, speculative and doubtful, especially where the cost of the line would have been

§ 582. (*b*) *The second rule.*—In another line of cases the true measure of damages in these actions is said to be the value of the stock on the day of the trial.[1] In an English case it is said that this is a sound rule in the ordinary cases of conversion of stock, but that in cases of failure to deliver stock the true measure of damages is the value when the demand is made and refused.[2] This second rule has found little favor, and there is believed to be no sound reason for its adoption.

§ 583. (*c*) *The third rule.*—It has been held in still another class of decisions that the measure of damages for the conversion of stock is the highest market value of the stock between the date of the conversion and the day of the trial. This is the rule in California in some cases.[3] So, also, in South Carolina,[4] Georgia,[5] and

largely in excess of the estimates. Curran *v.* Smith, 149 Fed. Rep. 945 (1906). See also §§ 705–7, *infra.*

1 Owen *v.* Routh, 14 C. B. 327 (1854); Shepherd *v.* Johnson, 2 East, 211 (1802); Bercich *v.* Marye, 9 Nev. 312 (1874). *Cf.* Williams *v.* Archer, 5 C. B. 318 (1847); and see Wilson *v.* Little, 2 N. Y. 443, 450 (1849), wherein there is a *quere* as to whether this may not be the better rule. In Fowle *v.* Ward, 113 Mass. 548 (1873), it is held that the measure of damages is the value of the stock upon the day when the bill in equity is filed, it being an equitable action by a pledgor against a pledgee. The measure of damages may be the price at which the defendant sold the securities, if already sold, and, if not sold, then the amount of depreciation in value since plaintiff demanded them, together with intervening dividends. Simmons *v.* London Joint Stock Bank, [1891] 1 Ch. 270.

2 Shaw *v.* Holland, 15 M. & W. 136, 145 (1846).

3 Cal. Code, § 3336, is as follows: "The detriment caused by the wrongful conversion of personal property is presumed to be: 1. The value of the property at the time of the conversion, with the interest from that time; or, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party." This is held to apply to the conversion of the shares of stock. Fromm *v.* Sierra Nevada, etc. Co., 61 Cal. 629 (1882); Dent *v.* Holbrook, 54 Cal. 145 (1880). *Cf.* Thompson *v.* Toland, 48 Cal. 99 (1874). The courts have held that this section of the code applies to the conversion of shares of stock, but they have not worked out a very consistent rule on the subject. In Douglass *v.* Kraft, 9 Cal. 562 (1867), the "highest value" rule is adopted, but in later cases the court seems to incline toward the modern New York rule. Hamer *v.* Hathaway, 33 Cal. 117 (1867); Page *v.* Fowler, 39 Cal. 412 (1870); Dent *v.* Holbrook, 54 Cal. 145 (1880); Tulley *v.* Tranor, 53 Cal. 274 (1878); Thompson *v.* Toland, 48 Cal. 99 (1874); Fromm *v.* Sierra Nevada, etc. Co., 61 Cal. 629 (1882).

4 Kid *v.* Mitchell, 1 Nott & M. (S. C.) 334 (1818).

5 Central R. R. etc. Co. *v.* Atlantic, etc. R. R., 50 Ga. 444 (1873). For failure to deliver bonds as called for by a contract, the vendee may recover the highest market price between the date of the breach of the contract and the date of the trial. San Antonio, etc. Ry. *v.* Wilson, 4 Tex. Civ. App. 178 (1893).

it was formerly the rule in New York[1] and Pennsylvania.[2] The New York courts have, however, in later cases wholly receded from this position; and the rule is now established, in such actions, that the measure of damages is not the highest price of the stock, but the value at the date of the conversion. There are also Pennsylvania decisions to the same effect.[3] Pennsylvania still, however, in part at least, adheres to the old rule.[4] Where an agent conceals

1 Markham *v.* Jaudon, 41 N. Y. 235 (1869); Romaine *v.* Van Allen, 26 N. Y. 309 (1863). In an action to recover damages for the unlawful conversion of grain, the rule in New York was held to be the highest price up to the time of trial. Lobdell *v.* Stowell, 51 N. Y. 70 (1872). To same effect, Kent *v.* Ginter, 23 Ind. 1 (1864). See 1 Sedgwick, Damages (7th ed.), 578, and note (a). *Cf.* Burt *v.* Dutcher, 34 N. Y. 493 (1866); Scott *v.* Rogers, 31 N. Y. 676 (1864); Devlin *v.* Pike, 5 Daly (N. Y.), 85 (1874). For the modern rule in New York, see § 581, *supra.*

2 Bank of Montgomery *v.* Reese, 26 Pa. St. 143 (1856); Musgrave *v.* Beckendorff, 53 Pa. St. 310 (1866); Reitenbaugh *v.* Ludwick, 31 Pa. St. 131, 141 (1858). In Pennsylvania, where one was accountable for stock as trustee, and converted it, he was held chargeable with the highest market value. Reitenbaugh *v.* Ludwick, 31 Pa. St. 131 (1858); North *v.* Phillips, 89 Pa. St. 250 (1879). *Cf.* Bates *v.* Wiles, 1 Handy (Ohio), 532 (1855). Where, upon a reorganization, an old stockholder is wrongfully refused his stock in the new, he may recover the highest market price of the same up to the time of the insolvency of the corporation. Reading Trust Co. *v.* Reading Ironworks, 137 Pa. St. 282 (1890).

3 North *v.* Phillips, 89 Pa. St. 250 (1879); Huntingdon, etc. Coal Co. *v.* English, 86 Pa. St. 247 (1878); Work *v.* Bennett, 70 Pa. St. 484 (1872); Neiler *v.* Kelley, 69 Pa. St. 403 (1871). *Cf.* Wilson *v.* Whitaker, 49 Pa. St. 114 (1865). So also in the later New York cases. Baker *v.* Drake, 53 N. Y. 211 (1873); s. c., 66 N. Y. 518 (1876); White *v.* Smith, 54 N. Y. 522 (1874); Harris *v.* Tumbridge, 83 N. Y. 92 (1880); Colt *v.* Owens, 90 N. Y. 368 (1882); Randall *v.* Albany City Nat. Bank, 1 N. Y. St. Rep. 592 (1886). *Cf.* Suydam *v.* Jenkins, 3 Sandf. (N. Y.) 614 (1850); Matthews *v.* Coe, 49 N. Y. 57 (1872); Bryan *v.* Baldwin, 52 N. Y. 232 (1873). See also Seymour *v.* Ives, 46 Conn. 109 (1878); McGuffey *v.* Humes, 85 Tenn. 26 (1886). It is now held in Pennsylvania that where a corporation, through innocent mistake, permits a transfer on its books of shares of stock under a forged power of attorney, the owner's measure of damages is the value of the stock at the time of the transfer, with interest from the date of the verdict, and not the highest price reached by the stock between the date of the conversion and the time of bringing suit, with the dividends since declared. Pennsylvania Co. *v.* Philadelphia, etc. R. R., 153 Pa. St. 160 (1893).

4 Where a broker illegally sells out his customer's stocks which he is carrying as pledgee, he is liable for the highest price of the stock in the market up to date of the trial in a suit for conversion, the court saying that this was by reason "of the shifting character of the prices of stock in our stock exchanges." Learock *v.* Paxson, 208 Pa. St. 602 (1904). The court said: "The foundation of this rule rests upon the changing character of the value of such property as evidenced by the varying quotations in the different stock markets, and sometimes the advances in valuation

from his principal the amount of stock received by the agent for property, and keeps a part of the stock, the principal may hold him liable for the highest market value of the stock reached between the act and a reasonable time after discovery of the act by the principal.[1]

§ 584. *Interest, dividends, and special damages.*—It is settled law that, in addition to the value of the stock at the date of conversion, the plaintiff may recover legal interest upon such valuation from the date of the conversion to the day of the trial. It follows as of course that, if the plaintiff has been damaged in an ascertained sum, he may, in an action for damages, recover not only that sum, but interest thereon in the meantime.[2] In Iowa he may recover

are made with astonishing rapidity. Political action or material or financial combinations often are the occasion of such exceptional advances. The very nature of such property, with its constantly changing valuations, indicates the necessity of a measure of damages shifting in character, and hence it has been made to differ from that in the case of ordinary chattels, where it is based upon their valuation at the time of the conversion, because such value is not so changeable."

1 McKinley *v.* Williams, 74 Fed. Rep. 94 (1896). Where a person holds land for himself and a partner, and transfers the same to a corporation for stock and conceals all the facts from his partner, the latter may recover the value of his share of the stock, and the measure of the value is the highest value between the day of receiving the stock and the day when the plaintiff received notice thereof. Morris *v.* Wood, 35 S. W. Rep. 1013 (Tenn. 1896).

2 O'Meara *v.* North American Min. Co., 2 Nev. 112 (1866); Boylan *v.* Huguet, 8 Nev. 345 (1873); Fisher *v.* Brown, 104 Mass. 259 (1870); Sargent *v.* Franklin Ins. Co., 25 Mass. 90 (1829); Seymour *v.* Ives, 46 Conn. 109 (1878); McKenney *v.* Haines, 63 Me. 74 (1873); Freeman *v.* Harwood, 49 Me. 195 (1859); Ormsby *v.* Vermont Copper Min. Co., 56 N. Y. 623 (1874); White *v.* Smith, 54 N. Y. 522 (1874); Sturges *v.* Keith, 57 Ill. 451 (1870); Baltimore, etc. Ry. *v.* Sewell, 35 Md. 238, 257 (1871); Pinkerton *v.* Manchester, etc. R. R., 42 N. H. 424 (1861); North *v.* Phillips, 89 Pa. St. 250 (1878); Huntingdon, etc. Coal Co. *v.* English, 86 Pa. St. 247 (1878); North America Building Assoc. *v.* Sutton, 35 Pa. St. 463 (1860); Noonan *v.* Ilsley, 17 Wis. 314 (1863); Forrest *v.* Elwes, 4 Ves. Jr. 492 (1799); *Re* Bahia, etc. Ry., L. R. 3 Q. B. 584 (1868); Blyth *v.* Carpenter, L. R. 2 Eq. 501 (1866); McMurrich *v.* Bond Head Harbor Co., 9 Up. Can. Q. B. 333 (1852). In the Civil Code of California, § 3336, interest in these cases is expressly provided for. Fromm *v.* Sierra Nevada, etc. Co., 61 Cal. 629 (1882); 2 Sedgwick, Damages (7th ed.), 391. The measure of damages is the market value at the time of conversion, with interest. Darling *v.* Potts, 118 Mo. 506 (1893). For refusal of the corporation to deliver stock which the plaintiff bought of it, the measure of damages is the value at the time of such refusal, with interest. Salt, etc. Co. *v.* Hickey, 36 Pac. Rep. 171 (Ariz. 1894). Where the measure of damages is based upon the market value of stock, interest may be added. Kuhn *v.* McKay, 7 Wyo. 42 (1897).

dividends and interest thereon,[1] and there are other authorities to the effect that in addition to interest the plaintiff may recover also all dividends paid upon the stock between the date of the conversion and the day of the trial; [2] but, aside from unusual cases, the rule would seem to be a harsh one, except in those jurisdictions where the measure of damages is the value at the time of the trial. The better rule is that the plaintiff may also recover any special damages which he has sustained by reason of the detention of his stock.[3]

§ 585. *Nominal damages.*—In certain cases, where the plaintiff has been guilty of laches, or where the stock is of no actual value, or where the stock could, for a reasonable time after the conversion, have been purchased in the market for the same or a lower price, or in any other case where the plaintiff has suffered only a technical conversion without any actual pecuniary loss, only nominal damages can be recovered.[4] Thus, the measure of damages for

1 Doyle *v.* Burns, 123 Iowa 488 (1904).

2 Bull *v.* Douglas, 4 Munf. (Va.) 303 (1814); Baltimore, etc. Ry. *v.* Sewell, 35 Md. 238 (1871); Bercich *v.* Marye, 9 Nev. 312 (1874); Bank of Montgomery *v.* Reese, 26 Pa. St. 143 (1856). *Cf.* Boston, etc. R. R. *v.* Richardson, 135 Mass. 473, 477 (1883). Where a party holding stock in escrow refuses to deliver when he should, and in a suit for conversion, instead of depositing the stock in court, sets up a defense which is without merit, the value of the stock and dividends and interest may be recovered. Clarke *v.* Eureka, etc. Bank, 123 Fed. Rep. 922 (1903); aff'd, 130 Fed. Rep. 325. Where a broker, a gratuitous bailee of corporate stock, delivers the same to the company without authority, and the stock is converted to the use of the company, the bailee is liable for its value, irrespective of what his intentions were in the premises. In such case the bailor may recover the value of the stock at the time of conversion, with all dividends paid from the time of delivery, together with interest on the value of the stock from date of conversion, and on the dividends from date of respective payments. Hubbell *v.* Blandy, 87 Mich. 209 (1891). Where several years elapse between the commencement of the suit and the trial, the case not having been prosecuted with reasonable diligence, the value at the time of the conversion, with interest, is the measure of damages. Dividends are not to be added unless a separate demand for them is alleged and a separate cause of action therefor set forth. Ralston *v.* Bank of California, 112 Cal. 208 (1896). In an action for the conversion of stock the measure of damages is the highest intermediate value between the time of conversion and a reasonable time after the owner has received notice of the conversion to enable him to replace the stock. Dividends accruing after the conversion are not added, nor interest on such dividends. Citizens', etc. R. R. *v.* Robbins, 144 Ind. 671 (1896).

3 Boylan *v.* Huguet, 8 Nev. 345 (1873); 2 Sedgwick, Damages (7th ed.), 391; Bodley *v.* Reynolds, 8 Q. B. 779 (1846); Davis *v.* Oswell, 7 Car. & P. 804 (1837). *Cf.* Seymour *v.* Ives, 46 Conn. 109 (1878).

4 Thus, where a borrower of shares fails to return them until after the corporation is dissolved, the lender having made no demand during the existence of the company, the meas-

the conversion of a mere certificate of stock cannot be placed at the value of the shares themselves which the certificate represents, if the ownership of the shares is not affected.[1] Where a pledgee's debt has really been paid and he retains the stock, and by reason thereof the pledgor is unable to enter a reorganization, the pledgor may recover the actual damages sustained, but the value of the stock must be shown by him, otherwise it will be inferred that it had little or no value.[2]

§ 586. *Damages for failure to complete a purchase of stock and for fraud inducing a purchase of stock.*—The measure of damages for the failure of a purchaser of stock to complete his contract is considered elsewhere;[3] as is also the purchaser's measure of damages for a refusal of the vendor to deliver.[4] The measure of damages for fraud inducing the purchase of stock "is the difference between the value of the stock at the time it was purchased and the price paid for it."[5] A misrepresentation by promoters as to the

ure of damages, in an action to recover the shares, will be the market value of them at the time the cause of action accrued; that is, at the time of demand. And if at that time the stock is worthless, only nominal damages are recoverable. Fosdick *v.* Greene, 27 Ohio St. 484 (1875). See Cameron *v.* Durkheim, 55 N. Y. 425 (1874); Hope *v.* Lawrence, 50 Barb. 258 (1867). In an action by a vendee on a contract for the sale of specific stock, which, without the knowledge of the vendor, had already been sold to another by his agent, the plaintiff may be able to recover only nominal damages. Wilson *v.* Whitaker, 49 Pa. St. 114 (1865); Skinner *v.* City of London, etc. Corp., L. R. 14 Q. B. D. 882 (1885). See Fowler *v.* New York Gold Exch. Bank, 67 N. Y. 138 (1876). A transferee's action upon the case for damages instead of in trover for conversion, against the corporation for refusal to register the transfer, entitles him to nominal damages only, unless he proves special damage. McLean *v.* Charles Wright Med. Co., 96 Mich. 479 (1893). See also Blair Co. *v.* Rose, 26 Ind. App. 487 (1901).

1 Daggett *v.* Davies, 53 Mich. 35 (1884), by Cooley, C. J.

2 Griggs *v.* Day, 158 N. Y. 1 (1899). This preceding case arose out of a controversy between a contractor in the construction of a railroad and the chief stockholder and promoter who advanced money on the security of stock and corporate notes. It was many years in the courts.

3 See § 336, *supra.*

4 See § 336, *supra.*

5 Redding *v.* Godwin, 44 Minn. 355 (1890). In an action for damages for fraud inducing the plaintiff to purchase stock, the measure of damages is "not the difference between the contract price and the reasonable market value if the property had been as represented to be, even if the stock had been worth the price paid for it; nor, if the stock were worthless, could the plaintiff have recovered the value it would have had if the property had been equal to the representations. What the plaintiff might have gained is not the question, but what he had lost by being deceived into the purchase." The defendant "was bound to make good the loss sustained, such as the moneys the plaintiff had paid out and interest, and any other outlay legitimately attributable to defendant's fraudulent conduct; but this lia-

amount of money they paid to the corporation for stock may sustain an action by the purchaser of such stock from them for damages.[1] The measure of damages for deceit in inducing a party to purchase stock is the difference between the price and the real value at the time of the purchase. Subsequent events growing out of the then existing condition of things may be introduced in evidence.[2] The measure of damages for fraud in inducing a person to sell stock at less than its real value is the difference between the

bility did not include the expected fruits of an unrealized speculation." Smith *v.* Bolles, 132 U. S. 125 (1889). The true measure of the damages suffered by one who is fraudulently induced to make a contract of sale, purchase, or exchange of property is the difference between the actual value of that which he parts with and the actual value of that which he receives under the contract. Rockefeller *v.* Merritt, 76 Fed. Rep. 909 (1896). In Smith *v.* Duffy, 57 N. J. L. 679 (1895), the measure of damages for fraud in the sale of stock was held to be the actual loss suffered by the vendee, irrespective of the market price of the stock. As to the measure of damages in an action against a broker for fraud inducing the plaintiff to invest in "Grant and Ward" securities, see James *v.* Work, 70 Hun, 296 (1893). The measure of damages in an action by a vendee for fraud in the sale of stock is the difference between the selling price and the real value at the time of the sale. High *v.* Berret, 148 Pa. St. 261 (1892). Where, in an action by a vendee of stock for fraud in inducing purchase, the jury find that the stock had no value whatever and render a verdict for the purchase price, it is immaterial that the court erred in regard to the measure of damages. Honsucle *v.* Ruffin, 172 Mass. 420 (1899). The vendee may bring an action for damges for deceit even where he has paid part of the price and given security for the balance. He may recover damages to the extent only that the representations were false. Weaver *v.* Shriver, 79 Md. 530 (1894). If a director misrepresents the financial condition of the company and thus induces a stockholder to sell his stock to him, he is liable to the vendor for the difference between the actual value of the stock and the price paid. Hume *v.* Steele, 59 S. W. Rep. 812 (Tex. 1900). The measure of damages is the difference between the actual value of the stock and the value it would have had if the representations as to the financial condition of the company had been true. Drake *v.* Holbrook, 66 S. W. Rep. 512 (Ky. 1902). And where one with intent to cheat and defraud induces another, by false and fraudulent representations, to purchase shares for value which he knows to be worthless, he is liable for the damages sustained, whether the purchase was made from him or from another at his instance. Hubbell *v.* Meigs, 50 N. Y. 480 (1872), 28 N. Y. App. Div. 1 (1898). The misrepresentation that certain property had already been purchased by the corporation is not cured by the fact that the corporation did acquire such property thereafter. McConnel *v.* Wright, [1903] 1 Ch. 546. The court in this case discussed at length the principle on which damages should be assessed.

1 Honsucle *v.* Ruffin, 172 Mass. 420 (1899).

2 Hindman *v.* First Nat. Bank, 112 Fed. Rep. 931 (1902). Where a purchase of stock induced by fraud is affirmed and suit is brought for deceit, the damage is the same as for breach of warranty in a contract of sale, namely, the difference between

value of the stock as represented and the actual value.[1] At common law an action to recover back the whole of the purchase-money upon a rescission for fraud is virtually a suit for money had and received.[2]

§ 587. *Damages in actions between stock-brokers and their customers.*—This subject is considered elsewhere.[3]

what the property was worth and what it would have been worth if the representations had been true. Beare *v.* Wright, 14 N. Dak. 26 (1905). The measure of damages in a suit by the purchaser of stock from the secretary and treasurer for fraudulent representations as to the debts of the corporation, is the difference between the value of the stock on the actual financial condition and its value had the condition been as represented. Drake *v.* Holbrook, 92 S. W. Rep. 297 (Ky. 1906).

1 Potter *v.* Necedah, etc. Co., 105 Wis. 25 (1899). Where there is no market value for stock the measure of damages in an action for deceit, causing a party to purchase the stock, is the difference between the value of the stock and its value if the corporation had had the amount of property represented, that being the subject of the misrepresentation. Boddy *v.* Henry, 113 Iowa, 462 (1901). In a suit by a vendor of stock for fraud inducing the sale, the value of the stock should include a proportionate part of the good will, and the good will may be valued by multiplying the average profits by a number of years depending upon the nature and character of the business, all of which is a question for the jury. Von Au *v.* Magenheimer, 115 N. Y. App. Div. 84 (1906). In a suit by a purchaser of stock to hold the directors liable for a false annual report which caused him to purchase, the measure of damages is the difference between the value of the stock as it is and as it would have been had the annual report been true. Parsons *v.* Johnson, 28 N. Y. App. Div. 1 (1898). The measure of damages for fraud in the sale of stock is the difference between the real value of the stock at the time of sale and what the value would have been had the representations been true. The market value may be shown as bearing upon the real value. Warner *v.* Benjamin, 89 Wis. 290 (1895); Titus *v.* Poole, 73 Hun. 383 (1893); aff'd, 145 N. Y. 414. A person who purchases bank stock from the bank itself may hold the bank liable for damages, where the public statement of the bank which he relied on in purchasing was false. The measure of damages is the difference between the value of the stock if the statement had been true and its actual value. Exchange Bank *v.* Gaitskill, 37 S. W. Rep. 160 (Ky. 1896). In an action for damages for deceit inducing the plaintiff to purchase stock, the measure of damages is "a sum of money equal to the difference between the value of the property as it was in fact and the value as it would have been if the representations had been true." In this kind of action no tender of the stock is necessary or proper. Testimony as to the value of the property of the corporation and of a sale of stock by a witness is admissible. Vail *v.* Reynolds, 118 N. Y. 297 (1890). Where one has been induced by fraudulent misrepresentations to buy or subscribe for shares of stock, the measure of damages, in an action against the vendor, is the difference between the value of the stock as represented and the actual value. Miller *v.* Barber, 66 N. Y. 558, 568 (1876).

2 Gassett *v.* Glazier, 165 Mass. 473 (1896).

3 See §§ 460–462, *supra.*

CHAPTER XXXVI.

STOCKHOLDERS' MEETINGS—CALLS, TIME, PLACE, AND CLASSES OF MEETINGS.

§ 588. *Introductory.*—The stockholders of a corporation constitute the origin, existence, and continuance of the corporation itself. They elect the directors, control the general policy through them, and within the charter limits may prolong or dissolve the corporate existence at their pleasure. All these vital powers of the stockholders can be exercised by them only in corporate meetings, duly convened and properly organized for the transaction of business. Accordingly, the method of calling together a corporate meeting, the time and place of that meeting, the notice to be given to the stockholders, and the various incidents relative to a proper convening of the members of the corporation, are of great importance. They constitute the subject of this chapter.

§ 589. *The place of meeting of stockholders must be within the state creating the corporation.*—The first and most general rule as to the place where stockholders may hold corporate meetings is that the place of meeting should be within the boundaries of the state which created the corporation, although through its agents, of course, the corporation may make contracts, carry on business, sue and be sued, and buy and sell property in another state.[1]

There is a difference of opinion as to the effect of business transacted at a stockholders' meeting held beyond the borders of the

1 See chs. XIII, §§ 237--240, *supra*, and XLI, §§ 696–700, *infra*.

state creating the corporation. Upon the one hand, it is held that all the acts and proceedings of such a meeting are wholly invalid and void; that the corporation is not bound thereby, and that the meeting is as though it had never been held.[1]

But it is the sounder view to regard the votes and proceedings at such a meeting as voidable rather than void. The corporation itself cannot allege that such proceedings are void. It is estopped from so doing.[2] So also are the stockholders who participate in

1 Craig Silver Co. *v.* Smith, 163 Mass. 262 (1895), citing the above text. Directors elected at a stockholders' meeting held out of the state, and to which all did not agree, are not directors. The old board holds over. Hodgson *v.* Duluth, etc. R. R., 46 Minn. 454 (1891); Miller *v.* Ewer, 27 Me. 509 (1847), where a mortgage executed by the authority of directors who were elected at the organization meeting of corporators held outside of the state which granted the charter was declared void. Cited and followed in Freeman *v.* Machias Water, etc. Co., 38 Me. 343 (1854), where a forfeiture of stock was declared illegal; Ormsby *v.* Vermont Copper Min. Co., 56 N. Y. 623 (1874), where it was held that a forfeiture of stock by authority of a by-law adopted by stockholders of a Vermont corporation at a meeting held in New York was not valid; Mitchell *v.* Vermont Copper Min. Co., 40 N. Y. Super Ct. 406 (1876); aff'd, 67 N. Y. 280; Smith *v.* Silver Valley Min. Co., 64 Md. 85 (1885), the organization being held out of the state; Camp *v.* Byrne, 41 Mo. 525 (1867), to the same effect. Stockholders cannot legally meet out of the state. Harding *v.* American, etc. Co., 182 Ill. 551 (1899). In Copp *v.* Lamb, 12 Me. 312 (1835), thirty years' user was held to have cured any defect. A Virginia corporation cannot be organized by an organization meeting in New York. Nor can the charter be assigned by a blank assignment after an organization in Virginia. The assignment must be of the stock. The corporation is neither *de facto* nor *de jure.* Suits against it fail. Welch *v.* Old Dominion, etc. Ry., 10 N. Y. Supp. 174 (1890). Stockholders' meetings held out of the state are voidable if not void, and at the instance of minority stockholders may be good ground for an injunction. Jones *v.* Pearl Min. Co., 20 Colo. 417 (1894). Where a charter is taken out in one state and the organization meetings are held in another state, the presumption is that no corporation is organized; and unless proof is given that the statutes of the first-named state authorized the holding of the organization meeting in another state, the stockholders are liable as partners. Duke *v.* Taylor, 37 Fla. 64 (1896). Where parties take out a charter in Tennessee, but, instead of holding their organization meetings in Tennessee, hold them in Florida, where they do all their business, they are liable in Florida as partners. Taylor *v.* Branham, 35 Fla. 297 (1895). The dicta in this decision as to the liability of stockholders generally in foreign corporations doing business in Florida are startling, to say the least.

2 Heath *v.* Silverthorn, etc. Co., 39 Wis. 146 (1875), holding that the corporation may be estopped to deny the validity of acts done outside the state, when the rights of third parties intervene, even though that meeting was the organization meeting. The legislature may validate the acts passed at such a meeting. Graham *v.* Boston, etc. R. R., 118 U. S. 161, 176 (1886), aff'g s. c., 14 Fed. Rep. 753 (1883). *Cf.* Grenada County *v.* Brogden, 112 U. S. 261 (1884), and the various

the meeting.[1] As to the creditors of the corporation the authorities differ.[2] If the corporation has been incorporated in two or more states, it is lawful to hold meetings of the stockholders in

cases of municipal subscriptions, ch. VI, § 94, n., *supra*.

1 A *bona fide* holder of a note given by a stockholder in payment of his subscription may enforce it, even though the organization and all other meetings of the company were held out of the state. Camp *v.* Byrne, 41 Mo. 525 (1867). In Ohio, etc. R. R. *v.* McPherson, 35 Mo. 13 (1864), the charter declared the directors to be the corporation. They met out of the state and organized and made a call on subscriptions. The court upheld the call. But the mere neglect on the part of a stockholder, who did not attend a meeting of this kind, or a mere failure to take affirmative action for a period of time short of that prescribed by the statute of limitations, will not deprive that stockholder of his right to attack the proceedings as irregular and in fraud of his rights. Ormsby *v.* Vermont Copper Min. Co., 56 N. Y. 623 (1874). A stockholders' meeting held outside of the state cannot be attacked by those who participate in it or receive the benefits of it. A statute against holding elections out of the state does not prevent stockholders' meetings for other purposes. Handley *v.* Stutz, 139 U. S. 417 (1891). An increase of capital stock which is voted at a stockholders' meeting held out of the state is valid if all the stockholders assent. "No valid objection can be made to a stockholders' meeting held in a foreign jurisdiction, provided all the shareholders give their consent to such meeting or ratify its action." Stutz *v.* Handley, 41 Fed. Rep. 531, 538 (1890). Rev'd on other grounds in Handley *v.* Stutz, 139 U. S. 417. By-laws enacted by a board of directors of a Texas corporation at a meeting of stockholders held in Paris are void, and a stockholder may disregard them, although he was represented by proxy at the meeting. The directors are not even *de facto*. Franco-Texan Land Co. *v.* Laigle, 59 Tex. 339 (1883). A special charter must be accepted before the corporation exists, and such acceptance cannot be at a meeting held out of the state. Hence a bill by a stockholder to set aside a forfeiture of his stock was dismissed by the court. Smith *v.* Silver Valley Min. Co. 64 Md. 85 (1885). A stockholders' meeting out of the state is "irregular, if not void." Mack *v.* De Bardeleben, etc. Co., 90 Ala. 396 (1890). A stockholder in a limited partnership who is represented by proxy at a meeting held outside of the state cannot object thereto, and he cannot object to meetings of the directors being held outside of the state, where he presented a claim at one of such meetings. Stradley *v.* Cargill, etc. Co., 135 Mich. 367 (1904).

2 Where a meeting of stockholders other than the first organization meeting is held out of the state, and directors are elected, the acts of those directors cannot be attacked by corporate creditors on the ground that the election was illegal. Wright *v.* Lee, 2 S. D. 596 (1892); s. c., 4 S. D. 237. For cases to the contrary see notes *supra*. Where a person takes title to land for a corporation to be formed, and thereafter he joins in the formation of the corporation, he cannot defend an action against the corporation to obtain title by setting up that its organization meetings were held outside of the state. Tuckasegee Min. Co. *v.* Goodhue, 118 N. C. 981 (1896). Creditors of a Delaware corporation cannot defeat its mortgage on the ground that it held its organization meetings outside of the state. Hasbrouck *v.* Rich, 113 Mo. App. 389 (1905).

either state.[1] And proceedings at a meeting in any one of the states are valid in respect to the property of the corporation in all of them, without a repetition of the meeting in any other of those states.[2] Where the statute allows elections to be held at a place fixed by the by-laws, the election need not be held at the city where the principal place of business is, but may be held at any other place in the state.[3]

§§ 590, 591. *First meeting under a special charter.*—Where an act incorporates three specified persons and their "associates," those three alone organize the company and are entitled to subscribe the capital stock or to allow others to subscribe.[4]

1 Graham *v.* Boston, etc. R. R., 118 U. S. 161 (1886); Covington, etc. Co. *v.* Mayer, 31 Ohio St. 317 (1877). See also Ohio, etc. Ry. *v.* People, 123 Ill. 467 (1888); and ch. LIII, § 910, *infra.*

2 Same cases.

3 Union, etc. Bank *v.* Scott, 53 N. Y. App. Div. 65 (1900). Where by resolution of the stockholders all the property of an embarrassed corporation is transferred to trustees to sell and pay the debts and reconvey the remainder to the corporation, and the trustees proceed to do so, the transaction is legal, even though the stockholders' meeting is not held at its principal office, and proxies were irregular and unauthorized, and the directors took no action, and the conveyances were irregular. Kessler & Co. *v.* Ensley Co., 141 Fed. Rep. 130 (1905); aff'd, 148 Fed. Rep. 1019.

4 Lechmere Bank *v.* Boynton, 65 Mass. 369 (1853); Hughes *v.* Parker, 20 N. H. 58 (1849). See also p. 663, *supra.* The grant of corporate powers to one person and his associates and successors does not require of such person that he should take associates before the act can take effect or corporate powers be exercised, but confers upon him alone the powers of the corporation, and his acts within the grant of such powers become the acts of the corporation. Penobscot Boom Corp. *v.* Lamson, 16 Me. 224 (1839). Where a special charter named the incorporators and commissioners, and the notice called for by the charter of the opening of the books of subscription was given, and all incorporators attended the meeting and verbally subscribed for stock, and gave checks to apply on the same, and a meeting of the stockholders was held and directors elected, and the directors held their meeting and elected officers, and annual meetings were held thereafter for five years, when the company was practically abandoned, and the checks were never used,—all this amounted to a legal organization of the corporation. Moreover, the corporation existed by the charter itself, without action on the part of the incorporators. A company thus organized may enjoin from exercising its franchises a subsequent attempted organization of the company made sixteen years thereafter, the subsequent organization having been made by part only of the incorporators. The incorporators cease to have any powers after the first organization meeting. The remedy may be in equity, and need not be in *quo warranto.* Union Water Co. *v.* Kean, 52 N. J. Eq. 111 (1893). Where the incorporators named in a special charter organize by subscribing one share each and allowing another person to subscribe for the remainder, he at the same time entering into a personal contract with them that he would construct the street railway called for by the charter within a

Statutory provisions as to notice of the first meeting are directory. They need not be observed if the stockholders acquiesce.[1]

Where several persons, their associates and successors, are declared to be a corporation, one of them with new parties may meet, organize, and adopt by-laws, without the capital being first subscribed and without the others if they do not object.[2] As to an over-subscription for stock, the rules that govern the subject are considered elsewhere.[3] The survivors of those who by special act are made a corporation may call the first meeting many years after the act was passed, and may open books for subscription to the stock.[4] But where a company is chartered in 1860, and does not organize until 1884, an exemption from taxation contained in the charter is lost by reason of a constitutional provision enacted in 1870 forbidding such exemptions.[5]

§ 592. *Directors' meetings.*—The various questions connected with directors' meetings, the place where such meetings may be held, the notice that is required, the question of whether the directors may act without meeting, and the requirements as to a quorum, are discussed elsewhere.[6] Where a statute provides that the charter may be amended in certain respects upon the directors or a majority of them making and signing a certificate, such making and signing need not be at a meeting of the directors. No meeting is required.[7]

§ 593. *By whom and when stockholders' meetings are to be called—Mandamus—Fraud in the call.*—Where the time and place of a meeting and the business to be transacted at that meeting are not so fixed by the charter or otherwise that the stockholders are bound to take notice of them, it is necessary that the meeting be called in accordance with the by-laws, or, in the absence of a by-law, by the highest existing corporate authority.[8]

In the absence of any special authority to any particular person

certain time, and for failure so to do he was to "return the charter," a suit by the original incorporators to cancel his subscription and to obtain control of the board of directors will not lie, inasmuch as the contract was an attempt to transfer the corporate franchise. Simonds *v.* East Windsor, etc. Ry., 73 Conn. 513 (1901).

1 Braintree, etc. Co. *v.* Braintree, 146 Mass. 482 (1888).

2 McGinty *v.* Athol, etc. Co., 155 Mass. 183 (1892).

3 See §§ 57, 58, *supra.*

4 Marmora, etc. Co. *v.* Murney, 1 C. P. Rep. (Can.) 29 (1850).

5 Planters' Ins. Co. *v.* Tennessee, 161 U. S. 193 (1896).

6 See § 713*a*, *infra.*

7 Burden *v.* Burden, 159 N. Y. 287 (1899).

8 Evans *v.* Osgood, 18 Me. 213 (1841), holding that, where a proprietors' meeting could be called "by a petition signed by twelve of them at least," it was not a legal call if eleven signed, although they owned twelve shares; Congregational Soc. of Bethany *v.* Sperry, 10 Conn. 200 (1834);

to call meetings, it has been held that the general agent of the corporation may make the call,[1] but that the secretary cannot;[2] yet even though the secretary calls a stockholders' meeting without authority of the board, nevertheless, if the next day the board ratifies the proceedings, the notice is good.[3] The president and secretary have no power to call a stockholders' meeting.[4] The board of directors may always call a meeting of the stockholders.[5] Although a meeting of the board of directors at which a quorum is not present calls a stockholders' meeting, and the stockholders' meeting takes action, yet where no stockholders object until six months thereafter the court will not interfere.[6] And even though, on account of vacancies in the board of directors, it cannot act, yet the remaining directors may call a stockholders' meeting to hold an election.[7]

Statutory provisions as to who shall call the meeting, whether it be the first and organization meeting, or a subsequent one, may be waived by unanimous consent of the incorporators or stockholders.[8]

State *v.* Pettineli, 10 Nev. 141 (1875), where the by-laws of a corporation provided that meetings of the stockholders should be called by the trustees, and it was held that any other mode of calling, such as by the president, was insufficient. In Johnston *v.* Jones, 23 N. J. Eq. 216 (1872), the charter provided for annual elections, but no by-laws had been made fixing the time. The authority to call an election being in the directors, it was held not sufficient for a majority of these to sign the notice without stating that it was given by order of the board, and without designating themselves as directors. See also Stevens *v.* Eden Meeting-house Soc., 12 Vt. 688 (1839), holding that notices of meetings could not be proved by parol where there was a by-law requiring the clerk to post written notice.

1 Stebbins *v.* Merritt, 64 Mass. 27 (1852).

2 The secretary and a person holding proxies on stock owned by the state cannot call a meeting to elect officers; nor can a statute order an election in a brief time. Cassell *v.* Lexington, etc. Co., 9 S. W. Rep. 502, 701 (Ky. 1888). The secretary has no inherent right to call a meeting of the stockholders, especially where the statute provides that the directors may call a stockholders' meeting. *Re* State of Wyoming Syndicate, [1901] 2 Ch. 431.

3 Hooper *v.* Kerr, etc. Co., 83 L. T. Rep. 729 (1900).

4 Dusenbery *v.* Looker, 110 Mich. 58 (1896).

5 Cassell *v.* Lexington, etc. Co., 9 S. W. Rep. 502, 701 (Ky. 1888). Paringa Mines Ltd. *v.* Blair, [1906] 2 Ch. 193. The board of directors may fix the time if the charter or by-laws do not. Commonwealth *v.* Smith, 45 Pa. St. 59 (1863).

6 Southern, etc. Bank *v.* Rider, 73 L. T. Rep. 374 (1895).

7 Toronto, etc. Co. *v.* Blake, 2 Ont. Rep. (Can.) 175 (1882). *Cf.* § 713*a*, *infra*.

8 See § 234, notes, *supra*, also §§ 590, 599, *infra;* Angell & Ames, Corp., § 491, to the effect that "want of authority may be waived by the presence and consent of all who have a right to vote." Although the charter prescribes that the commissioners who receive the subscriptions shall call the first meeting by publishing a notice, yet this call may be waived, and the stockholders may meet and

If, upon the organization of a corporation, a majority of the subscribers refuse to proceed in calling a meeting, the minority may call it, and bind the corporation.[1]

Where the statute requires due notice to be given, it need not be given by any particular person nor in any particular form.[2] A charter provision, or by-law, authorizing the calling of a meeting in a certain way does not necessarily prevent the meeting being called in a different way, but unless waived the rule is otherwise, where the charter or by-law is peremptory.[3] The president and cashier of a bank have no authority to call a stockholders' meeting, where the charter provides that stockholders' meetings may be called by the board of directors or any three stockholders.[4] The officers or

organize without a call, if all assent. Judah *v.* American, etc. Co., 4 Ind. 333 (1853); Chamberlain *v.* Painesville, etc. R. R., 15 Ohio St. 225 (1864), where the statute provided that, as soon as ten per cent. on the capital stock should be subscribed, the persons named in the certificate of incorporation, or any three of them, might give notice of an election of directors. It was held simply directory, and not indispensable to an election, that the notice be so given. In Newcomb *v.* Reed, 94 Mass. 362 (1866), the court declared the purpose of such statutes to be to avoid such difficulty as would arise where two parties should attempt to organize separately under the same charter. It was there held that persons elected officers at a meeting held in variance with such statutory direction were directors nevertheless, and were subject to the statutory liability for corporate debts. Where three persons are appointed to make a call, and one of them calls the meeting of incorporation, the other two making no objection, the organization of the company at the meeting so called is valid. Walworth *v.* Brackett, 98 Mass. 98 (1867); Hardenburgh *v.* Farmers', etc. Bank, 3 N. J. Eq. 68 (1834), holding that if the call for the meeting to elect the first directors be signed by the commissioners authorized to make the call individually, and not by virtue of a formal order of the commissioners, or if their names be signed to such a call by the secretary without objection by them, these irregularities will not affect the validity of the proceedings at the meeting.

1 Busey *v.* Hooper, 35 Md. 15 (1871).

2 West Koshkonong Cong. *v.* Ottesen, 80 Wis. 62 (1891).

3 Where a by-law provides that special meetings may be called by the president, or in his absence by the secretary, on application made by ten members in writing, the directors may call a special meeting without such an application. Citizens' Mut. F. Ins. Co. *v.* Sortwell, 90 Mass. 217 (1864). But where a by-law authorizes the trustees to call a meeting, a meeting called by the president is irregular. State *v.* Pettineli, 10 Nev. 141 (1875). When the by-laws require a call to be posted in writing, a call by parol is insufficient. Stevens *v.* Eden Meeting-house Soc., 12 Vt. 688 (1839). The manner of making the call may be prescribed by by-law; and when so prescribed, provided the by-law is reasonable, calls made in that way are valid, even though the charter said that three stockholders might call a meeting. Taylor *v.* Griswold, 14 N. J. L. 222 (1834).

4 Matthews *v.* Columbia Nat. Bank, 79 Fed. Rep. 558 (1897).

agents of a corporation whose duty it is to call meetings may, in case they neglect or refuse to issue the call, be compelled by *mandamus* to call a meeting at the instance of a stockholder.[1] Courts have no power to call corporate meetings except by *mandamus*.[2] But where the minority have a right to cumulate their votes, and the majority adjourn the annual election for the sole purpose of continuing in office the previous directors, the minority may enjoin further adjournments and may compel an election to be held, and may have a decree that the hold-over president and treasurer, who have been re-elected by the directors after a new election should have been held, are not re-elected for the entire year.[3]

1 People *v.* Cummings, 72 N. Y. 433 (1878); State *v.* Wright, 10 Nev. 167 (1875); People *v.* Governors of Albany Hospital, 61 Barb. 397 (1871); McNeely *v.* Woodruff, 13 N. J. L. 352 (1833); Regina *v.* Aldham, etc. Soc., 6 Eng. L. & Eq. 365 (1851). Where an election has not been held at the proper time, as required by statute, a stockholder may by *mandamus* compel the directors to call a meeting for that purpose, a request to that effect having been first made to the board of directors. Sylvania, etc. R. R. *v.* Hoge, 59 S. E. Rep. 806 (Ga. 1907). A *mandamus* to compel the calling of a meeting of the stockholders to elect directors should be against the board of directors and not against the president and secretary. Dusenbury *v.* Looker, 110 Mich. 58 (1896). *Mandamus* lies to compel the calling of a special stockholders' meeting in accordance with the by-laws. Bassett *v.* Atwater, 65 Conn. 355 (1895). The court will not order the directors to call a meeting for business other than an election when they or a certain proportion of the stockholders may call it. MacDougall *v.* Gardiner, L. R. 10 Ch. App. 606 (1875). In Goulding *v.* Clark, 34 N. H. 148 (1856), it is held that, where there is no officer competent to call a meeting, there is no way of convening except by reorganization of the company or a published notice given under the statutes. All the stockholders, of course, could convene and thereby waive notice. See § 599, *infra.* The proper officer may be commanded by *mandamus* to send out notices of the annual election. People *v.* Hart, 11 N. Y. Supp. 670, 673 (1890). *Mandamus* lies to compel a meeting of vestrymen. People *v.* Winans, 9 N. Y. Supp. 249 (1890). Where those who have the right to call a meeting of the shareholders refuse to exercise that right, for the express purpose of preventing the shareholders from duly assembling, the court will, if necessary, interfere to protect the shareholders against an abuse of power on the part of those intrusted with the management of the affairs of the company. Foss *v.* Harbottle, 2 Hare, 461 (1843); Isle of Wight R. Co. *v.* Tahourdin, L. R. 25 Ch. D. 320 (1883). *Mandamus* lies to compel the annual election of the entire body of directors or trustees. Commonwealth *v.* Keim, 38 Leg. Int. 32 (1881); People *v.* Fairbury, 51 Ill. 149 (1869). Dictum that *mandamus* lies to compel election. *Re* Union Ins. Co., 22 Wend. 591 (1840).

2 The fact that foreclosure proceedings are pending and a receiver is in possession does not give the court jurisdiction to call a stockholders' meeting to hold an election. Taylor *v.* Philadelphia, etc. R. R., 7 Fed. Rep. 381 (1881).

3 West Side Hospital of Chicago *v.* Steele, 124 Ill. App. Rep. 534 (1906).

If there is any fraud in the calling of the meeting, the proceedings of the meeting may be attacked in the courts. The fraud may consist in concealing the notice,[1] or in changing the time of the meeting,[2] or in misstating the business.[3] A court of equity may restrain the directors from fixing the time for an annual meeting at a date when many members are in the country, the purpose being to prevent them from exercising their right to vote.[4]

§ 594. *When the stockholders are entitled to notice of corporate meetings.*—If the time and place at which a corporate meeting is to be held and the business to be transacted are distinctly fixed in the charter or by a by-law, this is of itself sufficient notice to all the stockholders, and no further call or notice of that meeting is necessary, unless the charter or by-laws require it.[5] But an annual meet-

1 See § 596, *infra.*

2 In a stockholder's suit to enjoin a consolidation the court will consider the legality of an election, the time of holding which was illegally changed by the board of directors. Nathan *v.* Tompkins, 82 Ala. 437 (1887).

3 If directors convene a meeting to pass resolutions favorable to themselves on questions in which the interests of the directors are opposed to those of the shareholders, by a circular which is misleading, and which contains statements calculated to obtain proxies in their favor without giving the shareholders the information necessary to enable them to form a just judgment as to who are the proper persons to whom to intrust their votes, the court will grant an injunction to restrain the holding of the meeting or to restrain the directors from laying such resolutions before the meeting. Jackson *v.* Munster Bank, 13 L. R. Ir. 118 (1884).

4 Cannon *v.* Trask, L. R. 20 Eq. 669 (1875). A majority of the board of directors cannot lengthen their term of office by shortening the time of the annual meeting of the stockholders, in violation of the stockholders' by-laws, so that the election is held when they control the stock. Nathan *v.* Tompkins, 82 Ala. 437 (1887).

5 Warner *v.* Mower, 11 Vt. 385, 393 (1839); State *v.* Bonnell, 35 Ohio St. 10, 15 (1878). If the charter or by-laws of a corporation fix the time and place at which regular meetings shall be held, this is itself sufficient notice to stockholders, and no further notice is necessary. Morrill *v.* Little Falls Mfg. Co., 53 Minn. 371 (1893). Notice of the time and place of a stockholders' meeting must be given unless the stockholders are present in person or by proxy, or unless the time and place are fixed by statute, charter or usage. Hill *v.* Atlantic, etc. R. R., 143 N. C. 539 (1906). As to whether notice is necessary of the annual meeting, where the corporation has long been defunct, see Morrill *v.* Little Falls Mfg. Co., 60 Minn. 405 (1895). Where the by-laws fix the time and place for the annual meeting no notice is necessary, and even if a notice was misleading, yet if a majority met and elected a trustee, a suit instituted by the corporation under control of such trustee is legally instituted. Jones *v.* Hilldale, etc. Soc., 65 S. W. Rep. 838 (Ky. 1901). Where the by-laws of a membership corporation not having any capital stock, state the regular time and place for the annual meeting for election, no other notice to the members is necessary. Matter of New York, etc. Union *v.* Sullivan, 122 N. Y. App. Div. 764 (1907).

ing of the stockholders has no power to change the by-laws by increasing the number of directors, where no notice of such proposed change was given, the change itself being of vital importance and outside the usual business transacted at an annual meeting.[1] A by-law which fixes the day of meeting without also fixing the hour and place is insufficient as a notice of the meeting.[2] And it is a general and settled rule of law that notice, in some way or other, must be given to every person entitled to be present at a corporate meeting.[3] When, therefore, no sufficient notice is given by charter or statute or by-law, each stockholder is entitled to an express notice of every corporate meeting.[4] No usage can operate to excuse a failure to give such a notice.[5] These rules are based on the necessity of protecting the rights of stockholders, and especially of the minority. A stockholder who takes part in a meeting cannot raise the objection that other stockholders were not notified of the meeting.[6]

1 Bagley *v.* Reno, etc. Co., 201 Pa. St. 78 (1902).

2 The fact that one of the by-laws of the corporation fixes the day upon which the annual meeting of the corporation shall be held is not of itself a sufficient notice of the hour and place at which the meeting is to be held. There must be an express notice of the hour and place of meeting. Otherwise, unless all the stockholders are present and consent, either in person or by proxy, the meeting cannot legally be held. San Buenaventura, etc. Co. *v.* Vassault, 50 Cal. 534 (1875). Though the by-laws of a corporation fix the date of the annual meeting, that of itself will not be notice of the meeting. Notice must be given of the place of the meeting; and a provision of the charter for the calling of all meetings is a mandatory provision, applicable alike to general and special meetings. U. S. *v.* McKelden, 11 MacArthur & M. 162 (D. C. 1879).

3 "To support the validity of corporate acts, each member must be actually summoned." Angell & Ames, Corp., § 492. A member who is expelled at a meeting of which he had no notice may cause the proceedings to be set aside. Medical, etc. Soc. *v.* Weatherly, 75 Ala. 248 (1883). "Due notice of the time and place of a corporate meeting is, by the English law, essential to its validity, or its power to do any act which shall bind the corporation." Dillon, Mun. Corp., § 200.

4 Stow *v.* Wyse, 7 Conn. 214 (1828), the court saying, in a dictum: "If no particular mode of notifying the stockholders be provided, either in the charter or in any by-law, yet personal notice might be given; and this, in such case, would be indispensable." Wiggin *v.* Freewill Baptist Church, 49 Mass. 301 (1844), a dictum; Jackson *v.* Hampden, 20 Me. 37 (1841); Rex *v.* Langhorn, 4 Ad. & El. 538 (1836); s. c., 6 Nev. & M. 203 (1836); Smyth *v.* Darley, 2 H. L. Cas. 789 (1849), the last four cases being municipal corporation cases. See also Stebbins *v.* Merritt, 64 Mass. 27 (1852), where a meeting called by a general agent in the absence of a statute or by-law was upheld though one member was mentally incapable of receiving notice.

5 Wiggin *v.* Freewill Baptist Church, 49 Mass. 301 (1844); Rex *v.* Hill, 4 Barn. & C. 426 (1825), where an ancient custom of calling a meeting for an election of burgesses by ringing a bell was held not to be sufficient notice.

6 See § 599, *infra.*

§ 595. ***The essential elements of a notice of a meeting are time, place, and business.***—The contents of the notice depend upon the character of the meeting. There are three matters concerning every corporate meeting of which the members are entitled to notice, namely: the time, the place, and the business proposed to be transacted. Some or all of these may be known to him by virtue of a charter provision or a by-law or a statute. But if any one of them is not known in that way, the stockholders are entitled to an actual notice thereof. Accordingly, it is the rule that, in the absence of other valid notice, the call must specify the time and place of meeting and the business to be considered. Although the time of a meeting is fixed by charter, nevertheless the meeting may be held at a subsequent time and be valid.[1] The precise hour at which the meeting is to be held must be stated in the notice.[2]

In general, the notice need not specify the business to be considered where the meeting is one prescribed by charter, or where the business is prescribed by charter or statute or by-law, and no other business is to be transacted.[3] But if the meeting is to be held at a time not provided by the charter, the call must specify particularly the time and also the business;[4] and the better rule is that, where

1 People *v.* Cummings, 72 N. Y. 433 (1878); Hughes *v.* Parker, 20 N. H. 58 (1849). Elections need not be held on the day fixed by the by-laws. They may be held at any subsequent time. Beardsley *v.* Johnson, 121 N. Y. 224 (1890), aff'g s. c., 1 N. Y. Supp. 608 (1888).

2 San Buenaventura, etc. Co. *v.* Vassault, 50 Cal. 534 (1875).

3 Quoted and approved in Bagley *v.* Reno, etc. Co., 201 Pa. St. 78 (1902). Notice need not be given of special business to be transacted at the regular annual meeting of the stockholders. Chicago, etc. Ry. *v.* Union Pac. Ry., 47 Fed. Rep. 15 (1891); Sampson *v.* Bowdoinham Steam Mill Co., 36 Me. 78 (1853), holding that the notice of the annual meeting need not specify that the officers are to be elected, even though the by-laws require the notice to state the business; Warner *v.* Mower, 11 Vt. 385 (1839), where a provision of the by-laws relating to notices was considered as not affecting those for stated meetings, and holding that a notice of a stated annual meeting need not specify the business to be transacted, there being nothing in the by-laws limiting or specifying the business. It is believed, however, that the rights of stockholders will be best preserved by requiring notice to be given of any extraordinary business that may come before an annual meeting.

4 *Re* Bridport Old Brewery Co., L. R. 2 Ch. 191 (1866); *Re* Silkstone Fall Colliery Co., L. R. 1 Ch. D. 38 (1875). *Cf.* Wright's Case, L. R. 12 Eq. 335, n., 345, n. (1868); Tuttle *v.* Michigan Air Line, 35 Mich. 247 (1877), holding that at common law all notices of meetings for special or exceptional purposes were required to state the object of the call. Citing Ang. & A., Corp., § 492. A meeting to organize and elect directors is invalid where no notice of the business is given. *Re* London, etc. Co., L. R. 31 Ch. D. 223 (1885); Shelby R. R. Co. *v.* Louisville, etc. R. R., 12 Bush (Ky.), 62 (1876), in which a sale of a railroad

unusual business is to be transacted, even at a regular meeting, the notice of that meeting should state the unusual business.[1] Thus, at a meeting called to alter the by-laws and transact other business, an election cannot lawfully be held.[2] Nor can an assessment be levied at a special meeting when the stockholders were not duly

was set aside because authorized at a meeting of stockholders called by a notice not sufficient in point of time, and defective in not stating the object of the meeting; Zabriskie *v.* Cleveland, etc. R. R., 23 How. 381, 400 (1859), holding that, though the notice was insufficient, yet one who was represented by proxy cannot object, especially where he delayed a long time in complaining. A notice of a meeting of a benevolent society called to dissolve must state the object of the meeting. St. Mary's, etc. Assoc. *v.* Lynch, 64 N. H. 213 (1886). A resolution passed at an extraordinary meeting, upon a matter for the consideration of which it was not avowedly called, or which was not specified in the notice convening the meeting, is altogether inoperative. Imp. Bank of China *v.* Bank of Hindustan, L. R. 6 Eq. 91 (1868); Anglo-Californian Gold Min. Co. *v.* Lewis, 6 H. & N. 174 (1860); Stearic Acid Co., 9 Jur. (N. S.) 1066 (1863). Notice of a meeting to consider the giving of a mortgage is sufficient to enable the meeting to authorize a mortgage. Evans *v.* Boston Heating Co., 157 Mass. 37 (1892). One and the same meeting may be both ordinary and extraordinary; ordinary for the purpose of transacting the usual business of the company, and extraordinary for the transaction of some particular business of which special notice may have been given. See Cutbill *v.* Kingdom, 1 Exch. 494 (1847); Graham *v.* Van Diemen's Land Co., 1 H. & N. 541 (1856).

1 An annual meeting of the stockholders has no power to change the by-laws, increasing the number of directors, where no notice of such proposed change was given, the change itself being of vital importance and outside of the usual business transacted at an annual meeting. Bagley *v.* Reno, etc. Co., 201 Pa. St. 78 (1902), citing the above text. The annual meeting cannot vote an increase of the capital stock unless special notice of that business has been given, even though the by-laws provide that any business may be transacted at the annual meeting without special notice; the statute, however, prescribing that an increase of capital stock may be at "any meeting called for the purpose." Jones *v.* Concord, etc. R. R., 67 N. H. 234 (1892). By custom any business may be transacted at the annual meeting without special notice thereof being given, but any specific restriction as to any particular business modifies such rule. Mutual F. Ins. Co. *v.* Farquhar, 86 Md. 668 (1898). A consolidated company may maintain a suit against a director of one of the constituent companies for fraudulently, at the time of consolidation, causing an issue of a large amount of stock to him out of the treasury stock for past services, which stock was thereupon exchanged for stock in the constituent company, especially where such director as trustee of the treasury stock of both companies controlled them and voted such stock for the consolidation, and also voted proxies obtained on a notice of the meeting, which did not state that his compensation was to be voted upon. United, etc. Co. *v.* Smith, 44 N. Y. Misc. Rep. 567 (1904).

2 People's Ins. Co. *v.* Westcott, 80 Mass. 440 (1860). Nor an amotion made. Rex *v.* Liverpool, 2 Burr. 723 (1759); Rex *v.* Doncaster, 2 Burr. 738 (1759).

notified that that matter would come up for consideration.[1] A notice of a meeting to increase stock need not specify what the money is to be used for.[2] Where a special meeting is called to rescind the by-laws and adopt others in their place, the notice of the meeting may state that a copy of the proposed by-laws can be inspected at the company's office and will be submitted at the meeting.[3] At a special meeting which has been called for a particular purpose, only the business specified in the call can lawfully be transacted.[4] The transaction, however, of business other than that for which the meeting was called will not invalidate the entire proceedings at that meeting. There is only an invalidity *pro tanto*.[5] The notice of a special meeting to elect directors must state that purpose.[6] Even though the annual meeting is held later than the time fixed in the by-laws, yet it is not necessary in the notice to call it a special meeting.[7]

The notice of the business to be transacted must "be a fair notice, intelligible to the minds of ordinary men. . . . The court does not scrutinize these notices with a view to excessive criticism to find out defects, but it looks at them fairly."[8] An explanatory

1 Atlantic De Laine Co. *v.* Mason, 5 R. I. 463 (1858).

2 Jones *v.* Concord, etc. R. R., 67 N. H. 119 (1891); s. c., 67 N. H. 234.

3 Young *v.* South African, etc. Synd., [1896] 2 Ch. 268. Although a notice of a corporate meeting, and proxies given for a corporate meeting, add to the name of the corporation the place where it is located, this is immaterial. Langan *v.* Francklyn, 20 N. Y. Supp. 404 (1892).

4 Warner *v.* Mower, 11 Vt. 385 (1839).

5 *Re* British Sugar Ref. Co., 3 Kay & J. 408, 413 (1857); *Re* Irrigation Co. of France, L. R. 6 Ch. 176 (1871). But it is held that at a special meeting, all the members being present and consenting, business other than that specified in the call may lawfully be transacted. Rex *v.* Theodorick, 8 East, 543 (1807).

6 Dunster *v.* Bernards, etc. Co., 65 Atl. Rep. 123 (N. J. 1906).

7 Paringa Mines, Ltd. *v.* Blair, [1906] 2 Ch. 193.

8 Henderson *v.* Bank of Australasia, 62 L. T. Rep. 869 (1890), reversed on another point in L. R. 45 Ch. D. 330; South School District *v.* Blakeslee, 13 Conn. 227 (1839). A notice that in case certain things happen a meeting will be held is not good. It is conditional and not absolute. Alexander *v.* Simpson, L. R. 43 Ch. D. 139 (1889). Where one company buys out another, the former may agree to pay a certain sum to the directors and secretary of the latter "as compensation for loss of office." This agreement is legal if the stockholders of the selling company ratify the same. The notice of a meeting of the stockholders, however, to ratify such an agreement must specify such payment, in addition to stating that the object of the meeting is to ratify the agreement generally. A circular subsequently sent to the stockholders referring to the payment to the directors and secretary is not sufficient, even though it was sent before the meeting was held. Kaye *v.* Croydon, etc. Co., [1898] 1 Ch. 358. A resolution relative to directors' pay passed at a special stockholders' meeting may differ from the resolution specified in the notice of the meeting; but if the meeting adjourns and such

circular accompanying a notice may be considered a part of it.[1] A notice of a stockholders' meeting to approve of the sale of the property of the company for stock in another company should disclose the fact that the directors of the selling company are to receive a personal advantage in the new company for underwriting its debentures, if such is a part of the agreement.[2] Action taken at a stockholders' meeting not legally called may be ratified at a subsequent meeting which is legally called.[3] In a meeting called to affirm the action of a prior meeting such action may be affirmed in part and rejected in part.[4]

§ 596. *Service of the notice.*—If the particular form of the notice or the manner in which it shall be served is prescribed by charter or by-law or by statute, the notice must be given in that manner, unless notice is waived by unanimous consent; otherwise all the proceedings of the meeting are invalid.[5] Under a statute requiring

resolution is confirmed at the adjourned meeting, it must not differ from the resolution as first passed. Torbock *v.* Lord Westbury, [1902] 2 Ch. 871. Where the by-laws provide that they can be amended only after notice to the shareholders of the general nature of the amendment, it is insufficient to merely state in the notice that new by-laws are to be adopted, copies of which can be seen at the office or will be sent to those who apply therefor, it appearing that the new by-laws provided for compensating retiring directors and ratifying past compensations to directors and increasing their remuneration and appointing some of them directors for life and relieving others from responsibility from loss, and authorizing the borrowing of $750,000. Normandy *v.* Ind., etc. Co. Ltd., 97 L. T. Rep. 872 (1907).

1 "There is no inconvenience, irregularity or impropriety in supplementing, as is often done, a notice by an explanatory circular; and the shareholder, though perhaps strictly he might say, 'Why trouble me with the circular? What I am entitled to is a notice,' still I think ought fairly to look at the two as one document, and he has both before him for his consideration." Tiessen *v.* Henderson, [1899] 1 Ch. 861.

2 Tiessen *v.* Henderson, [1899] 1 Ch. 861.

3 Hill *v.* Atlantic, etc. R. R., 143 N. C. 539 (1906).

4 *Re* Trench, etc. Co. Ltd., [1900] 1 Ch. 408.

5 Shelby R. R. *v.* Louisville, etc. R. R., 12 Bush (Ky.), 62 (1876), where there was no such publication as was required by statute, and there was no waiver; Tuttle *v.* Michigan Air Line, 35 Mich. 247 (1877), where a consolidated company sued a subscriber to stock in one of the old companies, and he defeated the action by showing that the statutory notice of the proposed consolidation had not been given; Reilly *v.* Oglebay, 25 W. Va. 36 (1884), where a notice by *the secretary*, when the statute required to be given by the *board of directors* or by *stockholders holding one-tenth of the capital*, was held insufficient, although it was shown that he had the authority from stockholders holding the required amount of stock; Stevens *v.* Eden Meeting-house Soc., 12 Vt. 688 (1839), holding that, where a by-law required notice to be posted, parol proof of such posting was incompetent unless the written notice

"fourteen days' public notice at the least . . . by advertisement," it has been held that fourteen clear days' notice must be given.[1] The New York statutes, on the contrary, exclude the day of publication and include the day of the event.[2] Where notice of a meeting is not mailed thirty days before the meeting, as required by the by-laws, a stockholder who does not attend may have an election held at such meeting set aside, even though his vote would not have changed the result. He is entitled to be present to argue with the other stockholders, or to buy their stock, if he can and wishes to do so. The fact that his attorney at law was present is immaterial, no proxy having been given.[3] In the absence of an express provision as to the manner of serving a notice of a meeting, it is the common-law rule that each member of the corporation is entitled to notice, either personal or by a writing, actually received.[4] Notice of a call for the payment of a subscription must be served personally, and service by mail is insufficient, unless the by-laws authorize

was shown to have been lost; Swansea Dock Co. *v.* Levien, 20 L. J. (Exch.) 447 (1851), where a notice was held bad because the statute declared it should be printed in a newspaper circulating in the district of the principal place of business, while in this case there was no proof that the paper selected ever circulated there. Hence the removal of directors at such a meeting was illegal. Swansea Dock Co. *v.* Levien, 20 L. J. (Exch.) 447 (1851). As to waiver, see § 599, *infra*.

1 *Re* Railway Sleepers Supply Co., L. R. 29 Ch. D. 204 (1885), holding that where by statute a second meeting to confirm the action of a first meeting must be held "at an interval of not less than fourteen days," both of the days on which the meetings were held must be excluded; Reg. *v.* Aberdare Canal Co., 14 Q. B. 854 (1850), holding that where notice must be published "at least sixteen days before such meeting" in condemnation proceedings, a notice published January 27th for a meeting February 12th was insufficient; Reg. *v.* Justices of Shropshire, 8 Ad. & E. 173 (1838), not a corporation case, but holding that notice of appeal to be "fourteen days at least" before the opening day must be fourteen days exclusive of the day of serving notice and of the day of the event. To same effect, Norton *v.* Salisbury Town Clerk, 4 C. B. 32 (1846). A notice for four weeks successively, once a week, next preceding the time, requires publication for four full weeks once a week, and such publication must begin four weeks next before such time, and four full weeks must elapse between the first publication and such time. Hodge *v.* United States Steel Corp., 64 N. J. Eq., 807 (1903).

2 L. 1892, ch. 677, § 27; Code Civ. Proc., § 787.

3 Matter of Keller, 116 N. Y. App. Div. 58 (1906).

4 Notice to non-residents by letter was upheld in Stebbins *v.* Merritt, 64 Mass. 27 (1852). For dicta to the effect that the notice must be personal, see Tuttle *v.* Michigan Air Line, 35 Mich. 247 (1877); Stow *v.* Wyse, 7 Conn. 214 (1828). See also § 713*a*, *infra*, as to the kind of notice required of directors' meetings. See also § 594, *supra*, and notes.

service in that manner.[1] The physical or mental incapacity of one of the stockholders will not excuse a failure to give him notice of a meeting; but it is very clear that the meeting may lawfully convene and transact business, although one of the members is incapable, by reason of imbecility, of receiving the notice.[2] The absence of a stockholder from home does not excuse a failure to leave the notice.[3] And where one of the stockholders dies after notice of a meeting, but before the meeting convenes, and no administrator is appointed in time to act at that meeting, there is on this account no ground to impeach the regularity of the meeting.[4] A by-law that no representative of a deceased stockholder shall have a right to notice of meetings, unless the stock has been registered in his name, is valid.[5] Even though a stockholder has died, the corporation may continue to send notices to him at his registered address, the administrator not having requested a change.[6] It has been held that a pledgee of shares is not entitled to a notice of corporate meetings if the pledgor receives notice.[7] Where stock is owned by a firm, notice to one of the firm is sufficient.[8] If the notice is fraudulently concealed from the owner of a majority of the stock, even where the notice is published in accordance with statute, the election will be set aside.[9] The ex-

1 North, etc. Co. *v.* Bishop, 103 Wis. 492 (1899).

2 Stebbins *v.* Merritt, 64 Mass. 27 (1852).

3 Jackson *v.* Hampden, 20 Me. 37 (1841). In Porter *v.* Robinson, 30 Hun. 209 (1883), it is held that notice need not be given to a member of a board of school trustees, the board being a body corporate who is absent from the state and cannot attend the meeting, and that a failure to notify such a member will not render the proceedings at the meeting irregular or invalid. Members of English joint-stock companies residing abroad are not entitled to any notice of corporate meetings. *Re* Union Hill Silver Co., 22 L. T. Rep. 400 (1870).

4 Freeman's Nat. Bank *v.* Smith, 13 Blatchf. 220 (1875); s. c., 9 Fed. Cas. 760.

5 Allen *v.* Gold Reefs, etc. Limited, [1900] 1 Ch. 656, rev'g [1899] 2 Ch. 40.

6 Dana *v.* American, etc. Co., 65 Atl. Rep. 730 (N. J. 1907).

7 McDaniels *v.* Flower Brook Mfg. Co., 22 Vt. 274 (1850). An unrecorded pledgee of stock is not entitled to be notified of proceedings for a consolidation with another company. A corporation is not liable to an unrecorded pledgee of its stock, even though a consolidation is brought about and the new stock issued to the peldgor thereby depriving the pledgee of the value of the stock held in pledge, the corporation having acted in good faith. Cleveland City Ry. *v.* First Nat. Bank, 68 Ohio St. 582 (1903).

8 Kenton Furnace, etc. Co. *v.* McAlpin, 5 Fed. Rep. 737, 747 (1880).

9 Where, in addition to irregularities, the notice of the election at a deferred day, which is published in accordance with the charter, is concealed from the leading stockholder, the court will set the election aside. Johnston *v.* Jones, 23 N. J. Eq. 216 (1872).

pense of publishing the notice of a special stockholders' meeting is properly chargeable against the company.[1]

§ 597. *Notice must be served a reasonable time before the meeting.*—The notice must be served upon the stockholders at such time as is prescribed by the statutes, or if the statutes are silent, by the by-laws, or if both are silent on the subject, a reasonable time before the day of meeting.[2] Even though a notice of a meeting of the stockholders in an English corporation is so short as not to reach American stockholders in time for the meeting, yet if such notice was in accordance with the English law and was not in violation of the charter or by-laws, it is legal.[3] Where action by one meeting must be confirmed by another meeting, notices of both meetings may be sent out at the same time, the second to be contingent upon a resolution being passed by the first.[4]

§ 598. *The division of meetings into ordinary and extraordinary.*—Corporate meetings of stockholders are frequently divided, both by the judges and the text-writers, into two classes—the first being special or extraordinary, and the second being ordinary, regular, stated, or general. By reason of this attempt at classification much confusion has been introduced into the law without any corresponding advantage. The terms employed to distinguish the various kinds of meetings are used in different senses by different writers, so that it is difficult to define them in such a way as to avoid confusion.[5]

1 Lawyers', etc. Co. *v.* Consolidated, etc. Co., 187 N. Y. 395 (1907). The board of directors may at the expense of the corporation publish and also issue to the stockholders notice of a proposed scheme of consolidation or for an exchange of the stock for stock in another corporation, even though the plan is not consummated. Rascover *v.* American, etc. Co., 135 Fed. Rep. 341 (1905).

2 *Re* Long Island R. R., 19 Wend. 37 (1837). See also Covert *v.* Rogers, 38 Mich. 363 (1878), where a similar rule is declared as to notice to directors of their meetings. The legislature cannot unreasonably shorten the time of the next meeting. Cassell *v.* Lexington, etc. Co., 9 S. W. Rep. 502 and 701 (Ky. 1888). Where by statute it is provided that thirty days' notice shall be given of certain corporate meetings, that length of time may apply to notices of other meetings of the same corporation. Shelby R. R. *v.* Louisville, etc. R. R., 12 Bush (Ky.), 62 (1876).

3 Republican, etc. Mines *v.* Brown, 58 Fed. Rep. 644 (1893), rev'g Brown *v.* Republican, etc. Mines, 55 Fed. Rep. 7.

4 *Re* North, etc. Co., Ltd., [1905] 2 Ch. 15, rev'g [1905] 1 Ch. 609.

5 For instance, in England, all meetings of stockholders are called "general" meetings, and are either ordinary" (*i. e.*, regular) or "extraordinary" (*i. e.*, special). In England the same meeting may be both ordinary and extraordinary. See Lindley on Companies, pp. 425, 426 (6th ed.).

§ 599. *Waiver of notice.*—A stockholder may expressly or by his acts waive his right to have a notice of a corporate meeting duly served upon him.[1] For instance, an admission at a stockholders' meeting of the validity of a claim against the company is valid, even though the meeting was not called in accordance with the statutes, it not appearing that any stockholder has ever objected.[2] Although a stockholder is present at a meeting at which an increase in capital stock is voted, yet he may object thereto on the ground that special notice was not given that the question of the increase would be voted on at that meeting, inasmuch as if such notice had been given, other stockholders might have attended and changed the result.[3] But the court will refuse to set aside an election where every share of stock was represented at the election, even though the minority refuse to vote on the ground that the meeting had been called on less than ten days' notice, required by the statute.[4]

1 Quoted and approved in *In re* Hammond, 139 Fed. Rep. 898 (1905). The acts of a meeting are valid, though held without notice, if all are present or subsequently ratify and approve of the action. Stutz *v.* Handley, 41 Fed. Rep. 531 (1890); affirmed as to this point, but reversed as to others, in Handley *v.* Stutz, 139 U. S. 417 (1891). A party accepting the benefit of a contract for a long time cannot repudiate it on the ground that the calls for the meetings of the executive committee and of the stockholders which authorized the contract were insufficient; nor can he set up in such a case that the directors had not authorized the contract. Union Pac. Ry. *v.* Chicago, etc. Ry., 51 Fed. Rep. 309 (1892). A stockholder who takes part in a meeting cannot afterwards object that it was not properly called. Weinburgh *v.* Union, etc. Co., 55 N. J. Eq. 640 (1897). Germer *v.* Triple-State, etc. Co., 60 W. Va. 143 (1906). Objections to the regularity of the notice which was given are waived if all are present at the meeting and do not object to such irregularity. Stebbins *v.* Merritt, 64 Mass. 27 (1852); Richardson *v.* Vermont, etc., 44 Vt. 613 (1872), holding that objections to the proceedings of a meeting called by a notice which did not state what its object was, had been waived by a ratification at a later meeting; Jones *v.* Milton, etc. Turnp., 7 Ind. 547 (1856), where the stockholders not notified appeared and voted by proxy; Kenton Furnace Co. *v.* McAlpin, 5 Fed. Rep. 737 (1880). See also § 606, *infra*. Where several persons, their associates and successors, are declared to be a corporation, one of them with new parties may meet, organize, adopt by-laws, etc. without the capital being first subscribed and without the others, if they do not object. McGinty *v.* Athol, etc. Co., 155 Mass. 183 (1892). Notice may be waived. People *v.* Twaddell, 18 Hun, 427 (1879). If all the stockholders are present or represented at a meeting a defect in the notice is immaterial. Tompkins *v.* Sperry, etc. Co., 96 Md. 560 (1903). A stockholder's meeting held under waivers of notice is legal. Gray *v.* Bloomington & N. Ry., 120 Ill. App. Rep. 159 (1905).

2 Clark *v.* Warwick, etc. Co., 174 Mass. 434 (1899).

3 Jones *v.* Concord, etc. R. R., 67 N. H. 119 (1891); aff'd, 67 N. H. 234 (1892).

4 *In re* Griffing Iron Co., 63 N. J. L. 168 (1898); aff'd, 63 N. J. L. 357 (1899).

Difficulty as to waivers has been encountered where by statute or by charter the notice must be published or must be given a specified length of time before the meeting is held. This question arises often in regard to the first and organization meeting of the company, or in regard to a meeting to increase the capital stock, or to issue bonds, or to give a mortgage, or to effect a consolidation. The rule, however, is now well established that such statutory notice is for the benefit of the stockholders themselves, and, if they waive it, the meeting and all the proceedings are as valid as they would be had the full statutory notice been given.[1]

1 Even though the statute requires ten days' notice of the organization meeting to the subscribers to the capital stock, and that a copy of such notice be included in the report to the secretary of state, yet the stockholders may unanimously waive this provision. Butler, etc. Co. *v.* Cleveland, 220 Ill. 128 (1906). Even though the constitution and statutes require that the capital stock shall not be increased, except upon a majority vote of the stockholders at a meeting called for the purpose, on sixty days' public notice, yet the stockholders may unanimously waive such notice and the expiration of such time. State *v.* Cook, 178 Mo. 189 (1903). If all the stockholders are present in person or by proxy at a meeting, the statutory publication of notice of the meeting is thereby waived. *In re* Mathiason Mfg. Co., 122 Mo. App. 437 (1907). A constitutional and statutory requirement that bonded debt shall only be incurred, when voted at a meeting called on sixty days' notice, does not prevent a waiver of such notice by all the stockholders either by express waiver or by attendance without such notice. Riesterer *v.* Horton, etc. Co., 160 Mo. 141 (1901). A provision that notice must be given to stockholders thirty days before they vote in favor of a mortgage may be waived by them, and a waiver may be by failure to object. Bridgeport Electric, etc. Co. *v.* Meader, 72 Fed. Rep. 115 (1895). Even though the statutory notice of a stockholders' meeting is not given, a mortgage authorized by the board of directors elected at such a meeting is legal, where the corporation receives the benefit therefrom, without any stockholder objecting. Atlantic Trust Co. *v.* The Vigilancia, 73 Fed. Rep. 452 (1896). Where a mortgage is approved by the representatives of all the stock except two shares, it is good as an equitable mortgage, even though the meeting of stockholders authorizing it was not called by advertisement, as required by statute. Central Trust Co. *v.* Bridges, 57 Fed. Rep. 753 (1893). A statutory provision that a certain notice must be given of a meeting to authorize a mortgage may be waived. Central Trust Co. *v.* Condon, 67 Fed. Rep. 84 (1895). Although the statutes of Montana require that a mortgage may be given only after a stockholders' meeting convened by publication of notice, etc., has voted it, yet all the stockholders, by voting therefor, waive the required notice, and no one can complain. The mortgage is valid. Campbell *v.* Argenta, etc. Co., 51 Fed. Rep. 1 (1892). Although the constitution provides that there shall be sixty days' notice of the meeting to authorize the issue of bonds, yet where all the stockholders assemble and authorize the issue without any notice, and the bonds pass into *bona fide* hands, they may be enforced. The absence of a nominal stockholder whose stock is really owned by one of those present is immaterial. Wood *v.* Corry, etc. Co.,

Participation as an officer in issuing the call is a waiver by him

44 Fed. Rep. 146 (1890). A constitutional provision in regard to notice being given of a meeting for increasing the stock or bonds of a corporation is for the benefit of the stockholders and may be waived by them, or the omission of it may be ratified by them. Nelson *v.* Hubbard, 96 Ala. 238 (1892). The voluntary dissolution of a company under the statute, but without the ten days' notice required by the charter, is not such a dissolution as to prevent creditors from attaching the property of the company as though no dissolution had been had. Cleveland, etc. Co. *v.* Taylor, etc. Co., 54 Fed. Rep. 82 (1893). But the dissolution cannot be enjoined by creditors in the absence of fraud. Cleveland, etc. Co. *v.* Taylor, etc. Co., 54 Fed. Rep. 85 (1893). In general, see Columbia Nat. Bank's Appeal, 16 W. N. Cas. (Pa.) 357 (1885); s. c., 42 Leg. Int. 226; Manhattan Hardware Co. *v.* Phalen, 128 Pa. St. 110 (1889); Kenton Furnace Co. *v.* McAlpin, 5 Fed. Rep. 737 (1880), where no notice was given, although prescribed by the charter and by-laws. It was held to have been waived by the presence of all the stockholders at the meeting and their participation in its action; *Re* British Sugar Ref. Co., 3 Kay & J. 408 (1857), where it was adjudged that a shareholder who had received a circular notice of the meeting and was present could not question the legality of the meeting on the ground that the charter required, in addition to the circular, publication in a newspaper, which was not made.

A person who takes part in a meeting cannot object that it was held on five days' notice instead of fourteen, as required by the charter. Bucksport, etc. R. R. *v.* Buck, 68 Me. 81 (1878); Chamberlain *v.* Painesville, etc. R. R., 15 Ohio St. 225 (1864). A failure to give the statutory notice of the first meeting is immaterial where all but one stockholder were present and he afterwards ratified all that was done. Babbitt *v.* East, etc. Co. (N. J., 1876); Stew. Dig., p. 208, § 13. To same effect, p. 663, *supra*, and § 593, *supra;* also § 288, *supra*. A stockholder who knows of and approves of a proposed sale of a railroad by a stockholders' vote as allowed by statute cannot have the sale set aside on the ground that he was not notified of nor present at the meeting voting such sale, but he must be paid the value of his stock. Young *v.* Toledo, etc. R. R., 76 Mich. 485 (1889). The constitutional provision that bonds or stock shall not be increased except in a certain way does not apply to an original issue of bonds. Union, etc. Co. *v.* Southern, etc. Co., 51 Fed. Rep. 840 (1892). Directors elected at a meeting called on thirteen days' notice instead of fourteen, as required by statute, may make calls, where their election has been confirmed by a subsequent annual general meeting. Briton, etc. Assoc. *v.* Jones, 61 L. T. Rep. 384 (1889); People *v.* Peck, 11 Wend. 604 (1834), holding that a failure to comply with a statutory requirement regarding notice will not affect the proceedings of a meeting of a religious corporation where there is no claim that every voter was not present, or that evil resulted from the omission, and no fraud was involved. If all parties attended, they thereby admitted notice. See also Stebbins *v.* Merritt, 64 Mass. 27 (1852); Rex *v.* Chetwynd, 7 Barn. & C. 695 (1828), where the election of a burgess at a meeting of which no notice was given was held valid, because it appeared that all the members of the electing body were present; Rex *v.* Theodorick, 8 East, 543 (1807). *Cf.* U. S. *v.* McKelden, 11 MacArthur & M. 162 (D. C. 1879), where it was held that, although the date for the annual meeting is fixed by a by-law, the notice by publication provided for by

of informalities as to that call;[1] and recognition of an agent appointed at a certain meeting, by dealing and offering to deal with him as the agent of the company, is a waiver of the right to notice of that meeting.[2] One stockholder cannot avail himself of the neglect of the corporate officers to give due notice to another stockholder who does not himself complain.[3] But the failure of a stockholder to attend a stockholders' meeting is not a waiver of his right to object to the acts of the meeting as *ultra vires,* even though the notice of the meeting stated what was to be done.[4] A stockholder in a corporation may be estopped from questioning the validity of a stockholders' meeting by reason of his participation in the proceedings by proxy, where his agent was authorized to act at lawful meetings.[5] The waiver of all the stockholders is essential in order

the charter is necessary. See also *Re* Long Island R. R., 19 Wend. 37 (1837), in which it was said in a dictum that a notice regulated by statute "of course cannot be modified, or dispensed with." If all the incorporators meet and organize, a statutory requirement as to notice is waived and is not necessary. Ratification afterwards by one who was not present is equally sufficient. Benbow *v.* Cook, 115 N. C. 324 (1894). A corporation cannot defend a mortgage on the ground that the consent of the stockholders was not obtained, as required by statute. Atlantic T. Co. *v.* Crystal Water Co., 72 N. Y. App. Div. 539 (1902). See also § 808, *infra.*

1 Bucksport, etc. R. R. *v.* Buck, 68 Me., 81 (1878); Schenectady, etc. Plank Road Co. *v.* Thatcher, 11 N. Y. 102 (1854). The stockholder who, as a director, votes to call the annual meeting at an irregular time cannot question the acts of such meeting. Christopher *v.* Noxon, 4 Ont. Rep. (Can.) 672 (1883).

2 Bryant *v.* Goodnow, 22 Mass. 228 (1827).

3 Nickum *v.* Burckhardt, 30 Oreg. 464 (1897); Schenectady, etc. Plank Road Co. *v.* Thatcher, 11 N. Y. 102 (1854). Hill *v.* Atlantic, etc. R. R., 143 N. C. 539 (1906). In this case the court said: "The court rejected the offer of the defendant to prove that no notice had been given of the first election of directors. I think this was properly rejected, on the ground that the defendant could not avail himself of a neglect to give notice to any other stockholder. The defendant himself was present at that meeting and voted, and was elected a director. He has not suffered by an omission to serve notice, and he is not in a situation to object as to others." A stockholders' meeting held without notice or call cannot be objected to by those who participate or receive the benefits of it. Handley *v.* Stutz, 139 U. S. 417 (1891). A stockholder who takes part cannot object that another stockholder had no notice. *Re* Union Hill Silver Co., 22 L. T. Rep. 400 (1870); *Re* British, etc. Co., 3 Kay & J. 408 (1857). A party who did not attend the meeting cannot object that the inspectors were not sworn. *Re* Mohawk & Hudson R. R., 19 Wend. 135 (1838). See also § 620, *infra.*

4 McFadden *v.* Leeka, 48 Ohio St. 513 (1891). Failure to attend a corporate meeting is not a waiver of objections thereto. Matter of Empire State, etc., 53 N. Y. Misc. Rep. 344 (1907).

5 Columbia Nat. Bank *v.* Mathews, 85 Fed. Rep. 934 (1898). Even though the action taken at a special meeting is broader than as specified

to validate an election held at a meeting not properly called.[1] But where the treasurer has acted as such for several months without objection, notes signed by the treasurer cannot be repudiated on the ground that his election was invalid because the stockholders' meeting was not properly called.[2] He is a *de facto* officer.[3] A creditor cannot object that proper notice was not given of a stockholders' meeting which authorized an assignment for the benefit of creditors.[4] Action taken at a stockholders' meeting not legally called may be ratified at a subsequent meeting which is legally called.[5] A stockholder may object to a vote being taken by mail.[6]

§ 600. *Notice is presumed to have been regularly given.*—It is a presumption of law that proper and valid notice of a corporate meeting has been duly given to every stockholder, and that the meeting itself was regularly and lawfully held. The burden of proof is therefore upon him who alleges want of notice or insufficiency of notice, or attacks the regularity and validity of the proceedings.[7]

§ 601. *Adjourned meetings.*—An adjourned meeting is but a continuation of the meeting which has been adjourned, and when that meeting was regularly called and convened and duly adjourned, the stockholders may, at the adjourned meeting, consider and determine any corporate business that might lawfully have been transacted at the original meeting.[8]

in the notice of the meeting, yet if a proxy votes and the stockholder delays for over a year in objecting, the stockholder is bound. Synnott *v.* Cumberland, etc. Assoc., 117 Fed. Rep. 379 (1902).

1 State *v.* Pettineli, 10 Nev. 141 (1875).

2 Merchants' Nat. Bank *v.* Citizens' Gas Light Co. 159 Mass. 505 (1893).

3 See § 623, *infra.*

4 State, etc. Bank *v.* Merchants' Bank, 83 Miss. 610 (1904). A creditor cannot attack a corporate act on the ground that notice of a stockholders' meeting authorizing it was not given to all the stockholders where the only stockholder not receiving notice assented subsequently to the act. Vrooman *v.* Vansant, etc. Co., 215 Pa. St. 75 (1906). *Cf.* §§ 808, 809, *infra.*

5 Hill *v.* Atlantic, etc. R. R., 143 N. C. 539 (1906).

6 McMillan *v.* Le Roi, etc. Co. Ltd., [1906] 1 Ch. 331. See also § 625, *infra.*

7 McDaniels *v.* Flower Brook Mfg. Co., 22 Vt. 274 (1850); Hill *v.* Atlantic, etc. R. R., 143 N. C. 539 (1906). Porter *v.* Robinson, 30 Hun, 209 (1883); Sargent *v.* Webster, 54 Mass. 497 (1847); South School, etc. *v.* Blakeslee, 13 Conn. 227, 235 (1839); Lane *v.* Brainerd, 30 Conn. 565 (1862); Pitts *v.* Temple, 2 Mass. 538 (1807); Wells *v.* Rodgers, 60 Mich. 525 (1886), holding that notice is presumed, and the burden of proof in attacking the legality of the meeting is on the plaintiff. See also § 606, *infra.* All the stockholders are presumed to have had notice of a meeting that has been held. Beardsley *v.* Johnson, 121 N. Y. 224 (1890). *Cf.* Wiggin *v.* Freewill, etc. Church, 49 Mass. 301, 312 (1844). Notice of the meeting and participation therein is presumed. Synnott *v.* Cumberland, etc. Assoc., 117 Fed. Rep. 379 (1902).

8 Quoted and approved in *In re* Hammond, 139 Fed. Rep. 898 (1905). Synnott *v.* Cumberland, etc. Assoc.,

But where there is an absence of good faith, and an adjourned meeting is held in such a way as to prevent certain of the stockholders from knowing of it, the proceedings are invalid.[1] Where the original meeting was duly called and convened, the stockholders are not entitled to any other notice of the adjourned meeting than that which is implied in the adjournment.[2] But nothing can, without notice, be transacted at an adjourned meeting except the business which might have been transacted at the first meeting if a quorum had been present.[3] Even though notice of an adjourned meeting is unnecessary, yet if one is given and it is less broad as to the business to be transacted than the original notice, the second

117 Fed. Rep. 379 (1902), and in State *v.* Cronan, 23 Nev. 437 (1897); Granger *v.* Grubb, 7 Phila. 350 (1870); Farrar *v.* Perley, 7 Me. 404 (1831); Scadding *v.* Lorant, 3 H. L. Cas. 418 (1851). *Cf.* People *v.* Batchelor, 22 N. Y. 128 (1860), where the New York city board of aldermen appointed a day for the election of a city officer. At a subsequent stated meeting this resolution was rescinded, and then an election was thereupon held. *Held*, that the election was void, as some members were absent from the former meeting and had no notice of the election. A board of aldermen cannot elect an assessor and then at an adjourned meeting reconsider and elect some one else. State *v.* Phillips, 79 Me. 506 (1887). See also Hardenburgh *v.* Farmers', etc. Bank, 3 N. J. Eq. 68 (1834), where the stockholders at the first meeting proceeded to an election in spite of an adjournment by the commissioners, and the election was upheld. A meeting adjourned for want of a quorum may at the adjourned meeting proceed to business, if a quorum is present, and no notice of the adjourned meeting is necessary where the charter or by-laws provided for such adjournment. Smith *v.* Law, 21 N. Y. 296 (1860), involving a meeting of the board of directors.

1 State *v.* Bonnell, 35 Ohio St. 10 (1878). Where an election is held, after many adjournments, and a minority are present and elect directors, who repudiate a contract which exists with the holder of a majority of the stock, the latter being ignorant of the intent to elect officers, equity will enjoin the repudiation of the contract. New York, etc. Co. *v.* Parrott, 36 Fed. Rep. 462 (1888).

2 Quoted and approved in *In re* Hammond, 139 Fed. Rep. 898 (1905). Smith *v.* Law, 21 N. Y. 296 (1860); Warner *v.* Mower, 11 Vt. 385 (1839). No notice of an adjourned meeting is necessary where the stockholder is estopped from denying the validity of the original meeting. Callahan *v.* Chilcott, etc. Co., 37 Col. 331 (1906). In U. S. *v.* McKelden, 11 MacArthur & M. 162 (D. C. 1879), it was held that the proceedings of an original meeting being invalid by reason of insufficient notice, the adjourned meetings were invalid also, they being merely continuations of the original. To same effect, Wiggin *v.* Freewill, etc. Church, 49 Mass. 301 (1844).

3 Regina *v.* Grimshaw, 10 Q. B. 747 (1847). No business can be done at an adjourned meeting that could not have been done at the original meeting. Christopher *v.* Noxon, 4 Ont. Rep. (Can.) 672 (1883). Where a meeting of the board of directors could not authorize suit to collect assessments because the assessments were not yet due, an adjourned meeting of that meeting cannot authorize such suit, all of the directors not being present at the adjourned meeting and no new notice thereof having

notice governs.[1] Where the president and a portion of the members of an unincorporated association withdraw from a meeting, the remaining members may adjourn the meeting and at the adjourned meeting may take action, a quorum being present.[2] The president may adjourn a meeting which has been enjoined if all the stockholders are present, and a vote on the adjournment is not called for, and hence a meeting held later in the day by the minority is illegal.[3] A minority of an unincorporated voluntary association may adjourn from time to time, even if a majority of all the members is necessary to constitute a quorum in order lawfully to transact business.[4] A board of directors have no power to postpone a stockholders' meeting by sending out notices to that effect.[5] Where the voting of certain stock is enjoined and the meeting adjourns, the minority cannot insist on continuing the meeting and electing directors.[6]

been given. Bank of National City *v.* Johnston, 133 Cal. 185 (1901).

1 Synnott *v.* Cumberland, etc. Assoc., 117 Fed. Rep. 379 (1902).

2 Ostrom *v.* Greene, 161 N. Y. 353 (1900).

3 Haskell *v.* Read, 68 Neb. 107 (1903). See also § 606, *infra.*

4 Ostrom *v.* Greene, 161 N. Y. 353 (1900), the court saying in regard to the adjourned meeting: "Personal notice to every member was unnecessary, for it was the same in effect as if the association had sat in continuous session and had adjourned each day to the next."

5 Paringa Mines, Ltd. *v.* Blair, [1906] 2 Ch. 193.

6 Schmidt *v.* Pritchard, 112 N. W. Rep. 801 (Iowa, 1907).

CHAPTER XXXVII.

ELECTIONS AND OTHER CORPORATE MEETINGS.

§ 602. *Scope of the subject.*—The business which the stockholders of a corporation in meeting assembled have the power to transact is not extensive, but it is of great importance. They elect the directors, pass upon amendments to the charter, determine whether any increase of the capital stock shall be made, make the by-laws, and dissolve or continue the corporation. These constitute the chief functions of a stockholders' meeting. They are extraordinary in their character, and although they are exercised at long intervals are of vital importance. This chapter treats of the business which may be transacted at stockholders' meetings and of the methods of its transaction.

§ 603. *Elections are to be by the stockholders, and may be compelled by mandamus.*—At common law the directors of a corporation are to be elected by the stockholders in corporate meeting assembled.[1] Generally this is declared to be the law by charter or statutory provisions. A contract and by-law giving a voting power to bondholders at corporate elections is void as against public policy and the statutes, where the statutes prescribe that the directors shall be elected by the stockholders and shall not be elected in any other manner.[2] In most corporations the president, and also the vice-president, secretary, treasurer, and agents of the corporation, are elected or appointed not by the stockholders, but by the directors. All these matters, however, are generally regulated by the charter or a statute. Even though the statute provides that each stockholder shall have as many votes as he owns shares of stock, a by-law and contract that certain persons shall name two out of five directors are legal.[3]

At common law *mandamus* lies to compel an election of corporate officers.[4] There being nothing in the English statutes requiring

1 It has been held that stockholders cannot fill vacancies in the board of directors at a special meeting, when elections can only be at annual meetings. Moses *v.* Tompkins, 84 Ala. 613 (1887). The soundness, however, of this decision may well be doubted. The by-laws may and generally do give this power to the directors. And see dictum in *Re* Union Ins. Co., 22 Wend. 591 (1840), and § 624, *infra.*

2 Durkee *v.* People, 155 Ill. 354 (1895); aff'g 53 Ill. App. 396.

3 Colonist, etc. Co. *v.* Dunsmuir, 32 Can. S. C. Rep. 679 (1902). See also § 622*a*, *infra.* *Cf.* 161 Fed. Rep. 3.

4 See §593, *supra.* Where the minority have a right to cumulate their votes, and the majority adjourn the annual election for the sole purpose of continuing in office the previous directors, the minority may enjoin further adjournments and may compel an election to be held, and may have a decree that the hold-over president and treasurer, who have been re-elected by the directors after a new election should have been held, are not re-elected for the entire year. West Side Hospital of Chicago *v.* Steele, 124 Ill. App. Rep. 534 (1906).

directors, it is legal for an English corporation to have no directors, but to have managers, and another corporation may be one of the directors or may be one of the managers.[1]

All corporations for profit have power to elect a board of directors.[2]

The legislature may amend the charter so as to increase the number of directors;[3] but it cannot deprive the members of the corporation of the privilege of electing its directors.[4] Neither a by-law nor an unauthorized provision in the certificate of incorporation can provide that the first directors shall continue to be directors until they become incapacitated, resign or die.[5]

Although the corporation is not a going concern, nevertheless it may have an election of directors.[6]

§ 604. *The meeting must be held at the prescribed hour, which must be reasonable.*—The particular time at which corporate meet-

1 *Re* Bulawayo, etc. Co., Ltd., 97 L. T. Rep. 752 (1907).

2 A bank may have directors though the statute does not provide for them. All private corporations may have directors. Hurlbut *v.* Marshall, 62 Wis. 590 (1885). "The power inheres in the corporation to hold an election," where the charter or statutes are silent. Wright *v.* Commonwealth, 109 Pa. St. 560 (1885). "The power of electing both officers and members is an incident to every corporation. It is not necessary that such a power should be expressly conferred by the charter." Commonwealth *v.* Gill, 3 Whart. (Pa.) 228, 247 (1837). Authority in a charter to a cemetery corporation to do all things incident to a corporation does not give power to issue stock, and hence an election by so-called stockholders is not legal. Cooke *v.* Marshall, 196 Pa. St. 200 (1900).

3 Mower *v.* Staples, 32 Minn. 284 (1884). See also Gray *v.* Coffin, 63 Mass. 192 (1852); Longley *v.* Little, 26 Me. 162 (1846); Payson *v.* Withers, 5 Biss. 269 (1873); s. c., 19 Fed. Cas. 29; Joy *v.* Jackson, etc. Co., 11 Mich. 155 (1863); Lincoln, etc. Bank *v.* Richardson, 1 Me. 79 (1820); Greenville, etc. R. R. *v.* Johnson, 8 Baxt. (Tenn.) 332 (1874); Fall River Iron Works *v.* Old Colony, etc. R. R., 87 Mass. 221 (1862). See also §§ 499, 500, *supra.*

4 The legislature cannot arbitrarily name and appoint trustees of an educational corporation, the charter providing that vacancies shall be filled by the remaining trustees. Sheriff *v.* Lowndes, 16 Md. 357 (1860). It cannot give to the city of Louisville the power to elect the trustees of the University of Louisville, an educational corporation. Louisville *v.* President, etc., 15 B. Mon. (Ky.) 642 (1855). It cannot vest the government of an incorporated academy in a new board of trustees. Norris *v.* Trustees, etc., 7 Gill & J. (Md.) 7 (1834). Under the reserved power to amend or repeal a charter the legislature may amend the charter of an agricultural college which has private stockholders, but to which the state contributes funds, so that, instead of the state having four directors out of eleven, the state shall have seven out of twelve. Jackson *v.* Walsh, 75 Md. 304 (1892). But see Sage *v.* Dillard, 15 B. Mon. (Ky.) 340, 357 (1854), and §§ 500, 501, notes, *supra.*

5 State *v.* Anderson, 31 Ind. App. 34 (1903).

6 Beardsley *v.* Johnson, 121 N. Y. 224 (1890).

ings shall be held is often prescribed in the charter or a statute or in the by-laws of the corporation. When not so prescribed it is fixed by the officers who call together the corporate meeting. But in whatever way it is decided upon, the meeting must be convened at the time decided upon, or within a reasonable time thereafter.[1] Accordingly if a meeting is convened before the hour at which it is called and business is transacted, the proceedings will be invalid.[2] A meeting called to order at sun time and then postponed to standard time, before any proceedings are had, is legal.[3]

Frequently the particular office or place for meeting within the state is specified in the charter or by-laws of the corporation. In that event a meeting held at a different place will be irregular, and the proceedings at such a meeting void and ineffectual, if objected to.[4]

§ 605. *Inspectors of election— Conducting and closing elections.* —Ordinarily a chairman and inspectors of election are elected or ap-

1 Where a meeting was held by a minority of the stockholders several hours after the time fixed in the notice, and an adjournment made until the following day, at which adjourned meeting, without the knowledge of the other members, an election was held, the election was unfair and invalid. State *v.* Bonnell, 35 Ohio St. 10 (1878). But a delay of an hour and five minutes after the time specified in the notice is not, as a matter of law, an unreasonable delay which will vitiate the proceedings. South School District *v.* Blakeslee, 13 Conn. 227, 235 (1839). The court will not sustain an election where the majority were given to understand that the election would go over to a later hour in the day, even though no formal adjournment was had. State *v.* Smalley, 7 Ohio C. C. 400 (1893).

2 So, where a meeting was called for twelve o'clock, but was called to order and organized fifteen minutes before twelve, it was held to be a surprise and a fraud upon such of the stockholders as were not actually present at that hour, and that in consequence the proceedings were irregular and void. People *v.* Albany, etc. R. R., 55 Barb. 344 (1869); aff'd, 57 N. Y. 161. Where commissioners, after calling a meeting of subscribers, ordered the election postponed, but the subscribers nevertheless refused to postpone and proceeded with the election, the election is not void, unless, in the opinion of the court, a postponement was clearly necessary. Hardenburgh *v.* Farmers', etc. Bank, 3 N. J. Eq. 68 (1834). *Quære,* in this case, whether the election might not have been avoided if any considerable number of the stockholders were deprived of their election franchise by the failure to postpone. See also § 605, *infra.*

3 Proctor, etc. Co. *v.* Finley, 98 Ky. 405 (1895).

4 Where the customary place of meeting of a corporation is abandoned, and a new place fixed upon in a regular and lawful manner, a meeting at the old place is irregular, and the proceedings at such a meeting are invalid. Miller *v.* English, 21 N. J. L. 317 (1848). The meeting must be held at the usual place. American Primitive Soc. *v.* Pilling, 24 N. J. L. 653 (1855). *Cf.* McDaniels *v.* Flower Brook Mfg. Co., 22 Vt. 274 (1850), holding that a meeting at a residence is good, if all assent, even though the statute requires the meetings to be at the counting-room of the company.

pointed by the stockholders.[1] The presiding officer at a stockholders' meeting need not be a stockholder,[2] and he need not be elected with any particular formality.[3]

The inspectors of elections need not be stockholders.[4] If inspectors are provided for by the charter, and they do not act or are enjoined from acting, the stockholders may appoint others to take their place.[5] The duties of the inspectors are ministerial and not judicial. Their discretion and powers of investigation are very limited.[6] Even though by the by-laws the decision of the inspectors of election is made final and conclusive, yet their decision may

1 Where the statutes gives each share a vote, a by-law of the directors, prescribing who shall preside and pass upon the qualification of voters at the annual meeting, will not be presumed to be in violation of the statute, the directors having power to make the by-laws. Hence, an injunction will not be granted at the instance of a stockholder against the by-law being carried out. Mitchell *v.* Colorado, etc. Co., 117 Fed. Rep. 723 (1902). The same transaction was involved in Bartlett *v.* Gates, 118 Fed. Rep. 66, and a different conclusion was reached.

2 Stebbins *v.* Merritt, 64 Mass. 27 (1852).

3 Acquiescence in a person's assuming to act as chairman of a stockholders' meeting validates his acting as such. *Re* Argus Printing Co., 1 N. D. 434 (1891).

4 People *v.* Albany, etc. R. R., 55 Barb. 344, 373 (1869); aff'd, 57 N. Y. 161, holding also that, although an inspector is required by by-law to be a stockholder, yet the election of one who is not a stockholder is voidable and not void. An inspector may be a candidate for directorship. *Ex parte* Willcocks, 7 Cow. 402 (1827). A stockholder may be an inspector, but it is better to have an outside disinterested person. Dickson *v.* McMurray, 28 Grant's Ch. Rep. (Can.) 533 (1881). Where the scrutineers or inspectors are also candidates for election as directors and they pass upon an instrument which affects the right to vote a majority of the stock, such stock being in the name of another person, but they claiming the right as beneficial owners to vote it, their decision practically controls the election, and if they decide in their own favor the court may set the election aside. Dickson *v.* McMurray, 28 Grant's Ch. Rep. (Can.) 533 (1881).

5 People *v.* Albany, etc. R. R., 55 Barb. 344, 357 (1869); aff'd, 57 N. Y. 161. See also *Re* Wheeler, 2 Abb. Pr. (N. S.) 361 (1866). The failure of the inspector so appointed to take the prescribed oath will not invalidate the election. *Re* Mohawk, etc. R. R., 19 Wend. 135 (1838); *Re* Chenango, etc. Ins. Co., 19 Wend. 635 (1839). Where by statute an election is to be conducted by "inspectors," one inspector is insufficient. *Re* Lighthall, etc. Co., 47 Hun, 258 (1888); but see N. Y. L. J., June 29, 1889.

6 See § 611, *infra; Re* Mohawk, etc. R. R., 19 Wend. 135 (1838). The office of the inspectors is ministerial rather than judicial. Commonwealth *v.* Woelper, 3 Serg. & R. (Pa.) 29 (1817). Inspectors at elections having once accepted a vote and declared the result cannot then reject it and declare a different result. Hartt *v.* Harvey, 32 Barb. 55 (1860). The presiding officer at an election of a religious corporation, having decided who is elected, cannot ten days later change his decision on the ground that some of the voters were disqualified. Matter of Williams, 57 N. Y. Misc. Rep. 327 (1908).

be attacked for fraud in rejecting proxies.[1] The exclusion of a vote at an election may be upheld by the court on grounds different from those given at the election itself.[2]

A requirement that the election shall be by ballot does not invalidate an election by show of hand if no one objects.[3] Where a ballot contains the names of both candidates, one in print and one in writing, it is defective and is not counted for either candidate.[4] A vote at an election of the directors which does not have opposite the names the number of shares voted may be void and not to be counted.[5] After the ballot has been counted and announced, it is too late to permit the ballot to be opened to receive the votes of any who have not voted.[6]

Where no time is specified by law during which the polls must be kept open, it rests within the sound discretion of the inspectors to say when the polls shall close.[7] So also it is held that holding the polls open after the hour specified in the notice for them to close will not, where the inspectors exercise a reasonable discretion, invalidate an election.[8] Failure to file in the office of the county clerk the oath of the inspectors of election, as required by statute, does not invalidate the election.[9]

§ 606. *Conducting and closing meetings generally—Irregularities and informalities—Minutes of meeting.*—The form or mode of conducting an election is in general not material, provided it violates no positive provision of the charter or of a statute regulating it, is orderly and in good faith, and is conducted by authorized or proper persons.[10] And as a general rule of law, where, in the election of corporate officers, no particular mode of proceeding is prescribed by law, if the wishes of the stockholders have been fairly expressed, and the election was conducted in good faith, it

1 Triesler *v.* Wilson, 89 Md. 169 (1899).

2 Christopher *v.* Noxon, 4 Ont. Rep. (Can.) 672 (1883).

3 Christ Church *v.* Pope, 74 Mass. 140 (1857). It is not necessary that the voting be by ballot, even though the statute so prescribes. San Joaquin Land, etc. Co. *v.* Beecher, 101 Cal. 70 (1894).

4 People *v.* Pangburn, 3 N. Y. App. Div. 456 (1896).

5 *In re* Mathiason Mfg. Co., 122 Mo. App. 437 (1907).

6 Forsyth *v.* Brown, 2 Pa. Dist. 765 (1893).

7 *Re* Chenango County Ins. Co., 19 Wend. 634 (1839).

8 *Re* Mohawk & Hudson R. R., 19 Wend. 135 (1838). An election is not vitiated by the fact that the polls are kept open after the designated hour and votes received. Rudolph *v.* Southern, etc. League, 23 Abb. N. Cas. 199 (1889); People *v.* Albany, etc. R. R., 55 Barb. 344, 356, 360 (1869); aff'd, 57 N. Y. 161.

9 Union, etc. Bank *v.* Scott, 53 N. Y. App. Div. 65 (1900).

10 Fox *v.* Allensville, etc. Turnp. Co., 46 Ind. 31 (1874).

will not be set aside on account of any informality in the manner of conducting it.[1] The legality of an election and the regularity of its procedure as well as the qualifications of its directors cannot be attacked collaterally by a stockholder trying to enjoin a proposed sale of property by such directors.[2]

In the transaction of the business of a corporation the motions should be put in an intelligible way and then voted upon.[3] Nevertheless, even though no formal resolutions are passed or record made, yet if all the stockholders and directors are present, and it is agreed that certain things shall be done, this may bind the corporation.[4]

The parliamentary usages are the same as in other bodies, and mere irregularities in the manner of conducting the business are immaterial if the sense of the meeting has been fairly expressed.[5]

1 Quoted and approved in Titusville, etc. Dissolution, 8 Pa. Sup. Ct. 304, 309 (1898). Philips *v.* Wickham, 1 Paige, 590 (1829).

2 Jones *v.* Bonanza, etc. Co., 91 Pac. Rep. 273 (Utah, 1907).

3 A general understanding or assent or want of dissent is not equivalent to a question being put and voted upon. The statement by a minister of what salary he wished and the failure of members to object is not a sufficient expression of the meeting. Landers *v.* Frank, etc. Church, 114 N. Y. 626 (1889).

4 Burke *v.* Sidra Bay Co., 92 N. W. Rep. 568 (Wis. 1902), where it was agreed that a stockholder should loan money to the company. The stockholders may agree among themselves informally to distribute a certain sum as dividends without going through the form of corporate action. No formal declaration is necessary either by the stockholders or board of directors, and a distribution of profits by unanimous consent without corporate action is legal. Groh's Sons *v.* Groh, 80 N. Y. App. Div. 85 (1903); rev'd on another point in 177 N. Y. 8. See also § 534, *supra.* A corporation cannot collect the full amount of a subscription, which by unanimous consent of the stockholders at an informal meeting has been canceled in part. Sheldon Canal Co. *v.* Miller, 90 S. W. Rep. 206 (Tex. 1905). See also § 714, *infra.*

5 Philips *v.* Wickham, 1 Paige, 590 (1829); *Re* Wheeler, 2 Abb. Pr. (N. S.) 361 (1866); Downing *v.* Potts, 23 N. J. L. 66 (1851), in which it was held that non-compliance with a statute requiring a list of stockholders entitled to vote to be made out ten days before an election will not of itself make void an election, such provision being only directory. A motion may be put by the chairman, although it has neither been made nor seconded. *Re* Horbury, etc. Co., L. R. 11 Ch. D. 109 (1879). Although the meeting has voted down two motions to make calls, it may then pass another motion for a larger one. *Re* British, etc. Co., 3 Kay & J. 408 (1857). In England, by statute, any five stockholders may demand a pool. *Re* Phœnix, etc. Co., 48 L. T. Rep. 260 (1883); Hurrell & Hyde, Directors and Officers, 78. In general see also Gorham *v.* Campbell, 2 Cal. 135 (1852); Hardenburgh *v.* Farmers', etc. Bank, 3 N. J. Eq. 68 (1834); People *v.* Peck, 11 Wend. 604 (1834). See also § 605, *supra.* In State *v.* Pettineli, 10 Nev. 141 (1875), the court held that an election was illegal where there was no presiding officer and no inspectors. Although the notice of a special stockholders'

After the meeting is organized the majority cannot withdraw and organize another meeting.[1] Where a part of the stockholders secede from the meeting, and hold another on the pretext of disorder, but in fact by reason of a previously devised plan, the election by the seceders is not legal.[2] The chairman cannot adjourn a meeting against the will of the stockholders. The stockholders may proceed to hold the meeting without him.[3] Where the voting of certain stock is enjoined and the meeting adjourns, the minority cannot insist on continuing the meeting and electing directors.[4]

Where the chairman refuses to entertain an amendment, the party proposing it need not object to the ruling or leave the meeting, and even though he then votes against the main question, he does not waive his right to object to the resolution as passed.[5] Although the chairman declares a resolution duly carried, yet the court may review his decision.[6] Where the chairman refuses to poll the vote

meeting states that the resolution will be presented and passed upon, to give to each share one vote, provided such share has been held by the party for six months prior to an election, an amendment proposed at the meeting striking out the latter part of the resolution must be considered and put to a vote by the chairman. Henderson *v.* Bank of Australasia, L. R. 45 Ch. D. 330 (1890). A provision in the charter to the effect that the rights of preferred stockholders may be modified by a three-fourths vote in interest at a meeting of the preferred stockholders only, is strictly construed, and where the statute provides for the mode of holding such meeting the procedure must be strictly observed. Hemans *v.* Hotchkiss, etc. Co., [1899] 1 Ch. 115. Where a voluntary unincorporated association has no constitution or by-laws or rules, the conduct of its meetings may be in accordance with the ordinary parliamentary rules of deliberative assemblies. Ostrom *v.* Greene, 161 N. Y. 353 (1900).

1 *Re* Argus Printing Co., 1 N. D. 434 (1891).

2 Langdon *v.* Patterson, 158 Pa. St. 476 (1893).

3 State *v.* Cronan, 23 Nev. 437 (1897), holding also that if the president illegally adjourns the meeting and excludes the stockholders from the room, they may adjourn to another room and hold the meeting. Arbitrary action by the president in declaring a stockholders' meeting adjourned is void and the meeting may proceed without him. Chicago, etc. Co. *v.* Boggiano, 202 Ill. 312 (1903). The president may adjourn a meeting which has been enjoined if all the stockholders are present, and a vote on the adjournment is not called for, and hence a meeting held later in the day by the minority is illegal. Haskell *v.* Read, 68 Neb. 107 (1903). *Cf.* § 601, *supra.*

4 Schmidt *v.* Pritchard, 112 N. W. Rep. 801 (Iowa, 1907).

5 Henderson *v.* Bank of Australasia, 45 Ch. D. 330 (1890), reversing the court below. Where a special meeting is called, under the English statutes, to confirm or reject a resolution that had been adopted by a previous meeting, no amendment is in order. Wall *v.* London, etc. Corporation, [1898] 2 Ch. 469.

6 Young *v.* South African, etc. Synd., [1896] 2 Ch. 268. In England by statute the decision of the chairman as to a vote is conclusive, unless shown to be fraudulent. Wall *v.* London, etc. Corporation, [1899] 1 Ch. 550. Where the chairman declares a motion carried and there is no demand to poll the votes, the court will not inquire

and declares the meeting adjourned, the courts will not necessarily interfere.[1] If any fraud, surprise, or deceit has been practiced in conducting the meeting a different rule prevails.[2] There should be applied to stockholders' meetings the rule in directors' meetings that the majority cannot exclude the minority from being heard, by delegating power to a committee; and "even if the minority had a voice given to them, still if there existed a combination among the majority, before that voice was heard, to overbear it," the acts of such a body would be illegal.[3] The chairman may terminate the discussion after a reasonable time when the majority vote so to do.[4] The right to object to an informality may be waived, and a failure upon the part of those members not present to protest promptly, upon learning of the informality, is a waiver.[5] Failure to attend a corporate meeting is not a waiver of objections thereto.[6] The pre-

into the question of whether it was carried. Arnot *v.* United, etc. Lands, [1901] 1 Ch. 518. A decision of the chair as to whether a vote was carried or not is not binding where on the face of his statement his conclusion was incorrect. *Re* Caratal Mines, [1902] 2 Ch. 498.

1 The courts will not interfere although the chairman of the meeting refused to poll the vote on a motion to adjourn, but declared the meeting adjourned on a *viva voce* vote and left. In regard to the right to be heard the court refused to sustain a bill "for the purpose of enabling one particular member of the company to have an opportunity of expressing his opinion *viva voce* at a meeting of the shareholders." MacDougall *v.* Gardiner, L. R. 1 Ch. D. 13 (1875); National Dwellings Soc. *v.* Sykes, [1894] 3 Ch. 159.

2 Johnston *v.* Jones, 23 N. J. Eq. 216 (1872); People *v.* Albany, etc. R. R., 55 Barb. 344 (1869); aff'd, 57 N. Y. 161. State *v.* Pettineli, 10 Nev. 141 (1875); Commonwealth *v.* Woelper, 3 Serg. & R. (Pa.) 29 (1817). See also §§ 596, 604, 605, *supra.*

3 Great Western Ry. *v.* Rushout, 5 De G. & Sm. 290, 310 (1852). *Cf.* MacDougall *v.* Gardiner, L. R. 1 Ch. D. 13 (1875).

4 Wall *v.* London, etc. Corporation, [1898] 2 Ch. 469.

5 State *v.* Lehre, 7 Rich. L. (S. C.) 234, 325 (1854); *Re* Mohawk, etc. R. R., 19 Wend. 135 (1838); Rex *v.* Trevenen, 2 B. & Ald. 339 (1819). Stockholders who receive reports of what takes place at meetings, and who do not object to what is being done, will be considered as acquiescing therein if what is done might have been validly sanctioned by them is present; but not if what is done is altogether illegal, and beyond the power of even all the stockholders. See *Re* Phœnix Life Ass. Co., 2 J. & H. 441 (1862); Irvine *v.* Union Bank of Australia, L. R. 2 App. Cas. 366 (1877). Compare Evans *v.* Smallcombe, L. R. 3 H. L. 249 (1868); aff'g L. R. 3 Eq. 769; Spackman *v.* Evans, L. R. 3 H. L. 171 (1868); Houldsworth *v.* Evans, L. R. 3 H. L. 263 (1868); Phosphate of Lime Co. *v.* Green, L. R. 7 C. P. 43 (1871). See also § 607, *infra.* A ratification by the stockholders of directors' acts cannot be made by a general resolution ratifying "all of the acts of the officers." Farmers' L. & T. Co. *v.* San Diego, etc. St. Ry., 45 Fed. Rep. 518 (1891).

6 Matter of Empire State, etc., 53 N. Y. Misc. Rep. 344 (1907). See also § 599, *supra*, and § 733, *infra.*

sumption is that all the proceedings were regular and lawful.[1] The minutes of a meeting duly signed are the best evidence of what the meeting did.[2] Where no written minutes are kept of the proceedings of stockholders they may be proved by parol.[3] Although the record does not show that certain stock was voted, yet it may be proved by parol evidence that it was voted.[4] The secretary's record as to the amount of stock voted in favor of a mortgage may be contradicted by proof taken from the stock-book.[5] In a meeting called to affirm the action of a prior meeting, such action may be affirmed in part and rejected in part.[6] Stockholders may at a meeting called for that purpose amend the by-laws so as to increase the number of directors, and may at the same meeting elect such additional directors.[7] If a stockholder is violently ejected he may recover damages for assault.[8] Stockholders are privileged in their debates.[9]

§ 607. *The quorum—A majority of the stockholders attending a meeting may transact business.*—The right of the majority to rule in the management of the affairs of a private corporation is fully established.[10] They may control the company's business, pre-

1 Blanchard *v.* Dow, 32 Me. 557 (1851), where it was presumed that the election was by ballot; Ashtabula, etc. R. R. *v.* Smith, 15 Ohio St. 328 (1864), where it was presumed that the requisite amount of stock was subscribed before the election took place. See also §§ 599, 600, *supra.*

2 Harrison *v.* Morton, 83 Md. 456 (1896). See also § 714, *infra.* The failure of incorporators or stockholders to make a record of their proceedings at that time does not invalidate their action. Benbow *v.* Cook, 20 S. E. Rep. 453 (N. C. 1894). The corporate minutes may be signed after the meeting has been held. Miles *v.* Bough, 3 Q. B. 845 (1842); Southampton, etc. Co. *v.* Richards, 1 M. & Gr. 448 (1840); Lindley, Partn. 551. Concerning the mode of proving the corporate minutes, see § 714, *infra.*

3 Birmingham, etc. Co. *v.* Birmingham Traction Co., 128 Ala. 110 (1900). A by-law may be proved by oral evidence where there was no written entry of the same in the corporate records. Masonic, etc. Assoc. *v.* Severson, 71 Conn. 719 (1899).

4 Franklin T. Co. *v.* Rutherford, etc. Co., 57 N. J. Eq. 42 (1898).

5 Middleton *v.* Arastraville, etc. Co., 146 Cal. 219 (1905).

6 *Re* Trench, etc. Co., Ltd., [1900] 1 Ch. 408.

7 *In re* Griffing Iron Co., 63 N. J. L. 168 (1898); aff'd, 63 N. J. L. 357 (1899). Gold Bluff, etc. Co. *v.* Whitlock, 75 Conn. 669 (1903).

8 A person holding a certificate of stock issued by order of the court after an execution sale, is entitled to attend meetings, and his transferee who has presented the stock for transfer, and who also has a proxy from the transferrer, is entitled to attend the meetings and may recover damages for assault if he is ejected from the meeting. The company cannot defend on the ground that the execution sale was invalid, and that the stock had been canceled. Noller *v.* Wright, 138 Mich. 416 (1904).

9 Kimball *v.* Post Pub. Co., 85 N. E. Rep. 103 (Mass. 1908).

10 Durfee *v.* Old Colony, etc. R. R., 87 Mass. 230 (1862); Covington *v.* Covington, etc. Bridge Co., 10 Bush (Ky.), 69, 76 (1873); East Tennessee,

scribe its general policy, make themselves its agents, and take reasonable compensation for their services as agents.[1]

The question has arisen whether a meeting can be held and business transacted when a majority in interest of the stockholders are not present. But the law is clear that those stockholders who attend a duly-called stockholders' meeting may transact the business of that meeting, although a majority in interest or in number of the stockholders are not present.[2] Where by statute the quorum is to be a

etc. R. R. *v.* Gammon, 5 Sneed (Tenn.), 567 (1859); McBride *v.* Porter, 17 Iowa, 203 (1864); Faulds *v.* Yates, 57 Ill. 416 (1870); Leo *v.* Union Pacific R. R., 19 Fed. Rep. 283 (1884); s. c., 17 Fed. Rep. 273 (1883); Barnes *v.* Brown, 80 N. Y. 527 (1880); Gifford *v.* New Jersey R. R., 10 N. J. Eq. 171 (1854); Dudley *v.* Kentucky High School, 9 Bush (Ky.), 576 (1873). See also Livingstone *v.* Lynch, 4 Johns. Ch. 573 (1820), in which Chancellor Kent clearly states that the right of the majority to rule is one of the chief differences between a corporation and a partnership. The majority rule at common law. Commonwealth *v.* Nickerson, 10 Phila. (Pa.) 55 (1875); New Orleans, etc. R. R. *v.* Harris, 27 Miss. 517, 537 (1854). A majority of the stockholders control the policy of the corporation, and regulate and govern the lawful exercise of its franchise and business, even though the management may not seem to be wise. The majority rule. Wheeler *v.* Pullman Iron, etc. Co., 143 Ill. 197 (1892). Where a statute requires a three-fourths vote in value for a reorganization of a company, the stock not voted is not counted to make up the three-fourths, even though the trustees who represent the stock refuse to assent or dissent. *Re* Neath, etc. Ry., [1892] 1 Ch. 349. Where stockholders in an apartment-house corporation are entitled to rent apartments at a rental to be fixed by a majority vote of the stockholders, an increased rental so voted is legal. The by-laws providing for such a vote override a general statement in a prospectus to the contrary, the stockholders knowing of the by-law. Compton *v.* Chelsea, 128 N. Y. 537 (1891).

1 Meeker *v.* Winthrop Iron Co., 17 Fed. Rep. 48 (1883); s. c. *sub nom.* Winthrop Iron Co. *v.* Meeker, 109 U. S. 180 (1883). *Cf.* § 662, *infra.*

2 Quoted and approved in Sylvania, etc. R. R. *v.* Hoge, 59 S. E. Rep. 806 (Ga. 1907), and Gilchrist *v.* Collopy, 119 Ky. 110 (1904). Those of the stockholders who attend the meeting constitute a quorum, although they are a minority. Eagle Iron Co. *v.* Colyar, 156 Fed. Rep. 954 (1907). See also p. 346, note 1, *supra.* Those who attend a stockholders' meeting constitute a quorum unless the charter or by-laws provide to the contrary, even though they are but a minority of the stockholders and represent a minority of the stock. Green *v.* Felton, 84 N. E. Rep. 166 (Ind. 1908). Morrill *v.* Little Falls Mfg. Co., 53 Minn. 371 (1893); Granger *v.* Grubb, 7 Phila. 350 (1870); Craig *v.* First, etc. Church, 88 Pa. St. 42 (1878), where the principle is laid down that this is the rule for a meeting composed of an indefinite number of persons, like stockholders, but that where a definite number is involved, as in a board of directors, then a majority must be present. Brown *v.* Pacific Mail, etc. Co., 5 Blatchf. 525 (1867); s. c., 4 Fed. Cas. 420; Field *v.* Field, 9 Wend. 394 (1832); Gowen's Appeal, 10 N. W. Cas. 85 (Pa. 1880); Madison Ave. Bapt. Church *v.* Oliver St. Bapt. Church, 5 Robt. (N. Y.) 649 (1867); Everett *v.* Smith, 22 Minn. 53 (1875). As to the rule concerning

majority of the stockholders, this means a majority in interest.[1] A statute requiring the consent of the stockholders to the sale of corporate property does not mean all the stockholders, but means a majority.[2] Where the statute authorizes the stockholders to change the number of directors by a vote of a majority in interest, a by-law requiring ninety per cent. in interest is illegal.[3] A by-law cannot require a majority in interest of the stockholders to constitute a quorum where the statute states that those who attend a meeting in person or by proxy shall constitute such quorum.[4] Where the by-laws provide that they may be amended by a vote of two-thirds at any meeting, this means two-thirds of the stock represented at the meeting.[5]

Of those who attend the stockholders' meeting a majority rule. Their acts are as valid as though they constituted a majority of all the stockholders, or constituted a majority at a meeting in which a majority of the stockholders were present.[6] The presumption

directors, see § 713*a*, *infra*. It has been held that one person cannot constitute a quorum; that at least two members are necessary to make a corporate meeting. Sharpe *v.* Dawes, 2 Q. B. D. 26 (1876). In this case one stockholder "met," did all necessary business, and then voted himself a vote of thanks. In *Re* Sanitary Carbon Co., 12 W. N., p. 223 (1877), where one stockholder, having also proxies of the remaining three stockholders, held a meeting, "voted himself into the chair, proposed a resolution to wind up voluntarily, declared the resolution passed, and appointed a liquidator," the court reluctantly followed the preceding case and declared the "meeting" invalid. In the case Morrill *v.* Little Falls, etc. Co., 53 Minn. Rep. 371 (1893), where one stockholder held a stockholder's meeting, the court said: "It was held in Sharpe *v.* Dawes, 46 Law J. Q. B. 104, followed reluctantly in another case, that one person cannot constitute a quorum; that at least two persons are necessary to hold a corporate meeting; but this decision is based upon a narrow lexicographical definition of the word 'meeting,' as the coming together of two or more persons,—a reason that does not commend itself to our judgment." In the case of Ostrum *v.* Greene, 161 N. Y. 353 (1900), the court stated that it was open to question as to whether a majority of all the members in an unincorporated association was necessary in order to constitute a quorum. In the case Haskell *v.* Read, 68 Neb. 107 (1903), the court withdrew its statement in a prior decision in the same case that a majority must be present in order to constitute a quorum.

1 Weinburgh *v.* Union, etc. Co., 55 N. J. Eq. 640 (1897). A by-law that states a quorum shall be one-third of the stockholders holding one-third of the shares of stock refers to stock issued and not to the authorized capital stock. Castner *v.* Twitchell, etc. Co., 91 Me. 524 (1898).

2 Louisville, etc. R. R. *v.* Jarvis, 87 S. W. Rep. 759 (Ky. 1905).

3 Katz *v.* The H. & H., etc. Co., 183 N. Y. 578 (1905).

4 Darrin *v.* Hoff, 99 Md. 491 (1904).

5 Green *v.* Felton, 84 N. E. Rep. 166 (Ind. 1908).

6 Austin Min. Co. *v.* Gemmel, 10 Ont. Rep. (Can.) 696 (1886); Columbia, etc. Co. *v.* Meier, 39 Mo. 53 (1866),

always is that a legal majority voted for any act or proceeding that appears to have been passed.[1] The majority rule does not apply to a community irrigation ditch.[2]

Two important limitations and exceptions to the above principles are to be borne carefully in mind.

First, the majority cannot bind the minority to submit to an act by the corporation where such act is beyond the express and implied powers of the corporation as given to it by its charter. Such an act is *ultra vires*. A large amount of litigation has arisen from the attempt of the majority to carry out *ultra vires* acts. The minority may object, and even a single stockholder may have the *ultra vires* act enjoined or set aside.[3] The failure of a stockholder to attend the stockholders' meeting is not a waiver of his right to object to the acts of the meeting as *ultra vires*, even though the notice of the meeting stated what was to be done.[4]

The second exception arises where the legislature amends the charter of the corporation, and the majority of the stockholders attempt to accept that amendment and act upon it. In such a case, if the amendment materially changes the scope and purpose of the enterprise, the minority may object and may prevent the acceptance of the amendment.[5]

The question of how far the majority rule when that majority are interested in a contract which the corporation has made, and which is being passed upon by a stockholders' meeting, is considered elsewhere.[6]

and same cases as in the preceding notes; Gowen's Appeal, 10 W. N. Cas. 85 (1881). Such of the stockholders as attend a duly called stockholders' meeting constitute a quorum, and a majority of that quorum control the meeting. *Re* Rapid, etc. Co., 15 N. Y. App. Div. 530 (1897), holding also that where the statutes provide that a plurality of the votes represented at an election shall elect the by-laws cannot require a majority to constitute a quorum. A majority of those who attend the meeting constitute a quorum. Gilchrist *v.* Collopy, 119 Ky. 110 (1904).

1 Citizens' Mutual, etc. Ins. Co. *v.* Sortwell, 90 Mass. 217 (1864).

2 Candelaria *v.* Vallejos, 81 Pac. Rep. 589 (N. M. 1905).

3 This subject is fully treated in Part IV, *infra.*

4 McFadden *v.* Leeka, 48 Ohio St. 513 (1891). See also § 606, *supra.* Where the stockholders consent to the company buying property owned by one of the directors, a stockholder who was present and did not object cannot complain. Steinway *v.* Steinway, 2 N. Y. App. Div. 301 (1896); aff'd, 157 N. Y. 710, and in 163 N. Y. 183. A stockholder who takes part in and assents to the action of a stockholders' meeting which authorizes a sale of the property to another corporation in exchange for stock of the latter to be issued to stockholders of the former cannot afterwards object thereto and demand cash, even though his assent was only by refraining from voting against the proposition. Carr *v.* Rochester, etc. Co., 207 Pa. St. 392 (1904).

5 See ch. XXVIII, *supra.*

6 See ch. XXXIX, *infra.*

§ 608. *The majority of votes cast constitutes an election.*—It is the well-settled rule in corporations having a capital stock divided into shares that a majority of the votes cast at an election constitutes an election.[1] And this majority, moreover, need not be an actual numerical majority of all the votes represented at the meeting, but only a majority of the votes cast.[2] Accordingly, a majority of the votes cast will elect, even though a majority of the shares of stock are not voted at all, and even though the owners are present at the meeting and refuse to vote.[3]

1 People *v.* Albany, etc. R. R., 55 Barb. 344, 368 (1869); aff'd, 57 N. Y. 161; State *v.* Fagan, 42 Conn. 32 (1875), a municipal corporation case. See also § 607, *supra.*

2 See § 607, *supra;* Craig *v.* First Pres. Church, 88 Pa. St. 42 (1878); *Re* Union Ins. Co., 22 Wend. 591 (1840), holding also that a plurality elects. At a municipal corporation meeting only those who vote are counted. Persons not voting at all are not counted. Smith *v.* Proctor, 130 N. Y. 319 (1891). In regard to voting in church elections in New York, see People *v.* Keese, 27 Hun, 483 (1882).

3 Gowen's Appeal, 10 W. N. Cas. 85 (1881), where the supreme court held that "those who voluntarily absent themselves from a meeting duly called for an election must recognize the validity of the election regularly made by those who do attend." The question was whether an election held by a meeting of railroad stockholders at which a majority of all votes was not cast could be considered valid. State *v.* Green, 37 Ohio St. 227 (1881), was a case of election of clerk by a city council, and it was held that, all being present and engaged in holding the election, half the members may not defeat an election by refusing to vote and then objecting because a quorum had not voted. Commonwealth *v.* Wickersham, 66 Pa. St. 134 (1870), involved the election of a county school superintendent, which was required to be "*viva voce* by a majority of the whole number of directors present." A person receiving exactly half that number could not be declared elected, although one director refused to vote on the last ballot. "He remained, and being present, was entitled to be counted." The legal intendment [of his action] was that he voted for neither or for the minority candidate." But, under a by-law requiring a majority of the stock to be present, it has been held that the majority must be a majority of the whole stock, and not merely of the stock subscribed for. Ellsworth, etc. Co. *v.* Faunce, 79 Me. 440 (1887). If the statute requires a majority of the directors to elect a director or president, one who is present but does not vote must be counted. People *v.* Conklin, 7 Hun, 188 (1876). See also § 713*a*, *infra*, on this point. Stockholders may vote for less than the whole number of directors to be elected. Vandeburgh *v.* Broadway Ry., 29 Hun, 348 (1883). But where a meeting was called to elect three directors and a majority of the stockholders voted for five directors, only a small minority voting for three, the latter votes were held the only valid ones, and the three voted for were declared elected. State *v.* Thompson, 27 Mo. 365, 369 (1858). Where twenty-three directors are to be elected, a vote electing twenty-two is effectual to elect those twenty-two. A new election may be held to elect the remaining one. *Re* Union Ins. Co., 22 Wend. 591 (1840). This case holds also that a plurality is sufficient to elect.

Although less than the full number of directors to be elected receive a majority or plurality, yet those receiving such majority or plurality are elected, and another ballot or election may be had to elect the remainder.[1] Where the number of directors has not been legally reduced in accordance with the statute, and at the next election a few votes are cast for the larger number of directors, while nearly all the votes were cast only for the reduced number, the extra votes elect the extra member or members of the board.[2] Not only in the elections, but in voting on any other subject, the majority controls, unless there is a statutory provision to the contrary,[3] or there is fraud.[4]

§ 609. *Is every share of stock entitled to one vote?*—At common law, in public or municipal corporations, each qualified elector has one vote, and only one. This was a natural rule, since each duly-qualified citizen voted as a citizen and not as the holder of stock. But the same rule should not apply to private corporations. Stockholders are interested not equally, but in proportion to the number of shares held by them. Naturally and reasonably each share should be entitled to one vote. It has been held, however, that at common law each stockholder had but one vote, irrespective of the number

1 *Re* Union Ins. Co., 22 Wend. 591 (1840). Even though the board of directors consists of five, and the stockholders at an election cast all their votes for two, those two are elected, leaving three vacancies. Gilchrist *v.* Collopy, 119 Ky. 110 (1904). Less than the full board may be elected. The old board goes out, however, and none of them hold over. People *v.* Fleming, 59 Hun, 518 (1891). Where five candidates receive a plurality and three others receive a less number, but the latter are a tie, the board being seven, the five are duly elected and may act as a board, even though no second ballot has been taken to vote off the tie. Wright *v.* Commonwealth, 109 Pa. St. 560 (1885). Where at an election four persons received the necessary votes, they will be elected directors, although the whole number of directors to be elected is seven. A subsequent election cannot elect the whole seven, but can elect only the remaining three. Forsyth *v.* Brown, 2 Pa. Dist. 765 (1893). See also § 620, *infra*.

2 Matter of Westchester T. Co., 186 N. Y. 215 (1906).

3 See § 684, *infra*, and ch. XXVIII, *supra*. A consolidation under the Georgia statute need not be approved by every stockholder. A majority vote is sufficient. Dady *v.* Georgia, etc. Ry., 112 Fed. Rep. 838 (1900). A committee of arbitration may act by a majority vote unless the agreement provides otherwise. The resignation of one member just before the award is made does not invalidate the award. Republic of Colombia *v.* Cauca Co., 106 Fed. Rep. 337 (1901).

4 Where there are two trustees and they hold a majority of the stock, and one of them votes for himself and the other votes for some one else, thereby nullifying the estate's vote, and then the former trustee, by means of the minority stock, elects himself director and president and controls the board, the court will set the election

of shares held by him.[1] Where the statutes are silent on the subject, a by-law may give to each shareholder one vote for each share up to ten, and may fix the proportion of votes which he may cast in excess of that number.[2] A by-law cannot give to the presiding officer a casting vote at an election after he has once voted his stock.[3]

Generally the charter or statutes prescribe that each share of stock shall be entitled to one vote.[4] And a statutory or charter provision to this effect applies not only to elections, but also to all other questions that may come before the stockholders' meetings.[5] Preferred stock may by the terms of its original issue be deprived of voting power, even though the statutes provide for each stockholder casting as many votes as he has shares.[6] An election to be held by a "majority of stockholders" means a majority in interest.[7] A stock vote need not be taken unless called for.[8] And although each voter is given one vote, when in fact each share of stock is entitled to one vote, yet if for eight months the stockholders acquiesce in the election, the court will not by *mandamus* order a new election.[9]

aside. Matter of Elias, 17 N. Y. Misc. Rep. 718 (1896).

1 Taylor *v.* Griswold, 14 N. J. L. 222 (1834), declaring that a by-law to the contrary is void. This decision in the latter respect is wrong, and in the former respect is unfortunate. At common law stockholders voted by show of hands, and a large stockholder had no greater vote than a small one. *Re* Horbury, etc. Co., L. R. 11 Ch. D. 109 (1879). Stockholders each have one vote; not even a special provision in the articles filed under a general act can change this rule. Commonwealth *v.* Nickerson, 10 Phila. (Pa.) 55 (1873). For an interesting statement of the origin of the practice of giving each stockholder one vote only, and of the gradual changes made in the rule, see Harvard Law Rev., Nov., 1888, p. 156. See § 621, *infra.*

2 Commonwealth *v.* Detwiller, 131 Pa. St. 614 (1890). A by-law may authorize one vote for each share of stock, and a provision to this effect allows such vote on all questions. Proctor, etc. Co. *v.* Finley, 98 Ky. 405 (1895), approving the text above.

3 Lamb *v.* McIntire, 183 Mass. 367 (1903).

4 Hays *v.* Commonwealth, 82 Pa. St. 518 (1876). Where, by statute, two-thirds of the stockholders are authorized to do an act, this is construed to mean two-thirds of the stock—at least long acquiescence therein has that effect. Fredericks *v.* Pennsylvania Canal Co., 109 Pa. St. 50 (1885).

5 *Re* Rochester, etc. Co., 40 Hun, 172 (1886), construing a statute which is applicable to all New York corporations. Each share is entitled to one vote on a motion at an election to set aside the first vote and to take another vote. *In re* Mathiason Mfg. Co., 99 S. W. Rep. 502 (Mo. 1907).

6 State *v.* Swanger, 190 Mo. 561 (1905). See also § 269, *supra.*

7 Quoted and approved in *In re* Mathiason Mfg. Co., 122 Mo. App. 437 (1907). Weinburgh *v.* Union, etc. Co., 55 N. J. Eq. 640 (1897).

8 Jones *v.* Concord, etc. R. R., 67 N. H. 234 (1892). Even if, on a poll demanded by five members, each share has one vote, yet until such poll is demanded voting is by show of hands. *Re* Horbury, etc. Co., L. R. 11 Ch. D. 109 (1879).

9 *Re* Moore, etc. Co., 14 Q. B. Rep. (Can.) 365 (1856).

Under the reserved power the legislature may authorize the board of directors of an insurance company to allow policy holders to elect a majority of the board.[1]

§ 609a. *Cumulative voting.*—In the constitutions of several of the states there are provisions for enabling a minority in interest of the stockholders to elect a minority of the directors. This is effected by what is known as a system of cumulative voting. By it each stockholder is entitled to as many votes for directors as equal the number of shares he owns multiplied by the number of directors to be elected. Thus, if there are six directors to be elected, a stockholder who owns one hundred shares may poll six hundred votes, and these votes he may give entirely to one or two or more of the six candidates, as he may see fit. In this way any minority of the stockholders owning one-sixth of the stock, acting together, may elect one member of a board of six directors, and thus secure a representation in that body. A larger minority might secure the election of two members of such a board, the possibility of increasing the minority representation increasing as the minority increases, without it ever becoming possible for a minority, upon a full vote, to secure more than its equitable proportion of the whole board of directors. The larger the number of directors the smaller would be the minority which would be able to elect one member of the board; and the larger the minority the greater the representation possible to be secured.[2] Constitutional or statutory provisions which are designed to secure such a minority representation are found in California, Pennsylvania, Illinois, West Virginia, Missouri, Nebraska, Michigan, Kansas, Idaho, Kentucky, Mississippi, Montana, North Dakota, and South Dakota.[3] These provisions, if designed to be

1 In the instance before the court it was held that the various acts of the legislature on that subject did not apply to the Equitable Life Assurance Society. Lord *v.* Equitable, etc. Soc., 109 N. Y. App. Div. 252 (1905). See § 501, *supra.*

2 Cumulative voting given by the constitution is an absolute right, and does not require notice of the intent to so vote, nor any by-laws, to give it efficacy. By this provision, "if there are six directors to be elected, the single shareholder has six votes, and, contrary to the old rule, he may cast these six votes for a single one of the candidates, or he may distribute them to two or more of such candidates, as he may think proper. He may cast two ballots for each of three of the proposed directors,—three for two, or two for one, and one each for four others; or finally, he may cast one vote for each of the six candidates." Pierce *v.* Commonwealth, 104 Pa. St. 150 (1883).

3 The Pennsylvania provision is construed in Wright *v.* Commonwealth, 109 Pa. St. 560 (1885), holding that part of the directors so elected by a plurality and declared elected may act, although the remaining directors are not elected by reason of the vote as to them being a tie. See also Com-

retroactive have been held unconstitutional and void. They can only apply to corporations chartered after their enactment. So far as they concern corporations chartered before the adoption of such a constitutional provision they impair the obligation of the contract between the corporation, the stockholders, and the state, and infringe the vested rights of the stockholders.[1] But, under its reserved power to alter, amend, or repeal a charter the legislature may allow cumulative voting.[2] A statute giving the right to cumulate votes

monwealth *v.* Lintsman, 6 Pittsb. L. J. (N. S.) 122 (1875). Cumulation of votes was upheld in Commonwealth *v.* Yetter, 190 Pa. St. 488 (1899), a case where a school was incorporated as a joint-stock corporation. The Ohio statute prescribing that "each share shall entitle the owner to as many votes as there are directors to be elected" does not authorize cumulative voting. State *v.* Stockley, 45 Ohio St. 304 (1887). The Ohio statute of 1898 provides for cumulative voting. Schwartz *v.* State, 61 Ohio St. 497 (1900). Where cumulative voting prevails, and the statutes require three directors to be residents, and all the votes are cumulated on non-residents excepting thirty-two which are cast for three residents, the three residents are elected, and the remaining directors are those of the non-residents who received the highest number of votes. Horton *v.* Wilder, 48 Kan. 222 (1892). In Wright *v.* Central Cal. etc. Co., 67 Cal. 532 (1885), the court said that this provision conferred "upon the individual stockholder, entitled to vote at an election, the right to cast all the votes which his stock represents, multiplied by the number of directors to be elected, for a single candidate, should he think proper to do so, . . . or by distributing them, upon the same principle, among as many candidates for directors as he shall think fit." The court held also that this constitutional right as to voting could not be changed by a resolution of the directors.

1 State *v.* Greer, 78 Mo. 188 (1883); Hays *v.* Commonwealth, 82 Pa. St. 518 (1876); Baker's Appeal, 109 Pa. St. 461 (1885). See also, on this subject, ch. XXVIII, *supra*. Upon the question of the constitutionality of statutes providing for minority representation or cumulative voting in the election of public officers, a matter germane to the present subject, see People *v.* Kenney, 96 N. Y. 294 (1884); People *v.* Crissey, 91 N. Y. 616 (1883); State *v.* Constantine, 42 Ohio St. 437 (1884). In Loewenthal *v.* Rubber Reclaiming Co., 52 N. J. Eq. 440 (1894), the court held that the original by-laws constituted a contract between the stockholders, and that a by-law providing for cumulative voting could not be repealed. In Michigan it has been decided that a statute providing for the cumulative plan of voting at public elections is unconstitutional. Maynard *v.* Board, etc., 84 Mich. 228 (1890).

2 Under the reserved right of the legislature to alter or amend a charter, the legislature may pass a statute allowing stockholders to cumulate their votes in elections, thus enabling minority stockholders to elect a minority of the board of directors. Looker *v.* Maynard, 179 U. S. 46 (1900). Where by statute the state retains power to amend charters subsequently granted, a subsequent constitutional provision for cumulative voting applies to all such corporations, whether organized by special charter or under the general act, and does not impair the validity of a contract. So also where a corporation amends its charter under an act providing for cumulative voting, such cumulative voting applies to it. Gregg *v.* Granby,

does not apply to corporations then existing, even though such corporations accept the benefits of subsequent statutes, such statutes not imposing any conditions.[1] There are certain dangers about this mode of voting, and an unwary majority may find that a smart minority has deprived the majority of the control.[2] And where, in cumulating votes, the voter spreads his votes over so many persons that none of those particular persons are elected, he cannot have the election set aside on the ground that by cumulating on a less number of persons he can certainly elect them, nor on the ground that there

etc. Co., 164 Mo. 616 (1901). The legislature has no power to amend the charter so as to allow cumulative voting, even though in the original charter the legislature reserved the right to alter, amend, or repeal. Such reserved right is only for matters which concern the public. *In re* Election Newark Assoc., etc., 64 N. J. L. 217 (1899); Attorney-General *v.* Looker, 111 Mich. 498 (1897). See § 501, *supra.* In West Virginia it is held that where the legislature has the right to amend or repeal a charter, the statute giving the right to cumulate the votes applies to a corporation already existing as well as later corporations. Cross *v.* West Virginia, etc. Ry., 35 W. Va. 174 (1891). Under a reserved right to amend or repeal a charter the legislature may take from the stockholders of an insurance company the right to elect all the directors and give to the policy holders the exclusive right to vote for a majority of them. Lord *v.* Equitable, etc. Society, 57 N. Y. Misc. Rep. 417 (1908).

1 Smith *v.* Atchison, etc. R. R., 64 Fed. Rep. 272 (1894); Commonwealth *v.* Butterworth, 160 Pa. St. 55 (1894). *Cf.* Gregg *v.* Granby, etc. Co., 164 Mo. 616 (1901), as to a constitutional change. A corporation organized prior to the constitution of 1874 of Pennsylvania, which gave the right of cumulative voting, becomes subject to such right if it afterwards asks for and acquires new franchises. Commonwealth *v.* Flannery, 52 Atl. Rep. 129 (Pa. 1902).

2 Thus, suppose there are 1,000 shares, and ten directors to be elected, and one person holds 600 shares. Clearly he should be able to elect a majority of the ten directors. Suppose he votes his 600 votes for six of his friends (A, B, C, D, E, and F) and for four of the minority (G, H, I, and J); and suppose at the same time the 400 shares of the minority are cumulated on three other parties (K, L, and M), with ten votes for the four directors mentioned above (G, H, I, and J). The result will then be as follows:

A, B, C, D, E, and F	have 600	votes	each
G, H, I, and J	" 610	"	"
K, L, and M	" 1,320	"	"

In other words, the minority have secured a majority of the directors. Again, suppose the holder of the 600 shares does not vote for any minority candidate at all, but casts 600 votes for each of his six candidates, A, B, C, D, E, and F. Even then he may lose the election. The minority 400 may cumulate their 4,000 votes on six candidates, and give each of the six 666⅔ votes. Under the cumulative system the majority, in order to be safe, must not only abandon the idea of electing the whole board, but must cumulate their votes on such a proportion of the board as their stock bears to the whole stock, and must not cast complimentary votes for representatives of the minority. In the case of Schwartz *v.* State, 61 Ohio St. 497 (1900), a majority of the stock was voted in favor of a full board

was an oral contract as to who should be elected.[1] Where a state is a stockholder, and by statute is entitled to a certain vote at elections, a subsequent statute cannot give to the state a larger vote.[2] A statute that each share shall have one vote for each director in a bank prevents the application of a prior statute authorizing cumulative voting.[3] A statute allowing cumulative voting does not apply to an unincorporated joint-stock association, even though the latter exercises certain statutory powers, and not even a provision in the constitution that certain provisions therein shall apply to all associations and joint-stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships affects this conclusion.[4] Even though the stockholders are entitled to vote on the cumulative plan yet they are not obliged to do so.[5]

§ 610. *Proxies.*—At common law a stockholder has no right to cast his vote by proxy.[6] This rule was evolved from the analogous rule governing municipal corporations, which requires all votes to be given in person. The right to vote by proxy is often given by the charter itself. Even if not so given the right may be created by by-law.[7] The fact is that stock is simply property, and the

consisting of nine members. The minority cumulated their votes on five other candidates, thus giving each of those five more votes than any of the nine for whom the majority voted. The result was that the five were elected, thus giving to the minority the control of the board, by reason of the failure of the majority to cumulate their votes.

1 Dulin *v.* Pacific, etc. Co., 103 Cal. 357 (1894). The court said that the party "had in his own hands enough stock to have elected himself and one other director, in the face of any combination that could have been made; and the court had no power to release him from his error, or do that for him which he had power to do for himself." In the case Chicago, etc. Co. *v.* Boggiano, 202 Ill. 312 (1903), the holders of a minority of the stock by cumulating their votes elected a majority of the directors, the holder of the majority of the stock not having judiciously cumulated his votes.

2 Tucker *v.* Russell, 82 Fed. Rep. 263 (1897).

3 Attorney-General *v.* Bridgman, 134 Mich. 379 (1903).

4 Attorney-General *v.* McVichie, 138 Mich. 387 (1904).

5 Schmidt *v.* Mitchell, 101 Ky. 570 (1897).

6 Taylor *v.* Griswold, 14 N. J. L. 223 (1834); Philips *v.* Wickham, 1 Paige, 590 (1829); McKee *v.* Home, etc. Co., 122 Iowa, 731 (1904); Brown *v.* Commonwealth, 3 Grant (Pa.), 209 (1856), where the charter allowed only those *present* to vote; Craig *v.* First Presbyterian Church, 88 Pa. St. 42 (1878); Commonwealth *v.* Bringhurst, 103 Pa. St. 134 (1883); People *v.* Twaddell, 18 Hun, 427, 430 (1879); *Re* Dean and Chapter of Fernes, Davies, 116, 129 (1608); Attorney-General *v.* Scott, 1 Vesey, 413 (1749); Harben *v.* Phillips, L. R. 23 Ch. D. 14, 22, 36 (1882). Where the statute allows citizens to vote by proxy, an alien is not within its terms, and cannot do so. *Re* Barker, 6 Wend. 509 (1830).

7 Quoted and approved in Market Street Ry. *v.* Hellman, 109 Cal. 571 (1895); Worth, etc. Co. *v.* Bingham, 116 Fed. Rep. 785 (1902); People *v.*

stock owner should be allowed to act in regard to it by agent, the same as he may with other property owned by him. Where the statutes give the right to vote by proxy, the by-laws of the corporation cannot restrict that right by providing that only stockholders shall act as proxies.[1]

The ordinary proxy, being intended to be for an election merely, does not enable the proxy to vote to dissolve the corporation or to sell the entire corporate business and property, or to vote upon other important business, unless the proxy itself in general or special terms gives the proxy the power to vote on such questions.[2] But where the stockholder does not promptly object, he may be bound.[3] A proxy authorized to vote at a corporate meeting is not

Crossley, 69 Ill. 195 (1873); Phillips *v.* Wickham, 1 Paige, 590, 598 (1829); State *v.* Tudor, 5 Day (Conn.), 329 (1812); 2 Kent, Comm., 294, 295. A contrary rule is laid down in New Jersey. Taylor *v.* Griswold, 14 N. J. L. 222 (1834). Where the charter authorizes voting by proxy at elections for directors, and also empowers directors to make by-laws not inconsistent with the laws of the commonwealth, a by-law adopted by the board of directors allowing voting by proxy at all stock elections was held valid. Wilson *v.* Academy of Music, 43 Leg. Int. 86 (1886). A by-law may allow voting by proxy. Commonwealth *v.* Detwiller, 131 Pa. St. 614 (1890). A corporation as a stockholder may of course give a proxy where proxies are allowed. *Re* Indian, etc. Co., L. R. 26 Ch. D. 70 (1884). A by-law may authorize voting by proxy, and such a by-law may arise by long continuation and unbroken practice. Walker *v.* Johnson, 17 App. Cas. Dist. of Col. 144 (1900).

1 People's, etc. Bank *v.* San Francisco Super. Ct., 104 Cal. 649 (1894). Where the statute gives a right to vote by proxy, a by-law to the effect that only a stockholder can act as proxy is illegal and void. *Re* Lighthall, etc. Co., 47 Hun, 258 (1888).

2 Quoted and approved in McKee *v.* Home Savings, etc. Co., 122 Iowa, 731 (1904). Abbot *v.* American Hard Rubber Co., 33 Barb. 578, 584 (1861); Cumberland Coal Co. *v.* Sherman, 30 Barb. 553, 577 (1859); *Re* Wheeler, 2 Abb. Pr. (N. S.) 361 (1866), where the proxy, being authorized to vote for increasing the stock, voted also to issue the new stock in exchange for the stock of another company. Marie *v.* Garrison, 13 Abb. N. Cas. 210, 235 (1883), following 83 N. Y. 14. Where directors are authorized by charter to vote by proxy, the proxy cannot authorize a borrowing of money—an *ultra vires* and void act in England. Brown *v.* Byers, 16 M. & W. 252 (1847). A proxy to vote is not a proxy to demand a poll. *Re* Haven, etc. Co., L. R. 20 Ch. D. 151 (1881); Regina *v.* Government, etc. Co., L. R. 3 Q. B. D. 442 (1878). See also Decatur Bldg. etc. Co. *v.* Neal, 97 Ala. 717 (1893). A proxy for an election does not extend to an election four months later, the first election not having been held, the proxy being by a director, the directors being authorized to vote as directors by proxy. Howard *v.* Hull, 5 Ry. & Corp. L. J. 255 (Eng. 1888).

3 Where a proxy votes in favor of making all the stock common stock, the stockholder himself, if he wishes to object, must do so promptly. Synnott *v.* Cumberland, etc. Assoc., 117 Fed. Rep. 379 (1902). See also § 599, *supra*. Where by resolution of the stockholders all the property of an embarrassed corporation is trans-

authorized to vote to discharge a mortgage which secures the stockholder, who gave the proxy, as a creditor of the corporation.[1] A proxy authorizing the holder to vote "in the same manner as I should do were I there personally present" estops the stockholder giving the proxy from questioning the call of the meeting or the regularity of an increase of stock voted for at such meeting.[2] A proxy authorizing the proxy to vote as fully as a stockholder could were he personally present gives the proxy the right to vote on the question of adjournment and of opening the ballots.[3] A proxy has a right to vote on a *viva voce* vote or show of hands.[4] Where a vote is taken by show of hands each person is entitled to only one vote, even though as a proxy he represents several persons, and a person who is a proxy only may vote.[5] A proxy cannot vote when the owner of the stock is present and votes.[6] In England proxies deposited abroad have been allowed a vote by telegraph.[7] The sale of proxies is forbidden by statute in New York.[8] It is legal for the directors to send out proxies printed at the expense of the company and to enclose postage stamps paid for by the company, even though the proxies named were named by them.[9]

The expense of printing and sending out a proxy and a statement of questions in dispute cannot be collected from the company, even though it was sent out by a majority of the board of directors.[10]

Where a will directs that of three executors two shall give proxies to the third on stock owned by the estate, a court of equity will

ferred to trustees to sell and pay the debts and reconvey the remainder to the corporation, and the trustees proceed to do so, the transaction is legal, even though the stockholders' meeting is not held at its principal office, and proxies were irregular and unauthorized, and the directors took no action, and the conveyances were irregular. Kessler & Co. *v.* Ensley Co., 141 Fed. Rep. 130 (1905), aff'd, 148 Fed. Rep. 1019.

1 Moore *v.* Emsley, 112 Ala. 228 (1896).

2 Columbia Nat. Bank *v.* Mathews, 85 Fed. Rep. 934 (1898).

3 Forsyth *v.* Brown, 2 Pa. Dist. 765 (1893).

4 *Re* Bidwell, [1893] 1 Ch. 603. But under the English statutes proxies are not counted where the vote is by a showing of hands. *Re* Caratal Mines, [1902] 2 Ch. 498.

5 Ernest *v.* Loma, etc. Mines, [1896] 2 Ch. 572; aff'd, [1897] 1 Ch. 1.

6 Commonwealth *v.* Patterson, 158 Pa. St. 476 (1893).

7 In *Re* English, etc. Bank, [1893] 3 Ch. 385, the court allowed foreign creditors to vote abroad by proxy deposited abroad, and to telegraph such vote to the home meeting, on a scheme of reorganization, holding also that a proxy need not state the day of meeting.

8 Laws 1892, ch. 692, § 613, and L. 1901, ch. 588. It is illegal for a stockholder to sell his right to vote. Hafer *v.* New York, etc. R. R., 14 Week. L. Bul. 68 (1885). See also § 622, *infra.*

9 Peel *v.* London, etc. Ry., 95 L. T. Rep. 897 (1906); overruling Studdert *v.* Grosvenor, L. R. 33 Ch. Div. 528 (1886).

10 Lawyers', etc. Co. *v.* Consolidated, etc. Co., 187 N. Y. 395 (1907).

compel the two to give the proxies, although the third intends to use the proxy to continue himself as president, and the management of the company is alleged to be improvident and ruinous.[1] Where there are several executors, and only one of them is present at the election, he may cast the vote, even though a proxy has been given by another of the executors.[2]

A proxy should be in writing, but it need not be in any particular form; it need not be acknowledged or proved, but it must be in such shape as reasonably to satisfy the inspectors of election of its genuineness and validity.[3] And to this end the corporate officers may insist upon reasonable evidence of the regularity and genuineness of the proxy before allowing it to be voted.[4] A proxy may run to a specified person and in his absence to the persons or

1 This case was affirmed on an even division of the court. Lafferty's Estate, 154 Pa. St. 430 (1893); Tunis *v.* Hestonville, etc. R. R., 149 Pa. St. 70 (1892).

2 Schmidt *v.* Mitchell, 101 Ky. 570 (1897).

3 *Re* St. Lawrence Steamboat Co., 44 N. J. L. 529 (1882); *Re* Indian, etc. Co., L. R. 26 Ch. D. 70 (1884). No particular form of words is necessary to constitute a proxy. Smith *v.* San Francisco, etc. Ry., 115 Cal. 584 (1897). See the form of proxy in Marie *v.* Garrison, 13 Abb. N. Cas. 210, 234 (1883), following 83 N. Y. 14. Proxies need not be acknowledged, proved, or witnessed. *Re* Cecil, 36 How. Pr. 477 (1869). A proxy need not state the day upon which the election is to be held. *Re* Townshend, 18 N. Y. Supp. 905 (1892). A proxy is good, although the date when it is given is left blank and has not been filled in. *Re* St. Lawrence Steamboat Co., 44 N. J. L. 529 (1882). Where one gave a proxy to vote at an annual election, it was held *prima facie* evidence that he was a stockholder just before such election. Harger *v.* McCullough, 2 Denio, 119, 122 (1846). A proxy which had been exercised and voted upon for many years without renewal was sustained in Monsseaux *v.* Urquhart, 19 La. Ann. 482 (1867). Although a notice of a corporate meeting, and proxies given for a corporate meeting, add to the name of the corporation the place where it is located, this is immaterial. Langan *v.* Francklyn, 20 N. Y. Supp. 404 (1892). Under the Alabama statutes authorizing personal property owned by the wife to be disposed of by the husband and wife by parol, a wife's proxy to a husband to vote her stock may be oral. Hoene *v.* Pollak, 118 Ala. 617 (1898), holding also that a stockholder who knows that her stock has been voted by her husband in favor of selling all the corporate property for stock in another corporation cannot object thereto, where she afterwards disposes of part of the new stock so issued.

4 *Re* St. Lawrence Steamboat Co., 44 N. J. L. 529 (1882). But the inspectors have no right to refuse a vote by proxy or to assume a judicial power to try its genuineness, if it is apparently executed by the stockholder and is regular in form. *Re* Cecil, 36 How. Pr. 477 (1869). Neither the stockholder nor his proxy can be compelled by a by-law to take an oath that the former is the owner of the stock. People *v.* Tibbits, 4 Cow. 358 (1825); People *v.* Kip, 4 Cow. 382 (1822). The by-laws may require the proxies to be witnessed. Harben *v.* Phillips, L. R. 23 Ch. D. 14 (1882).

person at the time managing the business jointly and each of them.[1] The proxy should be dated, but the common law did not require a date.

In New Jersey, by statute, proxies are good for only three years from their date;[2] and in New York for only eleven months from their date, unless some other definite time is specified;[3] and in Pennsylvania for two months, and the proxy must be witnessed,[4] but must not allow a substitution, nor be used for purposes other than those specified therein.[5]

Where certificates of proxies are destroyed after use, parol evidence is admissible to prove their former existence and sufficiency.[6]

A proxy signed by the stockholder, with the name of the proxy and the date of the meeting left blank to be filled in afterwards, is legal.[7] A stockholder who signs a form of proxy in blank, and hands it over to another to be used in the ordinary way, impliedly authorizes that other to fill up the blank with his own name.[8] Although a proxy contains blanks as to the day and hour of the meeting, yet these may be filled in by the party using the proxy.[9]

A proxy is always revocable. Even when by its terms it is made "irrevocable," the law allows the stockholder to revoke it. Frequently an attempt is made to permanently unite the voting power of several stockholders and thus control the corporation by giving irrevocable proxies to specified persons. But the law allows the stockholder to revoke the proxy at any time.[10] Where the general

1 Bombay, etc. Corp. *v.* Shroff, [1905] A. C. 213.

2 Laws 1896, ch. 185, § 36.

3 Laws 1892, ch. 687, § 21.

4 Act of March 5, 1903.

5 Pepper & Lewis Digest, Vol. I, p. 954.

6 Haywood & Pittsborough P. R. Co. *v.* Bryan, 6 Jones, L. (N. C.) 82 (1858). Although the record does not show that certain stock was voted, yet it may be proved that it was voted by proxy. Franklin T. Co. *v.* Rutherford, etc. Co., 57 N. J. Eq. 42 (1898).

7 Sadgrove *v.* Bryden, 96 L. T. Rep. 361 (1907).

8 *Ex parte* Duce, L. R. 13 Ch. D. 429 (1879); *Ex parte* Lancaster, L. R. 5 Ch. D. 911 (1877). As to whether a blank proxy may be filled in by the agent, see *quære* in White *v.* New York, etc. Soc., 45 Hun, 580 (1887), citing cases.

9 Ernest *v.* Loma, etc. Mines, [1896] 2 Ch. 572; aff'd, [1897] 1 Ch. 1.

10 Schmidt *v.* Mitchell, 101 Ky. 570 (1897); Woodruff *v.* Dubuque, etc. R. R., 30 Fed. Rep. 91 (1887). In this case the stock certificates were turned over to trustees to transfer to themselves, with power to vote, hold, or sell the same. "Trust" certificates were issued. The court held that at any time previous to an actual sale by the trustees a certificate holder might revoke his interest in the "trust" and demand back his part of the stock. To same effect and on very similar facts, see Griffith *v.* Jewett, 15 Week. L. Bull. 419 (1886); Vanderbilt *v.* Bennett, 6 Pa. Co. Ct. Rep. 193 (1887). Such irrevocable proxies are not necessarily void as against public policy. Brown *v.* Pacific Mail Steamship Co., 5 Blatchf. 525 (1867); s. c., 4 Fed. Cas. 420. They simply are revocable.

manager attempts to obtain proxies for the purpose of ousting the existing management, and uses methods calculated to deceive the persons giving the proxies, he is guilty of a breach of trust and his contract with the company may be canceled.[1] Where the directors cause a clerk, who is in the employ of the company, to send out a circular to the stockholders representing himself as a large stockholder and asking proxies, with a view to thoroughly investigating the affairs of the company, and such proxies when obtained are used to prevent such investigation by taking the property out of the hands of the court, the court may disregard the vote of such proxies.[2] A few forms of proxies are given in the notes below.[3]

A proxy given for a valuable consideration may nevertheless be revoked if it is about to be used for a fraudulent purpose. Reed *v.* Bank of Newburgh, 6 Paige, 337 (1837). An agreement not to revoke a power which from its nature or by law is revocable is not binding. People *v.* Nash, 111 N. Y. 310, 315 (1888). A written contract not to vote by proxy, entered into by certain stockholders mutually for the purpose of preventing the board of directors from consummating a proposed sale of the franchises of the corporation, has been held a pernicious and unlawful compact. Fisher *v.* Bush, 35 Hun, 641 (1885). An irrevocable proxy is prohibited by statute in New York. It may be revoked even though coupled with an interest, in this case being to a pledgee. *Re* Germicide Co., 65 Hun, 606 (1892). A proxy, for five years, given so as to unite enough stock to control the corporation, the holder of the proxy agreeing that the person giving the proxy shall have an office at a salary of $2,500 a year, is void. At the instance of the latter person a court of equity will enjoin voting thereunder. Cone *v.* Russell, 48 N. J. Eq. 208 (1891). A contract between a stockholder and a person, by which the latter leases certain property to the corporation, and is to have a proxy from the stockholder, does not give the latter the right to rescind as against the corporation, even though such proxy is not given. The corporation is not affected by any agreement as to the management or voting. Kennedy *v.* Monarch, etc. Co., 123 Iowa 344 (1904).

1 Townsley *v.* Bankers', etc. Co., 56 N. Y. App. Div. 232 (1900).

2 *Re* Septimus Parsonage & Co., [1901] 2 Ch. 424.

3 Know all men by these presents, that the undersigned, being the holder of shares in The Mackay Companies, does hereby constitute and appoint Clarence H. Mackay, William W. Cook and George G. Ward, attorneys and attorney of the undersigned, with power of substitution to each, for and in the name of the undersigned to vote upon all shares of the undersigned in The Mackay Companies at the annual meeting of the shareholders, to be held at 53 State Street, Boston, Massachusetts, on the 15th day of February, 1907, and on such other day as the meeting may thereafter be held by adjournment or otherwise, with all the powers the undersigned would possess if personally present. A majority of said attorneys, as shall be present and shall act at the meeting (or if only one shall be present and act, then that one), shall have and may exercise all the powers of all of said attorneys hereunder.

—— ——.

February ——, 1907.

Know all men by these presents, that I, the undersigned stockholder in the American Telephone and Telegraph Company, do hereby appoint —— —— true and lawful attorney, with power of substitution, for me and in my name to vote at the annual meeting of the stockholders in said company, to be held in New York, N. Y., March 28, 1905, or at any adjournment thereof, with all the powers I should possess, if personally present. —— ——.

March ——, 1905.

§ 611. *The stock-book as evidence of a right to vote.*—The question who is entitled to vote upon a particular share of stock is,

Know all men by these presents, that the undersigned, stockholder in the American Telephone and Telegraph Company, does hereby constitute and appoint —— ——, —— ——, —— ——, and —— —— attorneys of the undersigned, with power of substitution to each, for and in the name of the undersigned to vote upon all stock of the undersigned in the American Telephone and Telegraph Company at the special meeting of the stockholders of said company to be held on Thursday, the twenty-first day of December, 1905, for the purpose of acting upon the question of authorizing the issue of convertible bonds, and at any adjournment of said meeting, with all the powers the undersigned would possess if personally present. A majority of such of said attorneys as shall be present and shall act at the meeting (or if only one shall be present and act, then that one) shall have and may exercise all of the powers of all of said attorneys hereunder. —— ——.

December ——, 1905.

I, —— ——, a shareholder of "The Eastern Extension Australasia and China Telegraph Company, Limited," hereby appoint Sir John Wolfe Barry, K. C. B., and him failing, Sir John Denison-Pender, K. C. M. G., and him failing, Francis Augustus Bevan, Esq., to act as my proxy at the general meeting of the company, to be holden on Wednesday, the 1st November, 1905, and at every adjournment thereof.

As witness my hand this —— day of October, one thousand nine hundred and five.

Signed ....

Address ....

The Companies Consolidation Bill as passed by the House of Lords in England in 1907 contains the following:

"67. An instrument appointing a proxy may be in the following form, or in any other form which the directors shall approve:

—— COMPANY, LIMITED.

I, —— ——, of ——, in the county of ——, being a member of the —— Company, Limited, hereby appoint —— —— of —— as my proxy to vote for me and on my behalf at the (ordinary or extraordinary as the case may be) general meeting of the company to be held on the —— day of ——, and at any adjournment thereof. —— ——.

Signed this —— day of ——.

I, —— ——, of ——, do hereby make, constitute, and appoint William Rockefeller, and George F. Baker, of New York (or either of them), my lawful proxies and attorneys for me and in my name, place, and stead, to appear at a meeting of the stockholders of the Delaware, Lackawanna and Western Railroad Company to be held at the office of said company, at 26 Exchange Place, in the city of New York, on the nineteenth day of February, A. D. 1901, and then and there to cast the number of votes to which I, as holder of stock in said company, shall be entitled in the election of officers and managers of said company.

Witness my hand and seal this —— day of ——, A. D. 1901.

—— ——.

In presence of —— ——.

Know all men by these presents, that I, —— ——, of ——, hereby appoint —— —— to be my substitute and proxy for me and in my —— name and behalf to vote at any election by the stockholders of the —— Company for directors, or other purposes, occurring within —— months from the date hereof, and also to vote on any and all matters and questions which may be presented and considered at any annual or special meeting of the stockholders of said company occurring within said period, as fully and with like effect as I, —— ——, might or could have done if I had been personally present and voting thereat.

In witness whereof, I, —— ——, have hereunto set my —— hand and seal this —— day of ——, 19—.

—— ——.

UNITED STATES STEEL CORPORATION.

Proxy for Meeting February 17, 1902.

Know all men by these presents, that the undersigned, —— ——, a stockholder in United States Steel Corporation, do hereby constitute and appoint Abram S. Hewitt, William E. Dodge, Francis H. Peabody, Myles Tierney, and Henry W. De Forest, and each of them, true and lawful attorneys, agents, and proxies of the undersigned, with power of substitution, for and in the name, place, and stead of the undersigned, to vote upon all common stock and all preferred stock, or either, held or owned by the undersigned, at the first annual meeting of the stockholders of the United States Steel Corporation, to be held at the office of said corporation, at Hoboken, New Jersey, on Monday, the seventeenth day of February, 1902, and at any and all adjournments thereof, for the transaction of any and all business that may come before the meeting, including considering and vot-

as a general rule, answered by a reference to the corporate transfer-book. He who is there registered as the owner of the stock is entitled to vote upon it.[1] It is not necessary that the owner of stock produce his certificate, or even have a certificate, in order to

ing upon the approval of the by-laws as amended; considering and voting upon the approval and ratification of all contracts, acts, proceedings, elections, and appointments by the board of directors or by the executive committee or by the finance committee since the organization of the corporation, including the agreements with Messrs. J. P. Morgan & Co., syndicate managers, dated, respectively, March 1 and April 1, 1901, and January 3, 1902, the last being the agreement of final settlement and release, which are referred to in the notice of said meeting and in the preliminary report to stockholders; the election of eight directors to hold office for three years; the election of independent auditors; and upon any and all matters that may come before the meeting, according to the number of votes the undersigned would be entitled to vote if then personally present, hereby revoking any proxy or proxies heretofore given to vote upon such stock, and ratifying and confirming all that said attorneys, agents, or proxies may do by virtue hereof. A majority of all or of any of said attorneys, agents, and proxies who shall be present and shall act at the meeting (or if only one shall be present and act, then that one) shall have, and may exercise, all of the powers of all of said attorneys, agents, and proxies hereunder, and they are instructed to vote in favor of the re-election of the present directors and in favor of approving the amended by-laws and in favor of the approval and ratification of each and every of said three agreements and said contracts, acts, proceedings, elections, and appointments.

Witness —— hand and seal, this —— day of ——, 1902.

Witness: —— ——, —— ——.

1 As between pledgor and pledgee the right to vote is in the one who is registered as a stockholder on the corporate books, unless there is an agreement between them to the contrary, and this rule prevails even though the stock stands in the name of the pledgee "as trustee." Commonwealth *v.* Dalzell, 152 Pa. St. 217 (1893), the court saying: "The general rule is that as between the corporation and the person offering to vote, the right follows the legal title, of which the certificates and the stock-books are the *prima facie* evidence. By-laws may establish a different rule, and there may be special circumstances to change the equities as to individuals or even as to the corporation." Where stock is transferable only on the books of the corporation, the person in whose name the stock stands on such books is entitled to vote it, and the books of the company are conclusive upon the question as to who is entitled to vote stock legally issued. Morrill *v.* Little Falls Mfg. Co., 53 Minn. 371 (1893); *Ex parte* Willcocks, 7 Cow. 402 (1827), stating, however, that in certain cases, like that of stock held for the corporation itself, a different rule prevails; State *v.* Ferris, 42 Conn. 560, 568 (1875), sustaining a vote by a bankrupt, the court saying: "The party who appears to be the owner by the books of the corporation has the right to be treated as a stockholder and to vote on whatever stock stands in his name;" Hoppin *v.* Buffum, 9 R. I. 513, 518 (1870), the court saying: "In a case of a dispute as to a right to vote, the books of the corporation are the *prima facie* evidence; at any rate, the corporation cannot be required to decide a disputed right. . . . Upon any other rule it could never be known who were entitled to vote, until the courts had decided the dispute." Allen *v.* Hill, 16 Cal. 113 (1860); *Re* St. Lawrence Steamboat Co., 44 N. J. L. 529 (1882). The president has no power to decide what stock should be allowed to vote. The transfer book governs as to that. State *v.* Cronan, 23 Nev. 437 (1897). See also next section for various cases on the conclusiveness of the transfer book.

vote.[1] Neither will indebtedness for the subscription price prevent the stockholder from voting.[2] So, also, it is immaterial that the person in whose name the stock is registered is merely a nominal holder, and that another person really owns the stock.[3] A subscriber upon a condition not yet performed may vote upon the question whether that condition shall or shall not be performed.[4] And stock issued for construction, the work not having been performed, may nevertheless be voted.[5]

Persons who are not registered stockholders on the day an election is held cannot vote, though they were stockholders on the day the election should have been held.[6] Where the corporation delays over thirty days in transferring stock, and in the meantime a resolu-

1 Beckett *v.* Houston, 32 Ind. 393 (1869).

2 Birmingham, etc. Ry. *v.* Locke, 1 Q. B. 256 (1841); Haskell *v.* Read, 68 Neb. 107 (1903); Savage *v.* Ball, 17 N. J. Eq. 142 (1864); American, etc. Co. *v.* State Board, 56 N. J. L. 389 (1894); People *v.* Albany, etc. R. R., 55 Barb. 344, 386 (1869); aff'd, 57 N. Y. 161; Downing *v.* Potts, 23 N. J. L. 66 (1851). So held in this case, even though the subscriber had paid nothing on his stock. In General Electric Co. *v.* Wightman, 3 N. Y. App. Div. 118 (1896), it is stated that under the New York statutes subscribers for stock are not entitled to any voice in the management until the stock has been paid up. It has been held in Maryland that a subscriber to the increased capital stock of a company is not entitled to the certificate until he has paid for the stock in full, and such subscriber is not entitled to the rights of a stockholder until he has paid in full. The court stated that such stockholders are not entitled to dividends equally with other stockholders. The basis of the decision was the difference between original stock and increased stock. The court refused to compel the corporation to issue a certificate. Baltimore, etc. Ry. *v.* Hambleton, 77 Md. 341 (1893). Where a mortgage must be authorized by a vote of two-thirds in value of the stockholders this means a stock vote, irrespective of the fact that some of the stock is only partly paid up. Purdom *v.* Ontario, etc. Deb. Co., 22 Ont. Rep. (Can.) 597 (1892).

3 State *v.* Leete, 16 Nev. 242 (1881), where a man put stock in the name of his son in order to qualify him to serve as a director. Where, however, the statute prescribes that only *bona fide* stockholders shall vote, a stockholder of record who is really a dummy for the real owner in order to enable the latter to avoid the statutory liability cannot vote. Smith *v.* San Francisco, etc. Ry., 115 Cal. 584 (1897). See also § 612, *infra*. A stockholder of record may vote, even though he is acting for some one else. Sylvania, etc. R. R. *v.* Hoge, 59 S. E. Rep. 806 (Ga. 1907).

4 Greenville, etc. R. R. *v.* Coleman, 5 Rich. L. (S. C.) 118, 135 (1851).

5 Savage *v.* Ball, 17 N. J. Eq. 142 (1864). Where a sale of bonds having a voting power is made subject to the ratification of another party, the vendor has the right to vote such bonds until the sale is so ratified. State *v.* McDaniel, 22 Ohio St. 354 (1872). Stock issued to a contractor for money to be paid may be voted by him, at least to the extent or proportion of such part of his liability as he has fulfilled. Price *v.* Holcomb, 89 Iowa, 123 (1893).

6 Johnston *v.* Jones, 23 N. J. Eq. 216, 228 (1872).

tion to wind up the company and reconstruct it was passed in a way that it could not have been passed if such transfer had been made, the court will, under the English statute, allow the transferee to vote as though the transfer had been made at once.[1] The holders of stock issued by a stock dividend are entitled to vote.[2]

Where the corporation keeps a stock-certificate book but no transfer or stock book, a transfer on the back of a certificate, which is then canceled and pasted back in the certificate book, and a new certificate issued to the transferee, is a sufficient transfer to constitute the transferee a stockholder.[3] Although votes are challenged, and the inspectors call for the stock-books, and such books cannot be obtained, yet this does not invalidate the election.[4] If the stock-book is lost, the directors may substitute a new one, filled out as accurately as possible.[5] Where the corporation has kept no regular stock-books, and the secretary, by order of the directors, prepares a stock-book, getting the information from various sources, this book governs.[6] Where the transfer book differs from the stock ledger the former governs.[7] A by-law authorizing the administration of an oath to examine the stockholders as to their title is illegal and void where the charter regulates the right to vote.[8]

There are some exceptions, however, to the rule that the transfer or stock book is conclusive on the question of who is entitled to vote. Thus, the inspectors of election may require whether the stock which is about to be voted belongs to the corporation, and if it does they may reject the vote.[9] So, also, they may allow an administrator to vote, although the stocks stands in the name of the deceased person.[10]

In some courts this rule is carried still further, and it is held that the inspectors of election may allow the pledgor to vote, although

1 *Re* Sussex Brick Company, [1904] 1 Ch. 598.

2 Bailey *v.* Railroad Co., 22 Wall. 604, 637 (1874), holding also that the rule is otherwise as regards the holders of a scrip dividend, where the scrip was redeemable by the company in cash or convertible into stock.

3 He may vote at elections, and an assignment by the corporation on the direction of officers elected by such a transferee is valid. Such a transfer is valid also, although a by-law provided that before selling his stock a stockholder must offer it to other stockholders for purchase. American Nat. Bank *v.* Oriental Mills, 17 R. I. 551 (1891). Where a corporation keeps a stock-certificate book, but no regular stock-book, the former controls as to the right to vote. Matter of Utica, etc. Co., 115 N. Y. App. Div. 821 (1906). See also § 382, *supra.*

4 *Re* Argus Co., 138 N. Y. 557 (1893).

5 *Re* Schoharie, etc. R. R., 12 Abb. Pr. (N. S.) 394 (1872).

6 *Re* Election, etc. Grove Cem. Co., 61 N. J. L. 422 (1898).

7 Downing *v.* Potts, 23 N. J. L. 66 (1851).

8 People *v.* Kip, 4 Cow. 382, note (1822).

9 See § 613, *infra.*

10 See § 612, *infra.*

the stock stands in the name of the pledgee on the books of the company;[1] and it has also been held that the purchaser of certificates of stock may vote thereon, although the stock stands on the books of the company in the name of the vendor.[2] It has been held in Georgia that where a stockholder has sold his stock and delivered the certificates, he has no right to give a proxy on the stock to some other person, even though the stock still stands in his name, and the giving of such proxy may constitute a tort for which the purchaser of the stock may sue for damages.[3] The vendor and vendee of stock may agree between themselves as to who shall vote the stock. Even though a person claims stock which stands in the name of another, and might obtain such stock by a suit for that purpose, yet the court will not consider this in a statutory proceeding to contest the validity of an election, because only the stockholders of record are entitled to vote.[4] Where the vendor expressly parts with the right to vote the

1 See § 612, *infra.*

2 Cited in Sylvania, etc. R. R. *v.* Hoge, 59 S. E. Rep. 806 (Ga. 1907). In the case of Allen *v.* Hill, 16 Cal. 113, 119 (1860), the court said: "It would seem, upon principle, that the real owner of stock should be entitled to represent it at the meetings of the corporation, and that the mere fact that he does not appear as owner upon the books of the company should not exclude him from the privilege of doing so." In Illinois it is held that the corporation must allow the real owner of the stock to vote, whether he be the registered owner or not, where the corporation has no by-law requiring a registry of transfers, and the vendee produces his certificate of stock duly transferred on the back. People *v.* Devin, 17 Ill. 84 (1855). In a stockholders' vote ratifying the acts of directors, a stockholder has no right to vote stock which he has transferred to others, even though it still stands in his name on the books. Graves *v.* Mono Lake, etc. Co., 81 Cal. 303 (1889). Where, however, the unregistered transferee did not challenge the right of his transferrer to vote and did not claim the right to vote, but attacked the election afterwards by *quo warranto,* his suit failed. People *v.* Robinson, 64 Cal. 373 (1883). State *v.* Smith, 15 Oreg. 98, 118 (1887), contains a dictum that the purchaser of a certificate of stock cannot vote on the stock until it has been transferred into his name. Where both the legal and equitable owners of stock agree as to how stock shall be voted, other stockholders cannot complain that the vote was not cast in accordance with law. State *v.* Ferris, 42 Conn. 560 (1875), where a bankrupt voted stock still standing in his name. State *v.* Pettineli, 10 Nev. 141 (1875). In this last case the registered holder had transferred the certificate, but obtained it again and exhibited it at the meeting. If a vote is not challenged, an objection to it afterwards may not meet with much avor. *Re* Long Island R. R., 19 Wend. 37, 44 (1837). See also § 620, *infra.* The vendor of stock may give the vendee a proxy to vote on the stock which still stands in the name of the vendor on the books. Stephenson *v.* Vokes, 27 Ont. Rep. (Can.) 691 (1896).

3 Witham *v.* Cohen, 100 Ga. 670 (1897).

4 Matter of Utica, etc. Co., 115 N. Y. App. Div. 821 (1906).

stock, he cannot, under the statutes of Pennsylvania, vote it even though he appears as a stockholder on the corporate books.[1]

In New York, by statute, the corporate transfer or stock book is made conclusive upon the question who may vote.[2] The inspectors cannot go back of it, but the court may.[3] There are various other statutory provisions in New York regulating voting, and the vote may by by-law be limited to those who are registered stockholders for a period not exceeding forty days before the election.[4] Under the New York statute a person who has sold his certificate of stock cannot vote.[5] A corporation may, in accordance with a by-law or a resolu-

1 Commonwealth *v.* Patterson, 158 Pa. St. 476 (1893). As between pledgor and pledgee the right to vote is in the one who is registered as a stockholder on the corporate books, unless there is an agreement between them to the contrary, and this rule prevails even though the stock stands in the name of the pledgee "as trustee." Commonwealth *v.* Dalzell, 152 Pa. St. 217 (1893). The registered stockholder may vote even though he has transferred his certificates to another. *Re* Argus Printing Co., 1 N. D. 434 (1891).

2 L. 1901, ch. 355. Vandeburgh *v.* Broadway Ry., 29 Hun, 348, 355 (1883); *Re* Long Island R. R., 19 Wend. 37 (1837); *Re* Mohawk, etc. R. R., 19 Wend. 135 (1838). The registered stockholder is entitled to vote although he has assigned his certificate of stock. Schoharie Valley R. R. Case, 12 Abb. Pr. (N. S.) 394 (1872).

3 Strong *v.* Smith, 15 Hun, 222 (1878).

4 See Laws 1901, ch. 355, § 20. Strong *v.* Smith, 15 Hun, 222 (1878), holding that the transfer book is conclusive upon the inspectors, but that the court has power to go back of the entries therein and inquire whether, as for instance in this case, a transfer of shares was an absolute sale or a pledge, and thus whether the transferrer or transferee has the right to vote them; citing *Ex parte* Holmes, 5 Cow. 426 (1826); *Re* Long Island R. R., 19 Wend. 37 (1837); and see N. Y. L. J., June 29, 1889. Although only stockholders who still own their stock are allowed to vote, a person who has given an option on his stock is nevertheless entitled to vote on it. *Re* Newcomb, 18 N. Y. Supp. 16 (1891). In New York when for any reason the corporation fails to hold an election at the stated time as provided in the charter or by-laws, and the election is held subsequently, only those stockholders are entitled to vote who were qualified electors at the time when the election ought to have been held. Vandenburgh *v.* Broadway R. R., 29 Hun, 348 (1883); People *v.* Tibbets, 4 Cow. 358 (1825). Where the statute limits the votes to stock that for ten days has been entered on the stock-book, a stockholder cannot vote who mailed a certificate for transfer the day before the ten days began, if the corporation did not receive the same until six days thereafter. The object of the statute is to enable persons to ascertain during the ten days who are entitled to vote. Where a statute forbids the voting of stock which has been transferred within twenty days prior to an election, and in a corporation having sixty shares of stock thirty-two shares are voted, four of which were transferred on the day of election, the court will declare the election void. *Re* Vernon, 1 Pennewill (Del.), 202 (1898).

5 *Re* Glen Salt Co., 17 N. Y. App. Div. 234 (1897); aff'd, 153 N. Y. 688.

tion of its board of directors, close its books for a reasonable time before an election, in order to prepare a list of the stockholders entitled to vote.[1] In Canada, however, it has been held that at common law a corporation has no power to close its transfer books temporarily for a meeting or dividends.[2]

§ 612. *The right of trustees, pledgees, administrators, etc., to vote.*—It is the general rule that a person holding stock as trustee is entitled to vote upon the stock, not only where he is duly registered as a holder of stock in trust, but also where he is registered absolutely as a stockholder upon the books of the corporation.[3] If the trustees disagree as to how the stock shall be voted, the courts have power to direct them.[4] A trustee of stock has the right to vote thereon even for a consolidation, and even though he holds it

[1] See § 538, *supra.* Even though by reason of the transfer books being closed for a short period of time, a vendor of stock is unable to have it transferred on the books, and the company fails before the books are opened, he is liable on the unpaid subscription. Cook *v.* Carpenter, 212 Pa. St. 177 (1904).

[2] *Re* Panton, etc. Co., 9 Ont. Law Rep. (Can.) 3 (1904). *Cf.* § 538, *supra.*

[3] Conant *v.* Millaudon, 5 La. Ann. 542 (1850); Wilson *v.* Central Bridge, 9 R. I. 590 (1870); Hoppin *v.* Buffum, 9 R. I. 513, 519, (1870), the court saying: "If the trust was of such a nature that the trustee has the control and management of the property, and is to exercise his discretion concerning it, then he is the proper person to represent and vote upon it. And the corporation cannot be required to examine into the nature of the trust, with a view to decide as to the right to vote;" *Re* Barker, 6 Wend. 509 (1831); *Re* Mohawk, etc. R. R., 19 Wend. 135 (1838); *Re* North Shore, etc. Ferry Co., 63 Barb. 556 (1872), holding also that the administrator of the trustee may vote the stock; Pender *v.* Lushington, L. R. 6 Ch. D. 70 (1877). In Clarke *v.* Central R. R., 50 Fed. Rep. 338 (1892), it was held that a trust company has no power to hold as trustee and vote the majority of the stock of a great railroad system, especially where it is also the trustee in a trust deed of the company, the court saying: "There are many situations in which stock may be so placed that it becomes inequitable or illegal for it to be voted. The law places the voting power of pledged stock in the pledgor or mortgagor, even where there is no express stipulation to that effect. And where the pledgor or mortgagor is disqualified to vote the stock, the disqualification extends as well to the pledgee or trustee." In this case, however, on the final hearing, the bill was dismissed. See 62 Fed. Rep. 328 (1894). Even though a statute requires that certificates running to trustees shall state who is the *cestui que trust,* yet an election may be legal though stock is voted by trustees and such stock does not state who is the real owner. State *v.* Cronan, 23 Nev. 437 (1897).

[4] Wanneker *v.* Hitchcock, 38 Fed. Rep. 383 (1889). Where stock is held in trust by two trustees and they disagree, the stock cannot be voted except that the court may remove a trustee if he is guilty of bad faith. Mannhardt *v.* Illinois, etc. Co., 90 Ill. App. 315 (1899).

for another corporation.[1] Where there are two trustees and they hold a majority of the stock, and one of them votes for himself and the other votes for some one else, thereby nullifying the estate's vote, and then the former trustee, by means of the minority stock, elects himself director and president and controls the board, the court will set the election aside.[2] A trustee holding stock and electing himself the president of a company and receiving a salary must not allow his personal interest in the salary to conflict with his duty as a stockholder to favor the sale of the corporate property at a high price.[3] An executor of an estate which holds a majority of the stock of the corporation, who brings about his own election as president at a large salary, may be removed from his executorship.[4] The executor of an estate owning stock in a corporation may enjoin the corporation from paying a back salary to its president, who is a co-executor of the estate, even though the stock of the estate was pledged by the decedent and was transferred into the name of the pledgee.[5] In England it is held that directors' fees received by trustees of an estate, who were elected directors in respect of the stock so held in trust, belong to the estate.[6] But in New York it is held that where the president, drawing a salary, dies, and the existing board of directors elect his executor as president to succeed him and vote him the same salary, he taking no part therein, he cannot be compelled to refund such salary to the company, even though as executor he controlled a

1 Market Street Ry. *v.* Hellman, 109 Cal. 571 (1895).

2 Matter of Elias, 17 N. Y. Misc. Rep. 718 (1896).

3 Elias *v.* Schweyer, 13 N. Y. App. Div. 336 (1897). Where a trustee holding stock votes himself into office and illegally votes to himself a large salary, the *cestuis que trust* may in a suit for his removal ask also that he account to such *cestuis que trust* for such salary. Elias *v.* Schweyer, 27 N. Y. App. Div. 69 (1898). Where a majority of the stock of the corporation passes by will to a trustee of the estate, and he makes himself president, and increases his salary, and pays little attention to the business, and tries to sell the company out to a consolidation, and does not properly divide the income between life tenant and remaindermen, and causes the company to sell its reserve, and is responsible for the company losing its most valuable contract, and is unable to agree with a *cestui que trust*, the court will remove him from the trusteeship. Lister *v.* Weeks, 60 N. J. Eq. 215 (1900). See s. c., 47 Atl. Rep. 588 (N. J. 1900). Even though a trustee of stock who has been an officer and stockholder in the corporation is voted a salary, this is no ground for removing him as trustee, there being no proof that he voted in favor of the salary. Neither is the fact that the company did not pay as large dividends as it formerly did any ground for the removal of the trustee. Dailey *v.* Wight, 51 Atl. Rep. 38 (Md 1902). See Matter of Andrews, 125 N. Y. App. Div. 457 (1908).

4 Matter of Hirsch, 116 N. Y. App. Div. 367 (1906); aff'd, 188 N. Y. 584.

5 Monmouth Inv. Co. *v.* Means, 151 Fed. Rep. 159 (1906).

6 *Re* Francis, etc., 92 L. T. Rep. 77 (1905).

majority of the stock.[1] Where trustees hold a majority of the stock of a corporation and one of them is enjoined from voting it, the election may be enjoined at the instance of a minority stockholder, until the first suit is decided.[2] Where a mortgage covers shares of stock and the trustee has the voting power, its discretion cannot be controlled by a majority of the bondholders.[3] A mortgage on shares of stock does not prevent the corporation controlled by such stock from issuing a mortgage on its property; and it is no breach of trust for the trustee of the first mortgage to be the trustee of the second mortgage where the first mortgage does not prohibit such second mortgage, the stock, by the terms of the mortgage, remaining in the name of the mortgagor.[4]

In California the real owner of stock may vote on it, although it stands on the books of the company in the name of a "dummy" as "trustee."[5]

A pledgor of stock is entitled to vote upon it in all cases where the stock continues to stand on the books of the company in the name of such pledgor.[6] And even where the pledgee has caused the stock to be transferred into his own name, as by law he allowed to do,[7] it has been held that the pledgor may demand the

1 Hirsch *v.* Jones, 115 N. Y. App. Div. 156 (1906); s. c., 191 N. Y. 195.

2 Villamil *v.* Hirsch, 138 Fed. Rep. 690 (1905).

3 Toler *v.* East Tennessee, etc. Ry., 67 Fed. Rep. 168 (1894).

4 Gasquet *v.* Fidelity, etc. Co., 75 Fed. Rep. 343 (1896).

5 Under the California statute, stock placed by the secretary in the name of a "dummy," as trustee, cannot be voted by such dummy, the real owners of the stock not having assented thereto, even though for business reasons they did not wish to have the stock isued to themselves. Stewart *v.* Mahoney Min. Co., 54 Cal. 149 (1880); Smith *v.* San Francisco, etc. Ry., 115 Cal. 584 (1897). See also *Ex parte* Holmes, 5 Cow. 426 (1826); American Nat. Bank *v.* Oriental Mills, 17 R. I. 551 (1891), holding that the beneficial owners are entitled to say how the vote shall be cast. In the last case the stock had been surrendered and new certificates issued, but no transfer book was kept.

6 *Re* Barker, 6 Wend. 509 (1831); *Ex parte* Willcocks, 7 Cow. 402 (1827); *Re* Cecil, 36 How. Pr. 477 (1869); Scholfield *v.* Union Bank, 2 Cranch, C. C. 115 (1815); s. c., 21 Fed. Cas. 723; *Re* St. Lawrence Steamboat Co., 44 N. J. L. 529, 540 (1882), a dictum. Although the pledgor of stock votes the stock in favor of a lease of the corporate property on such terms that no dividends on the stock are possible, yet in the absence of fraud the pledgee is bound. Gibson *v.* Richmond, etc. R. R., 37 Fed. Rep. 743 (1889).

7 See § 466, *supra*. A court will not at the instance of a pledgee order a transfer to be recorded on the books to the pledgee as pledgee, and giving the pledgor the right to vote the stock, inasmuch as this would complicate the title as between the corporation and its stockholders and interfere with the business of the corporation. American, etc. Co. *v.* Pacific, etc. Co., 34 Wash. 10 (1904).

right to vote at elections, and that upon proof of the facts the inspectors of election must allow the pledgor to vote the stock.[1]

It must be conceded, however, that the established rule is to the contrary.[2] Where the stock is transferred to the pledgee on the books of the company the corporation is not bound to allow the pledgor to vote, although a court of equity has power to compel the pledgee to give the pledgor a proxy.[3] Where by the terms of the pledge the pledgor reserves the right to vote the stock, the stock being transferred into the name of the pledgee, the pledgor may by a a bill in equity compel the pledgee to give to the former a proxy to vote the stock in favor of a merger of the corporation with another corporation, even though thereby the pledgee will have to take stock

1 In Oregon it is held that at common law the real owner of stock is entitled to vote it, even though it stands on the corporate books in the name of his pledgee. It is denied that the transfer book is binding upon the inspectors of election, and the decisions to that effect in New York are stated to be based on the New York statutory law. State *v.* Smith, 15 Oreg. 98 (1887). See also Allen *v.* Hill, 16 Cal. 113 (1860), to substantially the same effect. It has been held that the pledgee of stock is not even entitled to notice of meetings. McDaniels *v.* Flower Brook Mfg. Co., 22 Vt. 274 (1850).

2 The pledgor and pledgee of stock may agree between themselves as to who should vote the stock. If there is no agreement, the right to vote should follow the legal title; in other words, the title as it appears on the corporate books. Even under a statute authorizing inspectors of election, upon a challenge, to determine whether the party who appears to be the owner is really the owner, the pledgee is entitled to vote the stock standing in his name where there is no agreement to the contrary, and even though the stock stands in the pledgee's name "as trustee." Commonwealth *v.* Dalzell, 152 Pa. St. 217 (1893). A pledgee into whose name the stock has been transferred may vote it. He is a "*bona fide*" stockholder as required by the statute. The pledgor cannot appear at the meeting and vote the stock. *Re* Argus Printing Co., 1 N. D. 434 (1891). It is not a conversion for one who holds stock as pledgee to attend corporate meetings and vote upon the stock. Heath *v.* Silverthorn Lead Min. etc. Co., 39 Wis. 146 (1875).

3 J. H. Wentworth Co. *v.* French, 176 Mass. 442 (1900), holding also that the Massachusetts statute that a certificate of stock issued as a pledge shall state that fact on its face, enables the pledgor to vote without such proxy. If the certificate merely states that it is given in pledge, without stating the name of the pledgor, the pledgee to whom the certificate runs may vote the stock. The court may, however, refuse to grant a *mandamus* declaring certain persons duly elected directors where they were elected by the vote of the pledgee as against the wishes of the pledgor. Where stock in pledge is transferred on the books of the company to the pledgee absolutely he can vote it, unless the pledgor by a suit in equity compels the pledgee to give a proxy, and a statute giving the pledgor the right to vote applies only where the transfer on the books states that it is in pledge. Canadian Imp. Co. *v.* Lea, 69 Atl. Rep. 455 (N. J. 1908).

of the new corporation in exchange for the old stock.[1] Under the New York statute making the transfer book conclusively binding upon the inspectors of election, the inspectors cannot exclude the vote of the registered stockholder, although he holds the stock merely as pledgee; but under the New York statute allowing the courts to summarily review the election, the court has power to go back of the transfer book and set the election aside, where the statute gave the pledgor the right to vote.[2] In many of the states there are statutes which give to the pledgor the right to vote the stock.[3] And even where there is no statute to protect the pledgor's right to vote, it has been held that the courts will intervene,[4] and that by a bill in equity the pledgor may compel the pledgee to give him a proxy to vote the stock.[5] But in order to invoke the extraordinary powers of a court of equity in this respect, the pledgor must show that the interests of the company have been or will be prejudiced, or that the value of the stock has been or will be impaired, and that the intervention of the court is necessary to protect the pledgor's rights.[6] A pledgor may enjoin a pledgee from transferring

1 Pennsylvania R. R. *v.* Pennsylvania Co. etc., 205 Pa. St. 219 (1903).

2 Strong *v.* Smith, 15 Hun, 222 (1878).

3 Strong *v.* Smith, 15 Hun, 222 (1878). Concerning a similar statute in Rhode Island, see Sayles *v.* Brown, 40 Fed. Rep. 8 (1889). Under the Colorado statutes an owner who has pledged his stock may represent the stock at all meetings of the stockholders and vote accordingly. Miller *v.* Murray, 17 Colo. 408 (1892). See also as to the Colorado statute. Nat. Bank of Commerce *v.* Allen, 90 Fed. Rep. 545 (1898).

4 Scholfield *v.* Union Bank, 2 Cranch, C. C. 115 (1815); s. c., 21 Fed. Cas. 723; State *v.* Smith, 15 Oreg. 98 (1887), where the pledgor obtained an injunction against the pledgee voting the stock, and the pledgor was allowed by the inspectors to vote.

5 Vowell *v.* Thompson, 3 Cranch, C. C. 428 (1829); s. c., 28 Fed. Cas. 1308. See also Hoppin *v.* Buffum, 9 R. I. 513 (1870), holding that although the pledgor may by a bill in equity compel the pledgee, in whose name the stock stands, to make a retransfer or to give a proxy to the pledgor, yet where the pledgor for many years allows the pledgee to vote the stock and claims the right at an election only after the ballots are cast and are being counted, the court will not set the election aside.

6 McHenry *v.* Jewett, 90 N. Y. 58 (1882). Where the owner of a majority of the stock has been fraudulently deprived of her stock by her pledgee, who has thereby deprived her of the control and claims the stock as his own, the court will enjoin him from voting the stock and will appoint a receiver of such stock *pendente lite.* Ayer *v.* Seymour, 5 N. Y. Supp. 650 (Com. Pl. 1889). Where a person pledges his stock as additional security to a corporate creditor who has bonds of the company in pledge for the same debt, such pledge of bonds, however, being illegal, the pledgor of the stock cannot compel the creditor to resort to the bonds first; nor, although a fictitious sale of the stock is alleged, can he compel the transferee of the stock to return the stock so that the pledgor may vote it, unless the pledgor pays the amount due. Hinck-

stock into his name for the purpose of controlling an election, which otherwise the pledgor would control, where the statutes of the state provide for recording of such pledge without a transfer of the stock itself.[1] The pledgee of a majority of the corporate stock, who by voting their stock cause men of their choice to be elected directors, are not liable for the misconduct of such directors.[2] It is legal for a pledgor to give the pledgee the right to vote the stock and to elect two directors.[3]

An administrator or executor may vote on the stock of the deceased stockholder, even though such stock has not been transferred to the executor or administrator on the books of the company.[4] Stock held jointly by three executors cannot be voted unless they all agree upon the vote.[5] Where a will gives to one of three executors the power to vote the stock, and directs the other two executors to give him a proxy to that purpose, the court will order the proxy to be given, even though he intends to vote himself into office, and he may not be a good manager.[6] A partner may vote upon stock belonging to the firm and registered in the partnership name.[7] Where stock is entered on the corporate books in the name of a person as an officer of another corporation, the successor in office of that person

ley *v.* Pfister, 83 Wis. 64 (1892). Even though stock stands on the books in the name of the pledgee, yet a court of equity may enjoin him from voting such stock in prejudice of the rights of the pledgor. Haskell *v.* Read, 68 Neb. 107 (1903). See 161 Fed. Rep. 3.

1 Spreckels *v.* Nevada Bank, 113 Cal. 272 (1896).

2 Higgins *v.* Lansingh, 154 Ill. 301 (1895). See also § 468, *supra.*

3 Canadian Imp. Co. *v.* Lea, 69 Atl. Rep. 455 (N. J. 1908).

4 Quoted and approved in Schmidt *v.* Mitchell, 101 Ky. 570 (1897); Market Street Ry. *v.* Hellman, 109 Cal. 571 (1895). A foreign executor may vote stock belonging to the estate, even though the stock stands in the name of the deceased stockholder. *Re* Cape May, etc. Co., 16 Atl. Rep. 191 (N. J. 1888); *Re* North Shore, etc. Ferry Co., 63 Barb. 556 (1872), holding that an administrator may vote upon stock standing in the name of the deceased person, even though the latter held the stock as trustee. In a proceeding to dissolve a corporation the administrator is the proper representative of stock owned by the estate. Wolfe *v.* Underwood, 97 Ala. 375 (1893). The administrator and not the heirs at law have the right to vote. Schoharie Valley R. R. Case, 12 Abb. Pr. (N. S.) 394 (1872).

5 Tunis *v.* Hestonville, etc. R. R., 149 Pa. St. 70 (1892), aff'g s. c., 1 Pa. Dist. 207 (1892). Where there are but two stockholders and one dies, and his administrator takes possession of the corporate property as though it belonged to the estate, the other stockholder may have a receiver appointed. *Re* Belton, 47 La. Ann. 1614 (1895).

6 Lafferty's Estate, 154 Pa. St. 430 (1893). See also Tunis *v.* Hestonville, etc. R. R., 149 Pa. St. 70 (1892).

7 Kenton Furnace R. R. etc. Co. *v.* McAlpin, 5 Fed. Rep. 737 (1880). In California he may vote such stock where the stock belongs to the firm, but is registered in the name of the other partner who is dead. Allen *v.* Hill, 16 Cal. 113 (1860).

may vote the stock without a transfer on the corporate books.[1] Where a corporation is authorized to hold stock in another corporation it is entitled to vote such stock.[2] A corporation as a stockholder may vote its stock by an agent.[3] When a municipal corporation is a stockholder in a private corporation, it is entitled to vote upon its stock in the same way as any other stockholder.[4] The fact that the government or a single person owns all the stock of a company does not put an end to the corporate existence.[5] Where joint owners of stock disagree as to its vote, the vote is to be rejected.[6]

A receiver, who is in possession of shares of stock, generally votes such stock without his right to do so being questioned. Sometimes the court, upon appointing a receiver of stock, expressly authorizes him to vote the stock, and sometimes directs him how to vote it.[7] Even though a stockholder has made an assignment for the benefit of creditors, yet if the stock remains in his name and he votes it at a meeting with the knowledge of the assignee, and no objection is made, the proceedings of the meeting are not invalidated thereby.[8]

It seems that a stockholder may lease his stock. He may, for a certain sum, assign to another all dividends during the specified time, and give to the lessee the right to vote the stock during that

1 Farmers', etc. Co. *v.* Chicago, etc. Ry., 27 Fed. Rep. 146, 156 (1886); Monsseaux *v.* Urquhart, 19 La. Ann. 482 (1867). *Contra*, *Re* Mohawk, etc. R. R., 19 Wend. 135, 146 (1838), holding that the word "cashier" attached to a stockholder's name does not authorize a succeeding cashier to vote the stock.

2 Davis *v.* U. S. etc. Co., 77 Md. 35 (1893). *Cf.* § 615, *infra.*

3 State *v.* Rohlffs, 19 Atl. Rep. 1099 (N. J. 1890).

4 See § 99, *supra.* Where stock in a railroad is owned by a part of a county, that part becomes a municipality for the purpose of owning and voting the stock, Hancock *v.* Louisville, etc. R. R., 145 U. S. 409 (1892).

5 The United States government, though the owner of all the stock of a canal company, may continue as a stockholder and keep up the corporate existence by allowing the directors to retain one share each as a qualification share. U. S. *v.* Louisville, etc. Canal Co., 4 Dill. 601 (1873); s. c., 26 Fed. Cas. 1002. See also § 709, *infra.*

6 *Re* Pioneer Paper Co., 36 How. Pr. 111 (1865); Tunis *v.* Hestonville, etc. Ry., 1 Pa. Dist. 207 (1892). *Cf.* s. c., 149 Pa. St. 70.

7 A court may appoint a receiver to hold an election, etc. where the entire interests in the corporation, including the stock, belong to parties who have been defrauded. King *v.* Barnes, 51 Hun, 550 (1889); aff'd, 113 N. Y. 655. See also dictum in Wanneker *v.* Hitchcock, 38 Fed. Rep. 383 (1889), where the trustees of stock disagreed as to voting; People *v.* Albany, etc. R. R., 55 Barb. 344, 371 (1869), aff'd, 57 N. Y. 161; where a receiver's vote was set aside, fraud being involved and the appointment being invalid; American Inv. Co. *v.* Yost, 25 Abb. N. Cas. 274 (1890), where a receiver of stock was instructed how to vote, the action being to enforce an agreement to place stock in the hands of trustees until the debts of the company and chief stockholder were paid. See also pp. 1681, 1690, *infra.*

8 Third Nat. Bank of Cincinnati *v.* Jackson, 156 Fed. Rep. 144 (1907).

time.[1] A gift of stock, on condition that the dividends should all go to the owner and that he should vote it, is a gift of a remainder with a life interest in the donor.[2]

§ 613. *The corporation cannot vote upon shares of its own stock.*—Shares of stock owned by the corporation itself cannot be voted either directly by the corporate officers or indirectly by a trustee of the corporation. This is the established rule, whether the stock is registered in the name of the corporation or not.[3]

Where the directors, just before the election, issue or sell stock owned by the corporation, the purpose of such issue or sale being to control the election, the courts will interfere at the instance of other stockholders where an actual fraud is involved.[4]

§ 614. *Issuing stock in order to carry an election.*—Where the directors cause treasury stock to be sold to themselves at less than its real value and for the purpose of carrying an election, the court will set the sale aside as fraudulent.[5] In a proper case the court

1 Zachry *v.* Nolan, 66 Fed. Rep. 467 (1895).

2 Matter of Brandreth, 169 N. Y. 437 (1902).

3 Quoted and approved in O'Connor *v.* International, etc. Co., 68 N. J. Eq. 67 (1904). *Ex parte* Holmes, 5 Cow. 426 (1826); McNeely *v.* Woodruff, 13 N. J. L. 352 (1833); American Ry. Frog Co. *v.* Haven, 101 Mass. 398 (1869); Commonwealth *v.* Boston, etc. R. R., 142 Mass. 146 (1886); State *v.* Smith, 48 Vt. 266 (1876); Monsseaux *v.* Urquhart, 19 La. Ann. 482 (1867); U. S. *v.* Columbian Ins. Co., 2 Cranch, C. C. 266 (1821); New England, etc. Ins. Co. *v.* Phillips, 141 Mass. 535 (1880), where income bonds entitled to vote were held to have lost that right when they were paid; Brewster *v.* Hartley, 37 Cal. 15 (1869), where the company had pledged its stock. If all the stochkolders consent, the stock owned by the corporation may be voted. Farwell *v.* Houghton, etc. Works, 8 Fed. Rep. 66 (1881). Where a mortgage can be given only upon the vote of the stockholders, stock owned by the corporation cannot be voted, but the pledgee of such stock from the corporation was allowed to vote. Vail *v.* Hamilton, 85 N. Y. 453 (1881). Directors elected by votes upon stock owned by the corporation are illegally elected. *Ex parte* Desdoity, 1 Wend. 98 (1828). Where the statute requires the vote of the holders of a certain amount of the stock, only the outstanding stock is considered. The unissued stock and treasury stock are not counted. Market Street Ry. *v.* Hellman, 109 Cal. 571 (1895).

4 Quoted and approved in O'Connor *v.* International, etc. Co., 68 N. J. Eq. 67 (1904). See § 614, *infra*, on this subject.

5 Hilles *v.* Parrish, 14 N. J. Eq. 380 (1862). Where the stock of a cemetery company of the par value of $50 is worth but $5, the directors may issue it for land which is liable to come into competition with the company, even though one motive of the directors is thereby to control an election. Rural, etc. Co. *v.* Wildes, 54 N. J. Eq. 668 (1896), rev'g 53 N. J. Eq. 452 (1895). A stockholder who was not present at a stockholders' meeting is not bound by the ratification by such meeting of the issue of a large amount of the original capital stock to the directors themselves, who were illegally elected, but who

will enjoin the issue of the new stock.[1] So also where directors issue new stock to their friends at less than par and without offering it to the existing stockholders, the object being to control a coming election, the election will be enjoined and the issue set aside.[2] A dissenting stockholder may cause to be set aside a sale of unissued stock to other stockholders at a grossly inadequate price to enable them to obtain control.[3] Dissenting stockholders may file a bill to obtain a cancellation of stock issued in payment for patents to engage in business outside of the territory described in the charter, the real purpose being to obtain the vote on the stock.[4]

But an election is valid, although it is carried by treasury stock of the corporation, which is sold by the directors just before the election in order to carry the election, so long as the sale is not attacked and set aside for fraud.[5] Where the stock is not treasury

thereby acquire control of the company. Morris *v.* Stevens, 178 Pa. St. 563 (1897). Where *de facto* directors, immediately after the election, order an issue of a large amount of the original unissued capital stock of the company, and most of it is taken by one of their number, who thereby acquires a majority of the stock of the company, and subsequently the election is declared illegal, such directors may be enjoined from voting the stock so issued, and, if they have sold it, may be enjoined from voting other stock equal in amount to the stock so sold by them. The existing stockholders are entitled to subscribe for their proportion of the unissued original capital stock. Morris *v.* Stevens, 178 Pa. St. 563 (1897). See also *post*, p. 1333, note 1.

1 The court will enjoin the board of directors from issuing new stock on the verge of an election and for the sole purpose of carrying that election, where the directors really represent a minority of the stock, and where the power to issue the new stock is very doubtful. Such an injunction was granted, even though the charge was made that the complainant was interested in rival companies and was exercising control in their behalf. Fraser *v.* Whalley, 2 Hem. & M. 10 (1864).

2 Way *v.* American, etc. Co., 60 N. J. Eq. 263 (1900). Where a majority of the directors issued stock to a friend in order to carry an election, the court has power to set aside the issue and also the election. Luther *v.* C. J. Luther Co., 118 Wis. 112 (1903).

3 Essex *v.* Essex, 141 Mich. 200 (1905).

4 Kimball *v.* New England, etc. Co., 69 N. H. 485 (1899).

5 State *v.* Smith, 48 Vt. 266 (1876). In the case of Taylor *v.* Miami Exporting Co. 6 Ohio, 176, 223 (1833), a bill by a stockholder to compel a person to take back from the corporation certain stock which he had purchased of it just before the election, and had voted at the election, and then immediately sold again to the corporation, failed. The vote on these shares, however, did not affect the result. But see §§ 65, 70, 286 (notes), *supra*, and § 653, *infra*. Even though the holders of a majority of the stock are opposed to the board of directors, yet the former cannot obtain an injunction against the board of directors selling treasury stock. Gillette *v.* Noyes, 92 N. Y. App. Div. 313 (1904). Where the stockholders are present and no one objects to the issue of unissued stock to a director whereby he acquires control, such issue is legal.

stock, but is new increased capital stock, all the existing stockholders have a right to subscribe for their proportion of the new stock, and may protect that right by injunction.[1] A court of equity may set aside an election of directors carried by a trick, whereby an irresponsible person was allowed to subscribe for a large amount of stock, which he then voted, nothing being paid on the stock. Such a suit may be brought by some of the stockholders in behalf of all.[2] Even though stock has been issued irregularly to a director, yet where he has held it for a year the board of directors cannot just before an election arbitrarily cancel such stock in order to carry the election.[3] It is of course legal to purchase stock from stockholders in order to control an election.[4]

§ 615. *Where a corporation owns a majority of the stock of a rival company, may it vote the stock and control the latter company?*—It has been held in several cases that where one corporation owns a majority of the stock of a rival company, the temptation to manage the latter company for the benefit of the former company will be so great that a minority stockholder of the latter company may enjoin the former company from voting the stock.[5]

Christopher *v.* Noxon, 4 Ont. Rep. (Can.) 672 (1883).

1 § 286, *supra.*

2 Davidson *v.* Grange, 4 Grant's Ch. Rep. (Can.) 377 (1854).

3 Hall *v.* Lay, 27 N. Y. Misc. Rep. 602 (1899).

4 Toronto, etc. Co. *v.* Blake, 2 Ont. Rep. (Can.) 175 (1882).

5 Where one railroad company acquires a majority of the stock of another having so substantially similar a field of operations that there is a necessary conflict of interests between the two, the former may be enjoined from voting its stock on the question of annulling a lease from one to the other, even though both companies are in the hands of a receiver. George *v.* Central R. R. etc. Co., 101 Ala. 607 (1894). In Memphis, etc. R. R. *v.* Woods, 88 Ala. 630 (1889), it was held that where one railroad company has acquired a majority of the stock of another railroad company, and has elected the board of directors, and oppressed and defrauded such latter company by buying unnecessary rolling stock, making unnecessary repairs at exorbitant prices, unduly apportioning the earnings as between the two roades, and in other ways increasing its own profits at the expense of the latter company, a minority stockholder in such latter company may enjoin the former company from voting such stock at an election. A request to the company to bring the action was first made by the stockholder who brought the suit. A transportation company owning a majority of the stock of an ice company may be enjoined from voting the stock, if the former company intends to purchase ice from the latter company, but otherwise no such injunction will issue. American, etc. Co. *v.* Linn, 93 Ala. 610 (1890). A stockholder in one mining and manufacturing company may enjoin another rival company from voting the majority of stock in the former company, such majority being owned by the latter company. Mack *v.* De Bardeleben, etc. Co., 90 Ala. 396 (1890). Where an electric light company purchases a majority of the stock of a competing electric light company in

In New York, however, the more logical rule is laid down that a court of equity has no power to restrain a railroad corporation, which has legally purchased a majority of the stock of another railroad corporation, "from voting on the stock so purchased upon the allegation, or proof, that it intends to cause a board of directors to be elected, who, by their action or non-action, may injure or prejudice the interests of the minority stockholders of the corporation whose stock has been so purchased." [1] Such also is the law in New Jersey.[2] It has been held in Ohio that one railroad corporation has no power to acquire the bonds of another railroad corporation in order to control the elections of the latter, such bonds having a voting power.[3] Where a railroad company acquires con-

the same city, and elects the board of directors, and fraudulently uses its power to make the latter subservient to and as a feeder to the former, and intends to destroy the latter, the court, at the instance of a minority stockholder of the latter, will appoint a receiver of the company; but the proof of such intent must be clear. The fact that the directors so elected are stockholders in the controlling company is not sufficient. Davis *v.* U. S. etc. Co., 77 Md. 35 (1893). It is illegal for an Ohio corporation to purchase a majority of the stock of a Tennessee corporation for the purpose of controlling the latter, even though they are engaged in a similar business, the object being to form a monopoly. Hence the purchasing company cannot enforce the contract as to certain things which were to be done by the vendor of the stock. Marble Co. *v.* Harvey, 92 Tenn. 115 (1892). See also Alexander *v.* Searcy, 81 Ga. 536 (1889). A stockholder's suit to restrain another corporation from voting stock in his corporation does not lie where such other corporation is not made a party defendant. Hollifield *v.* Wrightsville, etc. R. R., 99 Ga. 362 (1896).

1 Oelbermann *v.* New York, etc. R. R., 77 Hun, 332 (1894).

2 A stockholder will not be enjoined from voting on the ground that he is not a *bona fide* stockholder, but that his stock was paid for by rival companies, and that he intends to control the company for the advantage of those companies. Camden, etc. R. R. *v.* Elkins, 37 N. J. Eq. 273 (1883). The New Jersey courts will at the instance of a stockholder enjoin a New Jersey corporation from owning and voting stock in a Washington corporation where the Washington courts hold that a Washington corporation has no power to own stock in another Washington corporation, and may be enjoined from voting such stock. Coler *v.* Tacoma, etc. Co., 65 N. J. Eq. 347, rev'g 64 N. J. Eq. 117 (1903). A federal court has held that where a corporation is organized to own and vote the stock of two competing railroads, the courts will enjoin the voting of the stock, the combination itself being forbidden by law. Clarke *v.* Central R. R. etc. 50 Fed. Rep. 338 (1892). In this case, however, on the final hearing, the bill was dismissed. See 62 Fed. Rep. 328 (1894). Stock held by one corporation in another cannot be voted, where its charter has been forfeited and a proxy given by its directors had been revoked by a part of them, leaving the remainder in minority, and the stock held by it had been returned to the corporation and canceled. *In re* Delaware River, etc. R. R., 68 Atl. Rep. 1104 (N. J. 1908).

3 State *v.* McDaniel, 22 Ohio St. 354, 368 (1872). Where the state has

trol of the bonds and stock of a competing company, and allows a foreclosure to take place, the minority stockholders may defend against such foreclosure on the ground that the earnings had been kept down and also diverted.[1]

The reasonable rule would seem to be that where one company, having no power to purchase the stock of a rival company,[2] illegally purchases a controlling interest in such stock,[3] or where one company, having legally purchased the majority of the stock of a rival company, has managed the latter company fraudulently in its own interests, a court of equity should enjoin it from voting the stock at the next election. But if the purchase of the stock was legal and there has as yet been no fraud in the management such an injunction should not be granted.[4] Moreover, even though a

brought suit to forfeit the charter of a railroad company on the ground that a majority of its stock is held contrary to the statutes and constitution of the state by another railroad company, the case may be removed to the federal court if the latter company is an instrument of interstate commerce, and purchased the stock for interstate commerce purposes. It is also removable where the latter company claims that its charter existed before such constitution and statutes, and gives it a right to own such stock. South Carolina *v.* Port Royal, etc. Ry., 56 Fed. Rep. 333 (1893). See 161 Fed. Rep. 3.

1 Farmers' L. & T. Co. *v.* New York, etc. Ry., 150 N. Y. 410 (1896).

2 See §§ 314–317, *supra.*

3 Milbank *v.* New York, etc. R. R., 64 How. Pr. 20 (1882), where the court, at the instance of a minority stockholder, enjoined another railroad company from voting a majority of the stock in his company, although fraud and partiality in the management for the benefit of the majority stockholder was a fear of the future instead of a fact in the past. The court said: "It is against public policy to have or permit one corporation to embarrass and control another and perhaps competing corporation in the management of its affairs, as may be done if it is permitted to purchase and vote upon the stock." In Louisiana it is held that where one corporation acquires stock in another corporation without authority so to do, the former may collect the dividends on such stock and may sell it, but cannot vote it, and hence that directors elected by such vote may be ousted by *quo warranto* proceedings. State *v.* Newman, 51 La. Ann. 833 (1899). A smelting company has no inherent power to purchase stock in another smelting company, and hence may be enjoined by a stockholder of the latter company from voting such stock. Parsons *v.* Tacoma, etc. Co., 25 Wash. 492 (1901). A minority stockholder in a railroad company claiming that another railroad company illegally owns a majority of the stock of the former, cannot enjoin such owner from voting the stock, by a suit instituted in a state where the former corporation is located, unless the latter corporation is served and brought in as a party defendant. Taylor & Co. *v.* Southern Pacific Co., 122 Fed. Rep. 147 (1903).

4 The right of one railroad corporation to own stock in another railroad corporation carries with it the right to vote for the directors and on all other questions, unless such vote is for the purpose of perpetrating an actual fraud. Rogers *v.* Nashville, etc. Ry., 91 Fed. Rep. 299 (1898). In this case the court held that where one

railroad purchases the stock of another railroad, in violation of the charter of the former, yet, if subsequently the legislature passes a law authorizing any corporation to purchase and own the stock of other corporations, the illegality of the above-mentioned purchase is cured, and the disability to hold such stock is removed, there being no longer any statute, rule of law, or principle of public policy forbidding such purchase.[1] Where a holding company increases the capital stock of one of its subsidiary companies and then causes it to purchase the common stock of the holding company, thereby creating a conflict of interest between the preferred stockholders of the holding company and the subsidiary company, which by the plan would control the holding company itself, minority stockholders may enjoin such a reorganization, it being a part of the plan that the holding company shall sell its various stocks to such subsidiary company.[2] A stockholder is an indispensable party to a suit to enjoin the voting of his stock at a meeting of shareholders for the election of directors, and this is the rule even though the stockholder is a corporation and has the same directors as the former corporation.[3] A stockholder cannot maintain a suit against the corporation to enjoin other stockholders from selling their stock to a second corporation, such second corporation and the other stockholders not being parties to the suit.[4] An individual may of course own a controlling interest in two corporations, although they compete in business;[5] but the courts will carefully scrutinize any contracts between

railroad owns a majority of the stock and controls the board of directors of another railroad and causes the latter to lease its road to the former, a stockholder of the former may file a bill in equity to set aside such lease on the ground that its terms were so inequitable as to constitute a fraud, and that in such case no demand need be made to the board of directors to bring the suit, if the facts alleged in the bill show that the board of directors is controlled by the guilty party. See also § 6, *supra*. A minority stockholder in a gas company, which, to preserve its property and business, must either borrow money for extensions or else consolidate with another company, cannot enjoin a sale of the assets of the former to the latter, such sale having been authorized by the directors and a majority of the stockholders, even though a majority of the stock of the former company is owned by the latter company, there being no actual fraud. Theis *v.* Spokane, etc. Co., 95 Pac. Rep. 1074 (Wash. 1908).

1 *In re* Buffalo, etc. R. R., 37 N. Y. Supp. 1048 (1896), involving the same transaction as was involved in Milbank *v.* N. Y. etc. R. R., 64 How. Pr. 20. See also §§ 314–317, *supra*.

2 Robinson *v.* Holbrook, 148 Fed. Rep. 107 (1906).

3 Taylor & Co. *v.* Southern Pac. Co., 122 Fed. Rep. 147 (1903).

4 Ingraham *v.* National Salt Co., 36 N. Y. Misc. Rep. 646 (1902); aff'd, 72 N. Y. App. Div. 582.

5 See pp. 856–857, note, *supra*. *Cf.* § 317, *supra*.

two such corporations so controlled.[1] A corporation that owns stock in another corporation may vote such stock in favor of dissolution of the latter, even though it was influenced so to vote by the fact that it has guaranteed dividends on the stock of the latter so long as the latter exists.[2] A New Jersey court has held that a scheme whereby an insurance company purchases a majority of the stock of a trust company, and the trust company purchases a majority of the stock of an insurance company, is illegal, and will be set aside at the instance of a dissenting stockholder, inasmuch as it results in self-perpetuating boards of directors, without the responsibility which would exist if those directors represented their own stock, and the court pointed out that the "Voting Trust Cases" in New Jersey had established the principle of law that agreements which sever the ownership of stock from the voting power are, in many instances, a violation of another principle of law, that "every stockholder is entitled to the benefit of the judgment of every other stockholder in the management of the affairs of the corporation." [3] Even though a

1 See § 662, *infra.*

2 Windmuller *v.* Standard, etc. Co., 114 Fed. Rep. 491 (1902). See also § 629, *infra.* In the case of Robotham *v.* Prudential Ins. Co., 64 N. J. Eq. 673 (1903), the court approved the decision in Windmuller *v.* Standard, etc. Co., 114 Fed. Rep. 491, but said that if the complaint had been framed on a different theory, and "if the complainants had attacked the action of the directors in instituting the proceedings for dissolution as the product of bribery or improper influence of any kind, or of favoritism to the majority stockholder, who had appointed the directors, a very different case would have been presented. If the complainants had also charged that the directors, their trustees, had not only committed a gross and flagrant breach of duty, but that the majority stockholder had instigated them to do it, a strong case, apparently, would have been made out in which to hold the majority stockholder liable for damages."

3 Robotham *v.* Prudential Ins. Co., 64 N. J. Eq. 673 (1903). The counsel in this case claimed that the following situation was legal: "One man controls a company of $10,000,000 capital. He may form a new company, with a capital of $5,100,000, to hold a majority of the stock. He may then sell all but $2,600,000 of the stock in company No. 2, and transfer his remaining stock to a new company with a capital of $2,600,000. He may then sell to company No. 3 all but $1,400,000 and transfer that to a new company. This process may go on until the power of the whole chain of corporations is vested in the holder of a few thousand dollars of stock in the ultimate company, and the same chain can be used for an unlimited number of companies." In reply to this the court said that such a situation, if it should arise, might lead to the following questions: "First. Whether the holders of the $4,900,000 of stock could not disfranchise the new irresponsible adventurers who assumed to wield the voting power of the $5,100,000 of stock—disfranchise this stock until the beneficial owners of it should take control of their own property and use its voting power. Second. Whether the actual, beneficial owners of the $5,100,000 of stock could not break through the chain of cor-

telephone company has no right to condemn and it organizes a telegraph company, which commences the condemnation proceedings, it is no defense that the latter is but a dummy of the former.[1] Although the Michigan statutes authorize one mining company to purchase the stock of other mining companies, yet where this results in establishing a practical monopoly in a certain kind of copper, a minority stockholder may enjoin the voting of such stock so held by the purchasing company, and no formal demand need first be made by him upon the directors to institute the suit.[2]

§ 616. *Illegal or fraudulent elections—The remedy of injunction against elections and against voting particular stock.*—A court of equity has power to enjoin the holding of an election by a corporation during the pendency of a suit.[3]

porate fictions which separated them from their property, and dictate how its voting power should be exercised. Third. Whether it would not be the duty of the attorney-general of the state to take proceedings to dissolve the holding companies, as an abuse of corporate franchises,—as a fraud upon the extremely liberal provisions of our corporate act, which, however, permit the incorporation of companies only for a 'lawful purpose.'"

1 Alabama, etc. Ry. Co. *v.* Cumberland, etc. Co., 88 Miss. 438 (1906). See also § 934, *infra.*

2 Bigelow *v.* Calumet, etc. Co., 155 Fed. Rep. 869 (1907), rev'd Oct., 1908. See also § 317, *supra.*

3 In Walker *v.* Devereaux, 4 Paige, 229, 247 (1833), Chancellor Walworth said: "This court unquestionably has the power to prevent this election by an injunction operating upon the commissioners, restraining them from acting as inspectors of the election." In Haight *v.* Day, 1 Johns. Ch. 18 (1814), Chancellor Kent dissolved the injunction, but did not question the power of the court to grant it. High on Injunctions, § 1230, says: "While the propriety of equitable interference by injunction with the election of officers of private corporations has been frequently criticised, and with no inconsiderable show of justice, the jurisdiction itself, although sparingly exercised, is too firmly established to be readily shaken without the intervention of legislative authority. The jurisdiction is, however, almost entirely of American growth, the English authorities affording few instances of its exercise." A court of equity has jurisdiction on a bill in equity to enjoin an election, although the statute provides for a summary remedy by application to the court, where the relief asked for by the bill involves also the transfer of stock. Archer *v.* American, etc. Co., 50 N. J. Eq. 33 (1892). The holding of an election may be enjoined pending a suit which has been commenced to restrain the voting the stock which has been illegally issued at less than par to friends of the directors in order to control the election. Way *v.* American, etc. Co., 60 N. J. Eq. 263 (1900). Where a corporation has brought suit against its president for an accounting for money misappropriated by him, and where the president owns a majority of the stock, the court may enjoin the holding of an election, it being shown that the president has power to elect a board of directors who may defeat the purpose of the suit. Coxe *v.* Huntsville, etc. Co., 129 Ala. 496 (1900). In the case State *v.* Kennan, 35 Wash. 52 (1904), it appears that a mining company had a capital stock of $50,000 dividend into 1,000,000 shares of the

A court of equity may enjoin the majority stockholders from

par value of five cents each and that the secretary issued over 1,000,000 spurious shares. The court sustained a bill in equity by a stockholder against the corporation and all its stockholders to determine which held the genuine stock, and enjoined any meetings or transaction of any business in the meantime. Even though the Michigan statutes authorize one mining company to purchase the stock of other mining companies, yet where this results in establishing a practical monopoly in a certain kind of copper, a minority stockholder may enjoin the voting of such stock so held by the purchasing company, and no formal demand need first be made by him upon the directors to institute the suit. Bigelow *v.* Calumet, etc. Co., 155 Fed. Rep. 869 (1907).

The court may enjoin the company from receiving any votes at an election unless the votes of the plaintiff are received. Brown *v.* Pacific Mail, etc. Co., 5 Blatchf. 525 (1867); s. c., 4 Fed. Cas. 420. In the latter case Judge Blatchford said: "As to the character of the injunction asked for, it is laid down in Judge Redfield's Treatise on the Law of Railways (vol. 2, sec. 221) that 'it has been common to produce a positive effect, through an injunction out of chancery, by means of a prohibitory order,' and that a mandatory order is, in courts of equity, seldom denied, unless the remedy at law is perfectly adequate." In this case Judge Blatchford enjoined the election inspectors from holding any election until the further order of the court, unless certain persons should first be permitted to vote certain stock; and also enjoined certain persons from voting any stock until after certain other persons had been afforded an opportunity to vote their stock. In Shelmerdine *v.* Welsh, 47 Leg. Int. 26 (Phila. Com. Pl., January, 1890), the court did not deny its power to enjoin the election, but said: "The case is not sufficiently clear to warrant a preliminary injunction that would prevent an election on the day named in the charter, and might cause the irreparable injury which such remedies are given to prevent." If the election is held in violation of an injunction, this fact will be considered in *quo warranto* proceedings. People *v.* Albany, etc. R. R., 55 Barb. 344, 384 (1869). The injunction generally runs against the inspectors, president, directors, officers, agents, servants, etc. Campbell *v.* Poultney, 6 Gill & J. (Md.) 94 (1834). It has been held that an injunction permanently forbidding the holding of any election whatever is an interference with the management of corporate affairs, to which the courts will decline to be a party; and such an injunction would, if granted, be void. People *v.* Albany, etc. R. R., 55 Barb. 344 (1869), aff'd, 57 N. Y. 161, holding also that while an injunction forbidding inspectors to hold an election at all, or to receive and count the votes thereof, is entirely void, since a court of equity has no power to restrain permanently an officer of a corporation from performing the ordinary duties of his office, yet they may be enjoined from holding an election until the further order of the court, or from receiving the votes of certain stockholders until the votes of others are deposited. An injunction may be granted staying an election. Scholfield *v.* Union Bank 2 Cranch, C. C. 115 (1815); s. c., 21 Fed. Cas. 723, where the inspectors denied the right of pledgors to vote. The corporation must not only be made a party defendant, but must be served or voluntarily appear before an injunction is granted. Morshead *v.* Southern Pac. Co., 123 Fed. Rep. 350 (1903). If directors convene a meeting, to pass resolutions favorable to themselves on questions in which the interests of the directors are opposed to those of the shareholders, by a circular which is

holding a new election, even though they claim that the former election was invalid.[1]

A court of equity may also enjoin the voting of particular stock. In order to obtain such an injunction, however, the complainant must show that the defendant intends to vote the stock; that he has no equitable right to do so; that the effect of the vote will be to control the election; and that irreparable and permanent injury will come to the corporation or to the stockholders unless the injunction is granted.[2]

Thus, an injunction has been granted where there was a conspiracy to obtain, on the eve of the election, an injunction against the complainants from voting their stock;[3] also where the directors propose to postpone the election in order to prolong their term of office;[4] also, in certain cases, where a stockholder has transferred

misleading, and which contains statements calculated to obtain proxies in their favor without giving the shareholders the information necessary to enable them to form a just judgment as to who are the proper persons to whom to intrust their votes, the court will grant an injunction to restrain the holding of the meeting, and to restrain the directors from laying such resolutions before the meeting. Jackson *v.* Munster Bank, 13 L. R. Ir. 118 (1884). For other instances in which a court of equity interfered, see § 593, *supra*, and § 618, *infra*.

1 Chiera *v.* Brevoort, 97 Mich. 638 (1893).

2 Reed *v.* Jones, 6 Wis. 680 (1858), holding that a preliminary injunction against a stockholder voting his stock cannot be granted on the ground that he had no title to the land which he conveyed in payment of the stock. The stock had not been canceled by the compnay, and no action was pending to cancel it. In McHenry *v.* Jewett, 90 N. Y. 58 (1882), a preliminary injunction was denied, inasmuch as the complaint showed no equitable cause of action. Where the owner of a majority of the stock has been fraudulently deprived of her stock by her pledgee, who has thereby deprived her of the control and claims the stock as his own, the court will enjoin him from voting the stock and will appoint a receiver of such stock *pendente lite.* Ayer *v.* Seymour, 5 N. Y. Supp. 650 (Com. Pl. 1889). An injunction against a stockholder's voting certain stock is not an injunction to "suspend the general and ordinary business of a corporation." An election is not such business. Reed *v.* Jones, 6 Wis. 680 (1858).

3 Brown *v.* Pacific Mail, etc. Co., 5 Blatchf. 525 (1867); s. c., 4 Fed. Cas. 420, in which the allegation was that the defendants contemplated, through improper means, to obtain an injunction preventing plaintiffs, who were large stockholders in a corporation, from voting at an approaching election, and that defendants were improperly obtaining proxies from other stockholders in order to control the election for their private purposes. The complainant alleged that defendants intended to obtain control for the benefit of rival companies, and intended fraudulently to prevent the complainants from voting. The court enjoined defendants from participating in any election unless plaintiffs' votes were received thereat, and from restraining plaintiffs in their right to vote.

4 A stockholder may enjoin directors from postponing an annual election which comes in February, but

part of his stock in order to increase the voting power of the stock the charter limiting the number of votes one stockholder may cast;[1] also where a majority of stock is owned by a competing company which has acquired control for the purpose of diverting business to itself;[2] also where "trustees," who are mere agents, refuse to transfer the stock to their principals or to give proxies.[3] A court of equity has no power, prior to an interlocutory decree or order, to appoint a master to conduct an election, and to finally decide whether certain stock should be allowed to vote or not, on the ground that such stock had been illegally issued for property in violation of the statute, especially where other stockholders are not made parties defendant.[4]

Where the owner of a majority of the stock sells it, the purchase price being only paid in part, and retains the stock in his name until the full price is paid, he cannot be compelled to deliver the stock or to refrain from ousting the vendee from the presidency of the corporation, where the vendee fails to meet the other payments even though the vendee has proceeded to improve the property.[5] A vendee of stock who has filed a bill in equity for specific performance will not be granted an injunction against the stock being voted by the vendor in the meantime, where the former does not allege that the vendor is insolvent or is about to dispose of the stock.[6] An unrecorded stockholder may maintain a suit to prevent the illegal voting of stock owned by the corporation itself.[7]

Equity has jurisdiction to compel the transfer of stock as be-

which the directors by by-law have changed to October, thereby endeavoring to extend their term. Elkins *v.* Camden, etc. R. R., 36 N. J. Eq. 467 (1883). See also Camden, etc. R. R. *v.* Elkins, 37 N. J. Eq. 273 (1883).

1 See § 621, *infra.*

2 See § 615, *supra.*

3 See § 622, *infra.* An injunction *pendente lite* against the voting of certain stock in connection with the formation of an alleged illegal pool will not be continued where it failed to accomplish its purpose at one annual meeting and will fail in the next meeting. Ryan *v.* Seaboard, etc. R. R., 89 Fed. Rep. 385 (1898).

4 Yetter *v.* Delaware, etc. R. R., 206 Pa. St. 485 (1903). A stockholder may object to the voting of overissued stock in the hands of the party to whom it was originally issued, even though he voted to issue such stock, and he may maintain an action to have the stock canceled. Haskell *v.* Read, 68 Neb. 107 (1903). Where by fraud a corporation has been induced to sell stock and it sues to recover back the same, it may have an injunction against the defendant assigning or transferring the stock, but cannot enjoin him from voting it. Maine, etc. Co. *v.* Alexander, 115 N. Y. App. Div. 112 (1906). See p. 1690, *infra.*

5 Stockton *v.* Russell, 54 Fed. Rep. 224 (1892).

6 Lucas *v.* Milliken, 139 Fed. Rep. 816 (1905).

7 O'Connor *v.* International, etc. Co., 68 N. J. Eq. 67 (1904); aff'd, 68 N. J. Eq. 680. See alsc § 620, *infra.*

tween parties. Hence where stock is issued in payment for property, and the party to whom the certificates is issued refuses to divide it among the owners of the property, as provided by contract, a court of equity may compel the division and may enjoin any election of the corporation until such division is made.[1]

The general rule is that one stockholder has nothing to do with the motive of another stockholder. The injunction must be based on damage reasonably certain to ensue.[2] Accordingly, an injunction will not be granted upon the ground that the stockholders against whom the injunction is sought are likely to obtain control of the affairs of the company, and that then they will probably misuse their power.[3] The form of the injunction order varies, of course, with the circumstances of the case. The federal courts have sanctioned a form which, while drastic in its terms, is effective in reaching the desired result, and is none too severe when the difficulties are considered.[4]

Where a party is enjoined from voting, the court will enjoin his proxy from voting.[5]

The proxy may be enjoined although his principal is not made a party and is not served.[6] But stockholders who are not made

1 Archer *v.* American, etc. Co., 50 N. J. Eq. 33 (1892). Where by reason of an order of the court stock is issued to a party and the certificate deposited in court to abide an appeal, the party to whom such stock runs cannot vote the same pending the appeal. Durfee *v.* Harper, 22 Mont. 373 (1899).

2 Ryder *v.* Alton, etc. R. R., 13 Ill. 516 (1851), where a subscriber failed in his defense against a subscription by attacking the policy of the majority in control.

3 Camden, etc. R. R. *v.* Elkins, 37 N. J. Eq. 273 (1883). *Cf.* Brown *v.* Pacific Mail, etc. Co., 5 Blatchf. 525 (1867); s. c., 4 Fed. Cas. 420. The voting of certain stock cannot be enjoined on the ground that it will elect directors who will use their power to fraudulently obtain a contract with the corporation. Lucas *v.* Milliken, 139 Fed. Rep. 816 (1905). A promoter cannot enjoin the corporation from increasing its stock, even though he claims that such increase will defeat a contract made prior to incorporation, by which he was to have a one-sixth interest, the corporation not having ratified such contract. Martin *v.* Remington, etc. Co., 95 N. Y. App. Div. 18 (1904). A director cannot have an injunction against stockholders calling and holding a meeting to remove him, there being no allegation that the stockholders have no such right. Shulman *v.* Star, etc. Co., 113 N. Y. App. Div. 759 (1906).

4 See the form of injunction granted in Brown *v.* Pacific Mail, etc. Co., 5 Blatchf. 525 (1867); s. c., 4 Fed. Cas. 420. Approved in People *v.* Albany, etc. R. R., 55 Barb. 344, 383 (1869). An injunction against a corporation recognizing a transfer of stock was held not to prevent the transferee's voting, in Commonwealth *v.* Stevens, 168 Pa. St. 582 (1895).

5 Clarke *v.* Central R. R. etc. Co., 50 Fed. Rep. 338 (1892). In this case, however, on the final hearing, the bill was dismissed. See 62 Fed. Rep. 328 (1894).

6 Brown *v.* Pacific Mail, etc. Co., 5

parties will not be enjoined.[1] The injunction against certain persons voting certain stock does not prevent the election from taking place. On the contrary, the election goes on and is valid, even though it happen that what would have been a minority of the votes, had not the injunction issued, becomes, by reason thereof, a majority, and elects.[2] Where the injunction is applied for at a time so near the election that the opposition will have no reasonable opportunity to be heard, the court may refuse the application on that ground.[3] A court of equity will not grant an *ex parte* injunction at the instance of a minority stockholder on the eve of an election against the voting of a majority of the stock, where the result would be to enable the minority to elect.[4] Where trustees hold a majority of the stock of a corporation and one of them is enjoined from voting it, the election may be enjoined at the instance of a minority stockholder until the first suit is decided.[5] The practice of serving an injunction after the meeting has assembled is not looked upon with favor by the courts.[6] Where an injunction has been obtained on false affidavits and bill to control an election, and the pro-

Blatchf. 525 (1867); s. c., 4 Fed. Cas. 420.

1 Brown *v.* Pacific Mail, etc. Co., 5 Blatchf. 525 (1867); s. c., 4 Fed. Cas. 420. In a suit to restrain specified stockholders from voting at a corporate election the stockholders so specified are necessary parties defendant. Jones *v.* Nassau, etc. Co., 53 N. Y. Misc. Rep. 63 (1907). See also § 615, *supra.*

2 Brown *v.* Pacific Mail, etc. Co., 5 Blatchf. 525 (1867); s. c., 4 Fed. Cas. 420. Where by reason of an injunction against voting certain stock the meeting is not held at the time specified in the notice, but later in the day a minority meet and adjourn to the next day and conceal such adjournment from the majority and elect directors, the court will oust them from office. State *v.* Bonnell, 35 Ohio St. 10 (1878).

3 Where a bill was filed to restrain certain stockholders from selling or assigning their stock, or from voting upon it at an ensuing election, which was to be held within three days from the date of the filing of the bill, the court held that inasmuch as the probable effect of the injunction would be to change the result of the election, and the consequent control of the affairs of the company, without allowing the stockholders sought to be restrained to be heard in their own defense, the injunction ought to be denied. Hilles *v.* Parrish, 14 N. J. Eq. 380 (1862). It appears, however, that counsel stipulated for a new election in case the complainant succeeded, and the court so ordered.

4 Lucas *v.* Milliken, 139 Fed. Rep. 816 (1905).

5 Villamil *v.* Hirsch, 138 Fed. Rep. 690 (1905).

6 "The practice of procuring an injunction and serving it after the meeting had assembled is not to be commended, and should only be tolerated in cases where the right thereto is clearly established." *Re* Rochester, etc. Co., 40 Hun, 172, 175 (1886). The practice of obtaining an injunction against the voting of certain stock and withholding service of the same until after the meeting is organized, and then refusing to adjourn, was condemned in Lucas *v.* Milliken, 139 Fed. Rep. 816 (1905).

ceedings in court are discontinued immediately after the election, the court will summarily vacate and set aside the election by reason of the abuse of the process of the court and the fraud on the rights of the stockholders.[1] An appeal from an injunction against voting certain stock will be dismissed where the parties may, under a statute, apply to the court to review the election on affidavits.[2] Where the statutes require a corporation to keep a book containing the names of the stockholders and the stock held by each, and it fails to do so, a stockholder cannot obtain a mandatory injunction to the effect that voting at the annual election shall be in accordance with a list of stockholders, as certified by the transfer agent and registrar of the corporation.[3] The federal court has no jurisdiction of a suit by a stockholder to enjoin a corporation from allowing certain stock to be voted on various grounds, where there is no allegation that the complainant's holdings of stock are worth upwards of two thousand dollars.[4]

§ 617. *Illegal or fraudulent elections — The remedies of quo warranto and mandamus.*—There are various ways in which an illegal or fraudulent election of directors or managers of an incorporated company may be investigated and remedied. The natural and proper remedy in all cases is the old remedy of *quo warranto* to test the title to office. In England *quo warranto* does not lie to test the legality of the election of officers of a private corporation,

1 Putnam *v.* Sweet, 1 Chand. (Wis.) 286, 334 (1849).

2 Where an injunction against postponing an election is granted, and the election is held, and the next day an appeal is taken from the injunction order, the appeal will be dismissed, inasmuch as the parties have the remedy under the statute of applying to the court to review the election. Camden, etc. R. R. *v.* Elkins, 37 N. J. Eq. 273 (1883). Where an injunction against voting particular stock has been refused, and the election held, an appeal will be dismissed. Foster *v.* Smith, 115 Cal. 611 (1897). Where in a suit by a stockholder to enjoin elections, etc., pending an adjustment as to what stock is genuine and what is spurious, another stockholder intervenes, the latter cannot take an appeal unless notice of the appeal is served also upon the corporation. Willard *v.* Fisher, 36 Wash. 229 (1904).

3 Mitchell *v.* Colorado, etc. Co., 117 Fed. Rep. 723 (1902). But where the directors and officers, in order to continue in office, do not give notice of an annual meeting, but enact by-laws to aid them in this purpose, and cause a stockholder to have the annual meeting enjoined, other stockholders may file a cross-bill in such injunction suit, and it appearing to the court that a fair election could not otherwise be held, the court will modify the injunction so as to allow the election to be held at a time fixed by the court and under the supervision of a master in chancery appointed by the court. Bartlett *v.* Gates, 118 Fed. Rep. 66 (1902).

4 Harvey *v.* Raleigh & G. R. R., 89 Fed. Rep. 115 (1898).

but in this country a contrary rule prevails.[1] An information in the nature of a *quo warranto* is not allowed of course, but is a subject for the exercise of a sound discretion.[2] *Mandamus,* instead of *quo warranto,* lies when the title *de jure* has been adjudicated.[3] In West Virginia *mandamus* is held to be the proper remedy to place a *de jure* director, in the place of the *de facto* director, and service

1 Commonwealth *v.* Arrison, 15 Serg. & R. (Pa.) 127 (1827), a case of church trustees; Commonwealth *v.* Graham, 64 Pa. St. 339 (1870), the same; People *v.* Tibbits, 4 Cow. 358 (1825), an insurance company; State *v.* Farris, 45 Mo. 183 (1869), college trustees; Creek *v.* State, 77 Ind. 180 (1881), church trustees; State *v.* Kupferle, 44 Mo. 154 (1869), an insurance company; State *v.* McDaniel, 22 Ohio St. 354 (1872), directors of a railroad; Commonwealth *v.* Smith, 45 Pa. St. 59 (1863); High, Extraord. Remedies, § 653, etc.; Shortt, Informations, 129 (Eng. 1887); Commonwealth *v.* Gill, 3 Whart. (Pa.) 228 (1837), giving the pleadings herein: People *v.* Albany, etc. R. R., 55 Barb. 344, 354 (1869); aff'd, 57 N. Y. 161. *Quo warranto* is a proper remedy to determine the right of a relator claiming to have been elected a director of a corporation. Attorney-General *v.* Looker, 111 Mich. 498 (1897). For a clear statement of the nature of an information in the nature of a *quo warranto* filed by a claimant for an office in the name of the attorney-general, see Gibbs *v.* Somers Point, 49 N. J. L. 515 (1887). A stockholder may institute *quo warranto* proceedings. Commonwealth *v.* Stevens, 168 Pa. St. 582 (1895). See also § 713, *infra,* concerning *de facto* officers. The validity of the charter of a school incorporated as a joint-stock incorporation cannot be tested in *quo warranto* proceedings brought to determine the rights of parties claiming to be trustees. Commonwealth *v.* Yetter, 190 Pa. St. 488 (1899). Where there is a contest as to who are the legal officers, the attorney for the defeated party cannot hold the corporation liable for his services. Commonwealth *v.* Order, etc., 192 Pa. St. 487 (1899). See s. c., 193 Pa. St. 240 (1899).

2 State *v.* Lehre, 7 Rich. L. (S. C.) 234 (1854). The court in its discretion may, in Minnesota, decline to allow a private person to file an information in the nature of *quo warranto* to test the title to office of directors. Whitcomb *v.* Lockerby, 59 N. W. Rep. 495 (Minn. 1894). *Quo warranto* does not lie against a superintendent who may be removed at any time by the directors. State *v.* Cronan, 23 Nev. 437 (1897). A newly elected president may file a petition to be allowed to file an information in the nature of a *quo warranto* to compel a *de facto* president to surrender the office where the basis of the petition is that the meeting of the board of directors which elected the *de facto* president was held out of the state in violation of the statutes of Illinois. Place *v.* People, 192 Ill. 160 (1901).

3 Leeds *v.* Atlantic City, 52 N. J. L. 332 (1890). The Massachusetts statute that a certificate of stock issued as a pledge shall state that fact on its face enables the pledgor to vote without such proxy. If the certificate merely states that it is given in pledge, without stating the name of the pledgor, the pledgee to whom the certificate runs may vote the stock. The court may, however, refuse to grant a *mandamus* declaring certain person duly elected directors, where they were elected by the vote of the pledgee as against the wishes of the pledgor. J. H. Wentworth Co. *v.* French, 176 Mass. 442 (1900).

on the latter may be by publication;[1] and *mandamus* lies at the instance of a corporation to compel illegally elected directors to turn over the books to the legally elected directors.[2] Under the Nevada statute *mandamus* lies at the instance of a superintendent to oust a person who is illegally holding that office.[3] The courts of one state will consider the board of directors as legally elected until the courts of the state wherein the company was organized decide to the contrary.[4] Hence *mandamus* does not lie in one state at the instance of persons, claiming to be directors in a foreign corporation, commanding other persons from refraining to act as directors, even though all the persons are residents.[5] Where the corporate property is being wasted by reason of a contest between two rival boards of directors, one board having been declared illegal by the court and the other refusing to act, the court will, at the instance of a minority stockholder, appoint a receiver to protect the property until a recognized board is elected, and the stockholder need not request the directors to bring suit before he himself brings suit.[6]

§ 618. *Illegal or fraudulent elections — The remedy by injunction against directors acting, and the remedy of a suit in equity where the validity of the election arises incidentally.*—A court of equity may, prior to the holding of an election, enjoin such election.[7] But a different rule prevails after the election has actually taken place.

1 Cross *v.* West Va. etc. Ry., 35 W. Va. 174 (1891). Compare s. c., 34 W. Va. 742, and People *v.* New York, etc. Asylum, 122 N. Y. 190 (1890); aff'g 7 N. Y. St. Rep. 277.

2 American Ry. Frog Co. *v.* Haven, 101 Mass. 398 (1869). After the courts have decided that certain persons are directors, *mandamus* will be granted that the defeated parties turn over the books and papers to the former. Matter of Journal Pub. Club, 30 N. Y. Misc. Rep. 326 (1900). Where a director was not qualified and a new director has been elected in his place, he cannot have *mandamus* to allow him to inspect the company's books and exercise other rights of a director, even though for a time he was permitted to act as director. People *v.* N. Y. etc. Co., 34 N. Y. Misc. Rep. 326 (1901).

3 State *v.* Cronan, 23 Nev. 437 (1897).

4 State *v.* Cronan, 23 Nev. 437 (1897). The summary statutory remedy in New York to review elections does not apply to foreign corporations. Matter of North Am. Rice Co., N. Y. L. J., April 23, 1902. See § 619, *infra.* It is doubtful whether a Maine corporation may institute a suit in New York to enjoin certain persons from representing themselves as officers in such Maine corporations and from interfering with its business, where the controversy turns upon the validity of an election. Washington, etc. Co. *v.* Dimmick, etc., 41 N. Y. App. Div. 596 (1899). See also § 734, *infra.*

5 Wason *v.* Buzzell, 181 Mass. 338 (1902).

6 Jasper, etc. Co. *v.* Wallis, 123 Ala. 652 (1899). See also §§ 629, 746, *infra.*

7 See § 616, *supr*

A court of equity has no inherent power or jurisdiction to entertain a bill for the purpose of reviewing a corporate election and ousting the parties who claim to have been elected.[1]

[1] The title of *de facto* officers to their office cannot be tested by an injunction or bill in equity. *Quo warranto* or a proceeding under the statute is necessary. People *v.* Albany, etc. R. R., 57 N. Y. 161, 171 (1874). A court of equity has no power to decide which set of officers was duly elected, unless that question arises incidentally in connection with some other equitable matter. St. Patrick's, etc. *v.* Byrne, 59 N. J. Eq. 26 (1899). A court of equity has no jurisdiction to decide which board of directors was elected. Kean *v.* Union Water Co., 52 N. J. Eq. 813 (1895), rev'g Union Water Co. *v.* Kean, 52 N. J. Eq. 111. An *ex parte* injunction against a director continuing his duties as a director is void in New York as being contrary to the statute. Ciancimino *v.* Man, 20 N. Y. Supp. 702 (1892). Where there are two rival boards of directors, each claiming to have been legally elected, the remedy of one against the other is not an injunction, but a *quo warranto* proceeding. Carmel, etc. Co. *v.* Small, 150 Ind. 427 (1897). No injunction lies against officers acting as such, on the ground of illegal election. *Quo warranto* lies. Hartt *v.* Harvey, 32 Barb. 55 (1860). Equity has no power, except as incidental to other relief, to review an election. Perry *v.* Tuskaloosa, etc. Co., 93 Ala. 364 (1891); Hullman *v.* Honcomp, 5 Ohio St. 237 (1855); New England, etc. Co. *v.* Phillips, 141 Mass. 535 (1886), where an injunction was sought to restrain persons from acting as directors who had been illegally elected. Allen, J.: "This course is open to the objection that suits to remove or to institute corporation officers do not belong to the original jurisdiction in chancery; and that the right to be such officer cannot, in general, and in the absence of special legislation allowing this remedy, be tested by means of an injunction." 1 Pomeroy, Eq., § 171; 3 Pomeroy Eq., § 1345. See also, to same effect, Owen *v.* Whitaker, 20 N. J. Eq. 122 (1869), where the legality of the first election was the only thing involved; Hughes *v.* Parker, 20 N. H. 58 (1849); Johnston *v.* Jones, 23 N. J. Eq. 216 (1872); Mickles *v.* Rochester City Bank, 11 Paige, 118 (1844); Mechanics' Nat. Bank *v.* Burnet Mfg. Co., 32 N. J. Eq. 236 (1880), where a third person suing the corporation sought to have its answer stricken out because the officers were not duly elected; Fadness *v.* Braunborg, 73 Wis. 257 (1889), a religious corporation case; Wandsworth, etc. Co. *v.* Wright, 18 W. R. 728 (1870), where fraud was charged on the part of the inspectors; Davidson *v.* Grange, 4 Grant, Ch. (U. C.) 377 (1854), where the court refused an injunction, but said in a dictum that the election might be set aside on account of fraudulent voting of shares subscribed for by "dummies" to get control of the election on the promise that the subscriptions would afterwards be canceled. Self-constituted directors without a regularly organized meeting have not a good title to their office; and where subsequently the incorporators elected other directors, the latter may cause to be stayed an action brought in the name of the company by the self-constituted directors. John Morley Bldg. Co. *v.* Barras, [1891] 2 Ch. 386. The Pennsylvania statute giving the court power to control and supervise elections where fraud, violence, or unlawful conduct prevents a fair and honest election does not sustain an injunction obtained by majority stockholders—who withdrew from the annual meeting and held a separate election because a stock vote was not allowed on

Nevertheless, where there has been a palpable fraud practiced in the election, and usurpers are about to take possession of the property in violation of all justice, a court of equity will enjoin them from doing so.[1]

the election of chairman—against the board elected by the minority. *Quo warranto* is the only remedy. Jenkins *v.* Baxter, 160 Pa. St. 199 (1894).

1 A stockholder who has applied regularly for his part of the increased capital stock, but whose application has been rejected, may by a bill in equity compel the company to issue the stock to him upon payment therefor, and if the stock has been already issued to parties in control they will be compelled to give it up. He may also enjoin officers and directors who have been illegally elected by means of such stock, from acting, pending the decision in the case. Schmidt *v.* Pritchard, 112 N. W. Rep. 801 (Iowa, 1907). Where the owners of the whole stock sell it, and part of them resign and place the representatives of the vendee in possession, and those who remain in the board do so at his request, but transfer to him their certificates of stock, and then subsequently, when the time for the annual meeting has gone by, they publish a notice of a meeting and conceal the notice from him, and elect a board, and attempt to take possession, a court of equity will enjoin them. Equity is not obliged "to leave the corporation and its lawful directors to the remedy at law, always taking at least months, and in the meantime suffer the road to be operated and perhaps ruined by the depredators, because they claim to be directors *de facto* or *de jure*." Johnson *v.* Jones, 23 N. J. Eq. 216, 229 (1872). Where the pledgee of stock sells it out and buys it in himself, and at the annual election votes the stock by proxy, even though the stock still stands on the corporation books in the name of the pledgor, and the pledgor claims that the sale is illegal and that the directors elected by the pledgee's vote intend to take action detrimental to the corporation, such pledgor is entitled to an injunction against such directors acting as directors. Reynolds *v.* Bridenthal, 57 Neb. 280 (1898). In Clarke *v.* Central, etc. Co., 54 Fed. Rep. 556 (1893), it appeared that, the board of directors having been illegally elected, "the voting power of the stock was enjoined, a new election ordered, and the court appointed receivers, not for the purpose of subjecting the properties to the claims of creditors, but to protect and to preserve them until they could be turned over to a legally elected board of directors, as proper trustees, who would have the right under the law to take and operate the railroad in the interest of all concerned. The court further directed that, when this new election should have taken place, said new board of directors might apply to the court to have the property returned to the control of the properly constituted officers of the corporation." In this case, however, on the final hearing, the bill was dismissed. See 62 Fed. Rep. 328 (1894). Where a corporation has an authorized capital of $5,000, but only $2,500 are directed by the stockholders to be issued, it is illegal and fraudulent to issue the remaining authorized capital without giving the existing stockholders a prior right to subscribe to such increased capital *pro rata*. Directors elected by reason of such illegal issue will be enjoined from acting, where they are about to change the whole policy of the company. Humboldt, etc. Assoc. *v.* Stevens, 34 Neb. 528 (1892). A suit in Kentucky between rival claimants to office to have an adjudication as to the same and to have a receiver does not pre-

The *de facto* directors may enjoin the claimants to office from attempting to take forcible possession or exercising the duties of the office.[1] If the validity of a corporate election arises incidentally in connection with a suit in equity, the court will pass upon the election. This may occur where a bill is filed to enjoin a forfeiture of stock,[2] or a consolidation of corporations,[3] or to set aside an illegal assessment;[4] but not in a suit to enjoin the sale of stock,[5] nor in a suit to compel the directors to turn over the property.[6] In a suit by a stockholder to hold a president liable for an

vent one of the parties from foreclosing a mortgage on the corporate property in another state and having a receiver thereof appointed. Kelly *v.* Mitchell, 98 Ky. 218 (1895). A suit by a state to enjoin the defendant railroad company from being managed by directors elected by the votes of stock of the company owned by a foreign railroad corporation *ultra vires*, and also to declare such votes and elections void, and also for a receiver, or in lieu of all this for a forfeiture of the charter, is not demurrable. State *v.* Port Royal, etc. Ry., 45 S. C. 470 (1895). For other instances in which a court of equity interfered, see §§ 593 and 616, *supra*.

1 Reis *v.* Rohde, 34 Hun, 161 (1884). Although there is a controversy as to the legality of an election, yet the newly-elected president, who takes peaceable possession of the property, may enjoin the old president, who claims to hold over and who has forcibly taken possession. Toronto, etc. Co. *v.* Blake, 2 Ont. Rep. (Can.) 175 (1882).

2 In an injunction suit, brought by a stockholder to prevent the corporate officers from forfeiting stock, the court will pass upon the legality of an election of directors, but of course will not and cannot remove them. Moses *v.* Tompkins, 84 Ala. 613 (1888); Garden, etc. Co. *v.* McLister, L. R. 1 App. Cas. 39 (1875). A court of equity may incidentally pass upon the validity of a corporate election. Haskell *v.* Read, 68 Neb. 107 (1903). Even though a court of equity has power to cancel illegal stock it cannot incidentally thereto pass upon the legality of a subsequent election. Crow *v.* Florence, etc. Co., 143 Ala. 541 (1905).

3 Where the directors are about to make an illegal consolidation, and a stockholder files a bill to enjoin it, the court will pass also upon the legality of the election of the *de facto* directors. Nathan *v.* Tompkins, 82 Ala. 437 (1887). The legality of an election and the regularity of its procedure as well as the qualifications of its directors cannot be attacked collaterally, by a stockholder trying to enjoin a proposed sale of property by such directors. Jones *v.* Bonanza, etc. Co., 91 Pac. Rep. 273 (Utah, 1907).

4 An assessment upon stock levied by a board of directors illegally elected, and a sale of the stock thereunder, does not put an end to the stockholders' suit to oust such board of directors and to set aside such assessment and to set aside contracts made by such board. The complaint is not multifarious. Whitehead *v.* Sweet, 126 Cal. 67 (1899).

5 In an action to enjoin the sale of stock by a corporation under a lien which the corporation has upon the stock, a court of equity will not inquire into the regularity of the election of the directors. Elliott *v.* Sibley, 101 Ala. 344 (1893).

6 The legality of the election of directors cannot be tested by a suit in equity, even though the suit is ostensibly brought to compel the directors to turn over the property. Bedford Springs Co. *v.* McMeen, 161 Pa. St.

illegal salary paid to him, the validity of his election may be contested and an injunction asked against his continuing to act as president.[1]

A court of equity may appoint a master to hold an election of a corporation when by reason of fraud, violence, or unlawful conduct on the part of some stockholder a fair election cannot otherwise be held.[2] Where a claimant to the office of the director has with violence illegally taken possession of the corporate property, the court may appoint a custodian of the property, and direct the custodian to deliver it to the proper officers.[3] But generally an injunction and a receiver are not the proper remedies for a claim that the directors were illegally elected.[4]

§ 619. *Illegal or fraudulent elections — Statutory remedy by petition to a court of equity.*—In consequence of the delays and difficulties attending the remedy of *quo warranto,* statutes have been enacted in many of the states which give courts of equity the power to review corporate elections at the instance of the parties aggrieved. Such statutes are found in New York, New Jersey, California, and other states. By these statutes the court, sitting as a court of chancery, is empowered to review corporate elections, and to grant such relief as the particular circumstances and justice of the case seem to require.[5] Under the statute giving the courts power to review

639 (1894). Where newly-elected directors bring suit in the name of the company for the corporate books, the legality of the election cannot be questioned by way of defense. The question of such legality can be raised only by a direct proceeding for that purpose. Austin, etc. Co. *v.* Gemmell, 10 Ont. Rep. (Can.) 696 (1886). The title of the secretary and treasurer to his office cannot be tried by replevin suit instituted by the corporation, and by an application for a mandatory injunction requiring him to deliver up the property. Standard, etc. Co. *v.* Byers, 31 Wash. 100 (1903).

1 Chicago, etc. Co. *v.* Boggiano, 202 Ill. 312 (1903).

2 Tunis *v.* Hestonville, etc. R. R., 149 Pa. St. 70 (1892). See pp. 1670, 1681, *supra.* Where the directors and officers, in order to continue in office, do not give notice of an annual meeting, but enact by-laws to aid them in this purpose, and cause a stockholder to have the annual meeting enjoined, other stockholders may file a cross-bill in such injunction suit, and it appearing to the court that a fair election could not otherwise be held, the court will modify the injunction so as to allow the election to be held at a time fixed by the court and under the supervision of a master in chancery appointed by the court. Bartlett *v.* Gates, 118 Fed. Rep. 66 (1902). A decree to the effect that stockholders entitled to vote were forcibly prevented from voting, and to the effect that a commissioner should conduct another election and report to the court the vote and the objections, is not a final decree. National, etc. Co. *v.* United, etc. Co., 180 Pa. St. 224 (1897). See also § 612, *supra.*

3 Ciancimino *v.* Man, 20 N. Y. Supp. 702 (1892).

4 Ulmer *v.* Maine, etc. Co., 93 Me. 324 (1899).

5 Under a statute authorizing a court to review elections, the proceeding may be in equity. Whitehead *v.*

an election the court may confirm the election or order a new one or make such other order as it deems best.[1]

These statutes have proven to be among the wisest and best that legislatures ever enacted in regard to corporations. They furnish a speedy, simple, just, and effective remedy for all complaints, and are free from useless technicalities and expense. Various decisions under these statutes are given in the notes below.[2] Although by

Sweet, 126 Cal. 67 (1899). See also the cases in note 2, below.

1 Stratford *v.* Mallory, 70 N. J. L. 294 (1904).

2 For various cases in New York, showing the wide powers exercised by the court under this statute, see *Ex parte* Holmes, 5 Cow. 426 (1826); Schoharie Valley R. R. Case, 12 Abb. Pr. (N. S.) 394 (1872); *Ex parte* Desdoity, 1 Wend. 98 (1828); Vandeburgh *v.* Broadway, etc. R. R., 29 Hun, 348 (1883); Strong *v.* Smith, 15 Hun, 222 (1878); *Ex parte* Wilcocks, 7 Cow. 402 (1827); Mickles *v.* Rochester City Bank, 11 Paige, 118 (1844); *Re* Long Island R. R., 19 Wend. 37 (1837). In this case an election was set aside because the directors had illegally declared certain shares forfeited for non-payment of instalments, and refused to record an assignment thereof so as to entitle the assignee to vote. In a proceeding under the New York statute the strict rules as to the reception of evidence in civil actions do not apply. *Re* Argus Co., 138 N. Y. 557 (1893), holding also that the application will be heard by the court under the New York statute, although another party is joined as petitioner without authority. Under these statutes an election may be declared void by reason of the conspiracy, frauds, or trickery of a part of the stockholders. People *v.* Albany, etc. R. R., 55 Barb. 344 (1869); aff'd, 57 N. Y. 161. A statute repealing the statutory remedy in chancery to review elections operates retrospectively as well as prospectively. *Re* New York, etc. Co., 23 Hun, 615 (1881). The statute authorizing a court of chancery to review elections and order new ones does not authorize the courts to issue a *mandamus* to the inspectors of election in regard to counting votes by proxy and amending the return. People *v.* Simonson, 61 Hun, 338 (1891). "Surprise and fraud upon part of the electors is ground for avoiding an election." People *v.* Albany, etc. R. R., 55 Barb. 344, 363 (1869). In this case the place of an election was filled by one party with roughs as proxies brought there for purposes of intimidation, and for voting on *viva voce* votes, and for crowding out the regular voters. People *v.* Albany, etc. R. R., 55 Barb. 379 (1869). In this case also, under the New York statute, in an equitable suit brought by the state, the court appointed a receiver and issued an injunction pending the suit, and finally declared elected persons who would have received the most votes of all votes that had been legally cast, although there had been two elections held at the same time by the two parties at different places in the same town. Under the New York statute making the transfer book conclusively binding upon the inspectors of election, the inspectors cannot exclude the vote of the registered stockholder although he holds the stock merely as pledgee; but under the New York statute allowing the courts to summarily review the election, the court has power to go back of the transfer book and set the election aside, where the statute gave the pledgor the right to vote. Strong *v.* Smith, 15 Hun, 222 (1878). The above remedy does not apply to foreign corporations. See § 617, *supra*. "Where no allegation of

the award of arbitrators stock is transferred to a certain party, and such party votes the stock at the next election, and thereafter the award is set aside and the stock retransferred, yet the party so deprived of the stock during the election cannot have the election set aside.[1]

§ 620. *Who may complain of an illegal election — A new election is not granted if the result will be the same.*—Only a stockholder whose rights have been infringed, and who is equitably entitled to complain, may institute the proceedings. Persons contracting with the corporation and creditors of the corporation cannot interfere; neither can the corporation ordinarily defend against

fraud or deceit is made, the court cannot interfere under the power vested in it by the Revised Statutes to nullify or set aside the will of the shareholders as expressed by their votes." *Re* Wellman, etc. *v.* Ciancimino, etc. Co., N. Y. L. J., May 13, 1890. The corporation itself may apply under the statute for an order to the effect that the persons declared elected were legally elected. *Re* Pioneer Paper Co., 36 How. Pr. 111 (1865). Although officers in possession of the corporate property and management may, in proceedings to have defendant's election declared illegal, obtain an injunction against the defendant's interfering with the management of property, yet where the plaintiff obtained the property and management by violence on the day of the commencement of the suit notwithstanding an injunction against such violence, his injunction will be dissolved. Ciancimino *v.* Man, 20 N. Y. Supp. 702 (1892). The above remedy does not apply to the legality of an election of the president by the directors. *Re* Caguey, N. Y. L. J., Sept. 15, 1891. As to the California statute see Brewster *v.* Hartley, 37 Cal. 15 (1869); Wright *v.* Central California, etc. Water Co., 67 Cal. 532 (1885). The statutory power of the court to inquire into the legality of corporate elections does not apply to the "appointment" of a director by the board to fill a vacancy due to a resignation. Wickersham *v.* Brittan, 93 Cal. 34 (1892). Nor does such a statute enable the director so "appointed" to settle the question of the legality of the election by applying to the court. Wickersham *v.* Murphy, 93 Cal. 41 (1892). Where two groups of stockholders are contesting for control, the expenses of the litigation should not be borne by the company. Wickersham *v.* Crittenden, 106 Cal. 329 (1895). The statute in New Jersey giving the chancery court power to adjudicate elections is unconstitutional, inasmuch as the constitution vests that power in the supreme court only. Goldstein *v.* Ewing, 62 N. J. Eq. 69 (1901). Where the stockholders disagree, and two elections are held in adjoining rooms at the same time, the court may consider the ballots cast at both meetings in order to arrive at the proper result of the election. *Re* Election, etc. Grove Cem. Co., 61 N. J. L. 422 (1898). See also, in general, *Re* St. Lawrence Steamboat Co., 44 N. J. L. 529 (1882), a case where proxies were illegally rejected. Although the inspectors admitted votes on insufficient evidence, yet if additional and sufficient evidence is presented to the court the election will stand. Conant *v.* Millaudon, 5 La. Ann. 542 (1850). In attacking the validity of a vote the burden of proof is on him who attacks it. *Re* Indian, etc. Co., L. R. 26 Ch. D. 70 (1884).

1 *Re* Leslie, 58 N. J. L. 609 (1896).

its contracts on the ground that its officers were not duly elected. If they are *de facto* officers, third persons may deal with them as such.[1] Nor is it every stockholder who may complain. A transferee of one of the stockholders who participated in the fraud will not be heard to impeach the result of that fraud.[2] And in general the plaintiff, a relator seeking to set aside a corporate election, is barred of relief if he himself was guilty of misconduct or neglect, or if it appears that he has subsequently acquiesced with knowledge of the facts.[3] It is a principle of law, also, that the legality of an election will not be inquired into upon the ground that illegal votes were cast, unless those votes were challenged at the election at the time when they were cast.[4] The failure of a stockholder to attend the stockholders' meeting is not a waiver of his right to object to the acts of the meeting as *ultra vires,* even though the notice of the meeting stated what was to be done.[5] The court will, however, refuse to set aside an election where every share of stock was represented at the election, even though the minority refuse to vote on the ground that the meeting had been called on less than ten days' notice required by statute.[6] An unregistered owner of stock

1 See § 713, *infra.*

2 *Re* Syracuse, etc. R. R., 91 N. Y. 1 (1883).

3 Wiltz *v.* Peters, 4 La. Ann. 339 (1849), where a commissioner of election attacked the legality of votes which he himself had admitted as commissioner. A stockholder who unreasonably delays in complaining of an election may be barred of any remedy. Jones *v.* Bonanza, etc. Co., 91 Pac. Rep. 273 (Utah, 1907).

4 *Re* Chenango, etc. Ins. Co., 19 Wend. 635 (1839), wherein the court said: "It is quite clear, generally speaking, that an illegal vote not challenged will not invalidate an election, nor will even be inquired into." See also Schoharie Valley R. R. Case, 12 Abb. Pr. (N. S.) 394 (1872). A stockholder who attends the election and votes, and does not object to others voting, although he knows they are doing so in violation of a by-law, cannot himself afterwards object to the legality of the election. State *v.* Lehre, 7 Rich. L. (S. C.) 234 (1854). See also People *v.* Robinson, 64 Cal. 373 (1883); *Re* Long Island, etc. R. R., 19 Wend. 37, 44 (1837), and §§ 599, 594, *supra.*

5 McFadden *v.* Leeka, 48 Ohio St. 513 (1891). Under a statute authorizing one company to sell out to another for any consideration that may be agreed upon between them, it is legal that the consideration be a right extended by the new company to the old stockholders to demand partly paid up stock of the new company within a limited time, a dissenting stockholder being given the right to have the fairness of the proposed sale passed upon by the court. It is the duty of the stockholder in such case to attend the meeting and vote against it if he objects. It was no excuse that he was ill or abroad or negligent in dissenting, under the English statute. Burdett Coutts *v.* True Blood, etc. Ltd., [1899] 2 Ch. 616. A stockholder is not bound to attend a meeting and vote against an illegal merger. Douglass *v.* Concord, etc. R. R., 72 N. H. 26 (1903). See also p. 1629, note 4, *supra.*

6 *In re* Griffing Iron Co., 63 N. J. L. 168 (1898); aff'd, 63 N. J. L. 357 (1899).

may maintain a bill in equity to enjoin an illegal voting of other stock at an election.[1]

Where a candidate at a corporate election receives a majority of the votes cast, the receipt of illegal votes in his favor does not defeat his election.[2] An election will not be set aside if it be shown that after throwing out the invalid votes the officers declared elected would still have, according to the return, a valid majority of the votes cast;[3] and a new election will not be ordered if, after rejecting all the illegal votes, and after admitting the opposition legal votes which were rejected, it still appears that the directors returned as elected had a majority of the votes.[4]

The court may declare a candidate elected who received only a minority of the votes actually cast, when such candidate plainly received a majority of all the legal votes cast.[5] But where the

1 O'Connor *v.* International, etc. Co., 68 N. J. Eq. 680 (1905). See also § 616, *supra.* Even though a person claims stock which stands in the name of another, and might obtain such stock by a suit for that purpose, yet the court will not consider this in a statutory proceeding to contest the validity of an election, because only the stockholders of record are entitled to vote. Matter of Utica, etc. Co., 115 N. Y. App. Div. 821 (1906).

2 *Re* Argus Co., 138 N. Y. 557 (1893).

3 People *v.* Tuthill, 31 N. Y. 550 (1864); *Ex parte* Murphy, 7 Cow. 153 (1827); *Re* Chenango, etc. Ins. Co., 19 Wend. 635 (1839); State *v.* Lehre, 7 Rich. L. (S. C.) 234, 325 (1854); McNeeley *v.* Woodruff, 13 N. J. L. 352 (1833); First Parish *v.* Stearns, 38 Mass. 148 (1838); School District *v.* Gibbs, 56 Mass. 39 (1848); Christ Church *v.* Pope, 74 Mass. 140 (1857). Even though certain stock is illegally issued and voted, yet if, after deducting that stock, the prevailing party would still prevail, the election will not be set aside. Kimball *v.* New England, etc. Co., 69 N. H. 485 (1899). The court will not consider the legality or illegality of votes, where those votes will not change the result, whatever the decision might be. Conant *v.* Millaudon, 5 La. Ann. 542 (1850). Where the officers declared elected received a majority of the original stock as well as a majority of the alleged illegal increased stock, they will not be ousted. Byers *v.* Rollins, 13 Colo. 22 (1889). Where, after rejecting all votes illegally cast by proxy, there is still a majority for the persons who were declared elected, the court will not disturb the election. Craig *v.* First Pres. Church, 88 Pa. St. 42 (1878). When an election is wholly illegal and without authority by reason of the organization not being complete, complaining stockholders need not show that the result will be different in another election, and in declaring the election void the court will not continue the directors so elected in office. Matter of Empire State, etc., 118 N. Y. App. Div. 616 (1907).

4 McNeeley *v.* Woodruff, 13 N. J. L. 352 (1833); *Ex parte* Desdoity, 1 Wend. 98 (1828).

5 Where the whole number of votes is five hundred and ninety-three, and there were present five hundred and thirty-seven, and the candidates declared not elected received three hundred votes, one hundred and fifty of which were illegally rejected by the inspectors, the court, under the New Jersey statute, declared those candidates elected and did not order a new

person declared elected received a minority of the votes, he will be ousted even though the other candidate was not qualified to act as a director.[1] Where *quo warranto* proceedings are pursued, they can

election. *Re* St. Lawrence Steamboat Co., 44 N. J. L. 529 (1882); Monsseaux *v.* Urquhart, 19 La. Ann. 482 (1867); *Ex parte* Desdoity, 1 Wend. 98 (1828); Vandeburgh *v.* Broadway Ry., 29 Hun, 348 (1883); Downing *v.* Potts, 23 N. J. L. 66, 84 (1851), where an election was set aside and a new one ordered because votes were illegaly rejected on one side and illegally accepted on the other, which changed the result, but two directors who were on both tickets and received all the votes cast were held elected. The court said that unless the legal votes rejected and the illegal votes received were sufficient to change the result of the election, the election would not be set aside. Hence where of two thousand three hundred and ninety-two votes for certain candidates seven hundred and ninety-nine were illegal, and there were illegally rejected one thousand eight hundred and ninety-four votes for the defeated candidate, who received forty-six votes, the court ordered a new election. In *Re* Long Island R. R., 19 Wend. 37 (1837), where the votes illegally rejected would have elected other persons, the court set the election aside, and did not declare elected those who would have been elected if the rejected votes had been counted, there being one thousand seven hundred votes not represented, and eleven thousand that were disqualified under the statute. The court may declare part of the directors illegally elected, and order a new election as to them, without affecting the title of the others to their offices. People *v.* Fleming, 59 Hun, 518 (1891). In Monsseaux *v.* Urquhart, 19 La. Ann. 482 (1867), the court ousted a director and declared elected another person in his stead. Where the presiding officer illegally rejects certain votes, declares certain persons elected, and adjourns the meeting, and the dissatisfied party continue the meeting and hold another election, the court will consider merely the question as to who received a majority of the votes which were legally offered to be cast. State *v.* Smith, 15 Oreg. 98 (1887). A court will not force upon the company directors who are technically entitled to be declared elected, certain proxies being irregularly executed, but will order a new election. Harben *v.* Phillips, L. R. 23 Ch. D. 14 (1882). In New Jersey it has been held that, if the illegally rejected votes would have given the defeated candidate a majority of all the stock, the court will declare him elected, and will oust the one that was declared elected. *Re* Cape May, etc. Co., 16 Atl. Rep. 191 (N. J. 1888).

1 "Votes cast for a candidate who is disqualified for the office will not be thrown away so as to make the election fall on a candidate having a minority of votes, unless the electors casting such votes had knowledge of the fact on which the disqualification of the candidate for whom they voted rested, and also knew that the latter was, for that reason, disabled by law from holding the office." *Re* St. Lawrence Steamboat Co., 44 N. J. L. 529 (1882), citing cases. See also People *v.* Clute, 50 N. Y. 451 (1872). Even though the directors who were declared elected were ineligible, because in violation of the New Jersey statute they did not produce the stock books at the election, yet the court will not necessarily declare elected those who received a minority of the votes, but will order a new election if there was no fraud or improper motive in failing to obey the statute. Stratford *v.* Mallory, 70 N. J. L. 294 (1904). Unless the stockholders know that they are voting for an ineligible candidate

only oust the party who is in office. It cannot declare another person elected.[1]

§ 621. *"Corners" in stock.*—The courts will not aid either party in carrying out an agreement for advancing the price of stock by means of fictitious dealings designed to deceive others concerning the real value of such stock.[2] Where both the vendor and vendee of stock know that the purpose of the vendee is to control the corporation and illegally issue corporate paper, the sale is illegal and void.[3] An agreement to make a "corner" in stock, by buying it up so as to control the market and then purchasing for future deliveries, is illegal.[4] It is not necessarily unlawful to form a "pool" for the purpose of dealing in a particular stock,[5] and the person who does the buying and selling must account to the others.[6]

a candidate who receives a minority of the stock cannot be declared elected; in other words, the votes cast for the ineligible person are not to be ignored, but a new election must be held. Schmidt *v.* Mitchell, 101 Ky. 570 (1897).

1 State *v.* McDaniel, 22 Ohio St. 354 (1872), where a number of legal votes were rejected which would have sufficed to elect certain directors who without such votes had only a minority of the votes cast. The court held that persons cannot be declared elected and inducted into office upon *quo warranto* information; People *v.* Phillips, 1 Denio, 388 (1845), making the same ruling as to a church corporation.

2 Livermore *v.* Bushnell, 5 Hun, 285 (1875). See also, in general, § 445, note, *supra*, and § 622, *infra*.

3 Newark *v.* Elliott, 5 Ohio St. 113 (1855).

4 Sampson *v.* Shaw, 101 Mass. 145 (1869); Raymond *v.* Leavitt, 46 Mich. 447 (1881); Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. St. 173 (1871); Arnot *v.* Pittston, etc. Coal Co., 68 N. Y. 558 (1877); Keene *v.* Kent, N. Y. D. Reg., March 15, 1887. *Cf.* Petrie *v.* Hannay, 3 T. R. 418 (1789). No suit lies against a broker for fraud in carrying out a pool or combination to "corner" and advance the price of lard. Leonard *v.* Poole, 114 N. Y. 371 (1889). See also § 445, *supra*. A person making a "corner" in wheat is not subject to a criminal prosecution therefor. Raymond *v.* Leavitt, 46 Mich. 447 (1881). It is not fraud for the owner of the larger part of the capital stock of a corporation to "corner" the market, that is, to enter into contracts with various parties to purchase stock of the corporation, although he knew that such contracts could not be fulfilled by such parties by reason of the fact that he himself held such stock, and it could not be obtained elsewhere. The same rule prevails although such person offered the stock for public subscription and purchased the greater part of it himself. Salaman *v.* Warner, 64 L. T. Rep. 598 (1891); aff'd, 65 L. T. Rep. 132 (1891). *Cf.* Barry *v.* Croskey, 2 Jones & H. 1 (1861), holding that the victim of the "corner" may file a bill in equity to recover back the money lost. For an interesting statement of the *modus operandi* of a "corner," see "An Investor's Notes on American Railroads," by Swann, ch. XII (1886).

5 Quincey *v.* White, 63 N. Y. 370, 383 (1875), modifying Quincey *v.* Young, 5 Daly, 327 (1874).

6 Where several parties buy a certificate of stock in fixed proportions and the certificate is taken by one for the benefit of all, he is a bailee

§ 622. *Voting trusts and pooling agreements — Restrictions on right to vote or sell stock — Contracts as to voting, elections, directors, and control.*—The control of a corporation generally determines its success or failure. The control also gives power, patronage, perquisites, salaries, and position. Hence it is sought for. In a large corporation the absolute control generally requires more money than one man is able or willing to invest. Consequently, for many reasons, various stockholders unite to obtain and retain the control. There is always danger, however, that some of these stockholders may die, or sell their stock, or unite with some other parties to obtain control. Hence, for twenty years last past, the business community and the lawyers have been trying to find some legal way of so tying up a majority of the stock of a corporation as to prevent its being lost. Various plans have been tried, some of which have failed, some have been partially successful, and some almost a complete success. This whole subject may be divided as follows:

(*a*) Contracts between stockholders to vote together. Contracts involving changes of officers and payment of salaries.

(*b*) Restrictions on the right to vote.

(*c*) Contracts between stockholders not to sell their stock except to each other.

(*d*) Charter provisions and by-laws restricting the right to sell the stock. Unincorporated associations.

(*e*) Irrevocable proxies.

(*f*) Deposit of certificates of stock with trustees, either with or without a transfer of same to the trustees.

(*g*) One corporation owning and holding the stock of other corporations.

for the others and not a vendor. Coquard *v.* Wernse, 100 Mo. 137 (1889). The general rule that an action affecting a joint enterprise for the purchase, upon speculation, of certain mining stocks, must join all the parties who enter the "pool," does not necessitate the joinder of one who is out of the jurisdiction. Angell *v.* Lawton, 76 N. Y. 540 (1879). The representative of a syndicate after selling the stock cannot modify the contract. He is liable to the others if he does so. Kountz *v.* Gates, 78 Wis. 415 (1891). Where there is a joint operation in stocks, a "pool," the transactions being carried on in the name of one only, the others may have specific performance leading to a division of the stocks. Johnson *v.* Brooks, 46 N. Y. Super. 13 (1880); Thornton *v.* St. Paul, etc. Ry., 45 How. Pr. 416 (1873); s. c., dismissed, 6 N. Y. Week. Dig. 309 (1878). A vendor of stock may collect the price even though the agreement contains a provision for pooling the stock which is illegal. Edgerton *v.* Power, 18 Mont. 350 (1896). See also § 320, *supra.* An agreement with brokers by which a person is to cause a legislative investigation, and in case certain stock declined such person was to share in the profits of short sales, is illegal and not enforceable. Veazey *v.* Allen, 173 N. Y. 359 (1903).

(*h*) Voluntary associations to acquire, hold and vote shares of stock.

Taking up those various modes of uniting the majority of the stock, the first is

§ 622*a*. *Contracts between stockholders to vote together — Contracts involving changes of officers, and payment of salaries.*—It is elementary law that stockholders owning a majority of the stock have a right to combine and control the election of the board of directors.[1]

Several parties in purchasing stock may agree that each one's share shall be transferred to him, but that all the stock shall be voted for five years in one way, that way to be determined by a majority of the stock so included in the agreement. Such an agreement is legal, especially as it provides that during that time the parties shall retain the power to vote such stock.[2]

1 Quoted and approved in Weber *v.* Della, etc. Co., 94 Pac. Rep. 443 (Idaho, 1908). Havemeyer *v.* Havemeyer, 43 N. Y. Super. Ct. 506, 513 (1878); s. c., 45 N. Y. Super. Ct. 464 (1879); aff'd, 86 N. Y. 618 (1881); Faulds *v.* Yates, 57 Ill. 416 (1870), where it was held that persons holding the majority of stock in a corporation could lawfully agree among themselves to vote as a unit to control an election; and that their agreement that their votes should be cast as should be decided by the majority of their own votes was not void as being against public policy. See also Pender *v.* Lushington, L. R. 6 Ch. D. 70 (1877), where the court said: "There is, if I may say so, no obligation on a shareholder of a company to give his vote merely with a view to what other persons may consider the interests of the company at large. He has a right, if he thinks fit, to give his vote from motives or promptings of what he considers his own individual interest." A stockholder who signs an agreement with others to vote their stock as a unit cannot afterwards complain of acts of the board of directors, which acts were in accordance with the policy of the pooling agreement. Ziegler *v.* Lake St. El. R. R., 69 Fed. Rep. 176 (1895), giving portions of the agreement. "It is not *per se* unlawful for a number of persons, by previous agreement, to buy shares of the stock of a corporation for the purpose of controlling its policy, electing its officers, etc." Beitman *v.* Steiner, 98 Ala. 241 (1893). Where two partners desire to incorporate, and each to have the same interest, and a third party to have a smaller interest, thereby holding the balance of power, and such arrangement is carried out, and the third party is really a dummy of one of the partners, and thereby gives the control of the corporation to that partner, yet the other partner has no legal cause of complaint, notwithstanding the general understanding as to the division of control. Baumgarten *v.* Nichols, 69 Hun, 216 (1893). Although a contract of certain stockholders to vote together is legal, yet a conspiracy to obtain an illegal injunction against others voting will not be countenanced by the court. People *v.* Albany, etc. R. R., 55 Barb. 344, 368 (1869); aff'd, 57 N. Y. 161.

2 The court consequently held that a member of the syndicate who refused to vote in accordance with a decision of the majority had no right to vote (by reason of the California statute prescribing that only *bona fide* holders of stock should vote), the court holding that the original pur-

Thus, executors holding a majority of the stock of a corporation may, in order to sell a portion thereof, agree with the purchaser that they will vote for two persons named by the purchaser to act as directors so long as the executors hold the remainder of the stock, and the court will grant an injunction against the executors voting in violation thereof.[1] An executory contract, however, between stockholders that they will vote in a certain way or elect certain persons as directors will rarely be enforced specifically by the courts, and an action at law for damages for breach of contract is unsatisfactory in that, as a rule, no substantial damages can be proven.[2]

chase of the block of stock bound that stock in its vote. Smith *v.* San Francisco, etc. Ry., 115 Cal. 584 (1897). Where the subscriber for the entire capital stock makes an agreement with other persons by which they take a proportion of it and pay the corporation therefor, and all agree that until the full amount has been taken in ten share lots, the stock will continue to stand in his name, he cannot afterwards claim the right to retain the stock on payment therefor. Hladovec *v.* Paul, 124 Ill. App. Rep. 589 (1906); aff'd, 222 Ill. 254.

1 Greenwell *v.* Porter, [1902] 1 Ch. 530. Where by contract between two stockholders owning an equal share in the corporation, future stock acquired by either of them is to belong one-half to each, such contract may be specifically enforced. Stewart *v.* Pierce, 116 Iowa, 733 (1902). See on this point §§ 320, 338, *supra*.

2 An agreement that a certain person shall be president for two years will not be specifically enforced by the courts. Dulin *v.* Specific, etc. Co., 103 Cal. 357 (1894), holding also that an election in which the party is not even elected a director will not be set aside, even under the statutory power of the courts to set aside elections on equitable grounds. A court of equity will not grant specific performance of a contract to vote stock as the complainant stockholder wishes, with a view to controlling the corporation. Hence where the promisee of such a contract knows the promisor will not fulfill his contract, and consequently the promisee buys the promisor's stock at a high price, he, the promisee, cannot rescind such purchase, but must pay the stipulated price. Gage *v.* Fisher, 5 N. D. 297 (1895). Where several persons make a contract to unite in obtaining control of a corporation by buying the stock and one of them is to be made secretary and manager, he may sue the others for damages if they obtain the control and then do not appoint him. Lloyd *v.* Dickson, 116 La. 90 (1906).

An agreement to elect a certain person president is waived if he participates in electing others. American, etc. T. Co. *v.* Toledo, etc. Ry., 47 Fed. Rep. 343 (1890). A contract between a stockholder and a third person by which the third person is to be made a director, and agrees to devote his time and attention to the business, and develop the property, and procure the construction of a railroad, and cause various lots of land owned by the corporation to be sold, will not sustain an action at law for damages by the stockholder for breach of the contract. An action in such a case may be maintained only by the corporation or by the stockholder in its behalf. So far as the contract intended to control the action of the board of directors it was illegal. Kountze *v.* Flannagan, 19 N. Y. Supp. 33 (1892). An agreement that certain persons should have control of

A contract by which the directors who own a majority of the stock sell such stock and agree to substitute the vendees as directors of the company is legal.[1]

the corporation until certain debts were paid must be clearly proved before it will be sustained by the courts. Proctor, etc. Co. *v.* Finley, 98 Ky. 405 (1895). A contract between two companies by which one is to name four of the six directors of the other (and is also to sell the stock of the latter, carry out its contract, and pay dividends on its stock) is illegal. James *v.* Eve, L. R. 6 H. L. 335 (1873).

Even though a partnership transfers its assets to a corporation, each partner taking an equal proportion of the stock, except that a third party was given the balance of power, and such third party afterwards acts with one of the partners and controls the corporation, yet this is not sufficient to set aside a transfer of the assets to the corporation at the instance of the other partner. Baumgarten *v.* Nichols, 69 Hun, 216 (1893).

1 A contract to sell one's stock in a corporation and to resign a directorship and the presidency, and, having done so, to endeavor to induce other directors to resign, in order that the purchasers of the stock may come in and take their places and so control the management of the company, there being no evidence of fraud, has been held a contract not void as against public policy. Barnes *v.* Brown, 80 N. Y. 527 (1880). A contract whereby a manufacturing corporation and all of its stockholders agreed to sell a certain proportion of the capital stock of said company and to substitute two persons nominated by the vendee as directors in such corporation is not presumed to be *ultra vires*, and a provision in such contract that the purchaser will carry on the business and divide profits every six months may be enforced by the corporation. Rider Life Raft Co. *v.* Roach, 97 N. Y. 378 (1884). An agreement by which the directors of a company sell their stock and resign their offices and substitute the purchasers in their places is not illegal or objectionable if all the stockholders assent and if the corporation is not injured. The assent of a few minor stockholders whose stock was given to them will be presumed, in case they have not objected. Raymond *v.* Colton, 104 Fed. Rep. 219 (1900). Where a director, who is also treasurer, sells his stock to the other directors, it being a part of the sale that he give up his offices, the corporation may treat his offices as vacant. Anderson, etc. Co. *v.* Pungs, 127 Mich. 543 (1901). In the case of Ryan *v.* McLane, 91 Md. 175 (1900), the court seemed to doubt somewhat this statement that it is legal for the board of directors who own a majority of the stock to agree to sell it and substitute the vendees as directors of the company. It would seem, however, as if such a contract would in its effect be no different from the common provision which appears in the statutes of many of the states and in the by-laws of many corporations, that a majority in interest of the stock may at any time remove any of the directors and elect others in their place. A sale of the majority of the stock, together with a statutory power to remove the directors, is the same as a sale of the majority of the stock with a voluntary agreement to have the directors resign and new ones substituted. Where a construction company owning the bonds and stocks of street railway companies sells the same to a trust company on the agreement of the latter to complete the work, and by the contract a majority of the directors of the construction company resign, and appointees of the trust company are substituted, a stockholder of the construction com-

Such a transaction, however, is closely scrutinized by the courts, and if fraudulent, as a matter of fact, the retiring directors are personally responsible for any losses.[1] A sale of his vote by a stockholder is illegal.[2]

Even though a resolution is passed by the stockholders that certain stock shall name a majority of the directors, yet this will not control subsequent elections, and any person acquiring a majority of the stock may control the election notwithstanding he voted for such resolution.[3]

A contract in regard to elections in private corporations is not legal if it provides that a lucrative corporate position shall be given

pany cannot compel the trust company to account for the value of the stocks and bonds, unless he shows actual fraud, even though a part of the agreement was made after the appointees of the trust company had been installed in office. Kidd *v.* New Hampshire, etc. Co., 66 Atl. Rep. 127 N. H. 1907). See 85 N. E. Rep. 98 (Mass 1908).

1 Where the officers and directors, in a conspiracy, resign their offices and substitute other officers who are irresponsible and untrustworthy, in consideration of unlawful payments made to the former directors, and the assets of the corporation are thereby lost, the first named directors are personally responsible for their action and a receiver of the corporation may hold them liable. Bosworth *v.* Allen, 168 N. Y. 157 (1901). A director of an assessment life insurance company who receives money for causing a person and his friends to be elected directors, thereby giving them the control of the company, together with its property, may be held liable by the receiver of the company for the money so received. McClure *v.* Law, 161 N. Y. 78 (1899). See also Gilbert *v.* Finch, 173 N. Y. 455 (1903). Money received by a director of a co-operative insurance company for substituting other directors and transferring its business to another company can be recovered back on the ground of fraud, and such director is chargeable with notice of the facts which he knew or might have learned by the exercise of reasonable care. McClure *v.* Wilson, 70 N. Y. App. Div. 149 (1902). It is a breach of trust for the officers of a beneficial association to receive pay for substituting other officers. Heineman *v.* Marshall, 117 Mo. App. 546 (1906). Where a trustee retires from office in consideration that his successor pay him a sum of money, the money so paid belongs to the trust estate. Perry on Trusts (3d ed.), § 427. Specific performance will not be granted of an agreement of the vendors of stock that they will resign as directors and substitute the vendee's representatives instead. Fremont *v.* Stone, 42 Barb. 169 (1864), the court stating that such a contract is unfair towards the minority stockholders. See also Jacobs *v.* Miller, 15 Alb. L. J. 188 (1877). Directors have no power to contract with an outsider that he shall, upon purchasing certain stock, be made a director in the company, but a sale of stock with an agreement that the vendee should be elected superintendent may be rescinded if the latter part of the agreement is not carried out. Seymour *v.* Detroit Copper, etc. Mills, 56 Mich. 117 (1885).

2 Hafer *v.* New York, etc. R. R., 14 W. L. Bull. 68 (1886). See also Yale Law Journal, vol. 1, p. 7, and § 610, *supra*.

3 Morel *v.* Hoge, 61 S. E. Rep. 487 (Ga. 1908). See also Holt *v.* California, etc. Co., 161 Fed. Rep. 3 (1908).

to one or more of the parties to the contract.[1] Thus, an agreement of a large stockholder holding a majority of the stock, that upon the purchase and absorption of plaintiff's business by the corporation the plaintiff should be engaged for a term of years as vice-president and general manager of the corporation at a specified salary, is contrary to public policy and is void.[2] A contract by which the vendors of

1 Quoted and approved in Withers *v.* Edmonds, 26 Tex. Civ. App. 189 (1901), where the court held that a contract between the president and the teller of a bank, providing means to secure the re-election of the same board and their own re-election as officers, is illegal as involving their election to lucrative positions.

2 West *v.* Camden, 135 U. S. 507 (1890). A contract made by a stockholder for a consideration to vote for a particular person for manager of the company, and in the event of his election to vote for an increase of the salary attaching to that position, is illegal and cannot be enforced. Woodruff *v.* Wentworth, 133 Mass. 309 (1882). An agreement of persons holding a majority of the stock, they being directors also, that a person purchasing stock from them shall be general manager, and may at the end of two years sell the stock back to them at a stated price, is contrary to public policy and void. The vendors need not repurchase. The arrangement is unfair to the corporation. Wilbur *v.* Stoepel, 82 Mich. 344 (1890). A proxy for five years, given so as to unite enough stock to control the corporation, the holder of the proxy agreeing that the person giving the proxy shall have an office at a salary of $2,500 a year, is void. At the instance of the latter person a court of equity will enjoin voting thereunder. Cone *v.* Russell, 48 N. J. Eq. 208 (1891). Where a stockholder in a railroad company is induced to take part in the formation of a land company and is to receive a certain sum of money when a depot is located on such land, he cannot enforce the agreement. It is practically a sale of his vote. Fuller *v.* Dame, 35 Mass. 472 (1836). A contract of the vendor of bank stock that he would make the vendee the cashier is illegal and void. Noel *v.* Drake, 28 Kan. 265 (1882). Where the president of a corporation brings about a sale of all its stock and a change of its officers, under a contract by which the corporation is to pay him a certain sum, he cannot collect that sum from the corporation itself. Wood *v.* Manchester, etc. Co., 54 N. Y. App. Div. 522 (1900). A contract between promoters, by which one of them is to be employed by a proposed insurance company on a salary and a percentage of premium, is too indefinite to be enforced, even though some of the promoters proceeded to form the company. It seems also that such a contract is contrary to public policy. Flaherty *v.* Cary, 62 N. Y. App. Div. 116 (1901); aff'd, 174 N. Y. 550. A contract whereby a stockholder sells his stock to an individual who guarantees that the former will be employed at a stated salary by the corporation for two years is enforceable against the person so purchasing the stock, even though the corporation passes into the hands of a receiver before the expiration of the two years and the employment is thereby stopped. Kinsman *v.* Fisk, 37 N. Y. App. Div. 443 (1899). An agreement to vote in a particular way, in consideration of some personal benefit, is illegal; for a vote ought to be an impartial and honest exercise of judgment. Elliott *v.* Richardson, L. R. 5 C. P. 744 (1870). See also Moffatt *v.* Farquharson, 2 Bro. C. C. 338 (1788); Card *v.* Hope, 2 B. & Cr. 661 (1824). Compare Bolton *v.* Madden, L. R. 9 Q. B.

the entire capital stock of the company agree that the purchaser shall have entire control and management of the business for fifteen months, and elect officers and directors during that time, at the end of which time he is to pay for the stock, it appearing that third parties were not affected thereby, is legal.[1] Where all the stockholders join

55 (1873), where an agreement between two subscribers to a charity to vote for each other's nominees was held not to be illegal. A contract by which a stockholder in a corporation agrees to secure to the purchaser of his stock a corporate office at a stated salary, and in case of his removal to repurchase the stock, is void as against public policy and as a fraud on other stockholders, unless it is proved that the transaction is not for the private benefit of the vendor, or that it was consented to by the other stockholders. Guernsey *v.* Cook, 120 Mass. 501 (1876); Noyes *v.* Marsh, 123 Mass. 286 (1877). A contract to preserve the control and *status quo* was involved in Harris *v.* Scott, 67 N. H. 437 (1893). The contract provided for voting on all subjects, for salaries, and for sales of stock before and after death. The court refused to grant specific performance for sale after death. Where three persons, being the owners of a majority of the stock, agree that they will vote their stock to elect as directors three persons to be named by one of them, and two persons to be named by the others, and that one of them, who received a salary of $2,500, should receive a salary of $5,000, and that two of such directors should receive a salary of $500 each, the agreement is illegal. Snow *v.* Church, 13 N. Y. App. Div. 108 (1897). A contract by which a purchaser of a majority of the stock of three corporations agrees that the corporations should employ the seller of the stock at a fixed salary for a certain time, and after a certain time the seller to have a salary and name one-half of the directors, is illegal, and cannot be enforced by the vendor as against the vendee, even though the stock has been delivered and paid for under such agreement. Fennessy *v.* Ross, 5 N. Y. App. Div. 342 (1896). A contract of sale of stock whereby the vendee is to be voted a certain salary and an equal representation in the board, and in case either party wishes to sell stock it is first to be offered to the other party at a fixed price, is void as an attempt to barter away the offices. Fennessy *v.* Ross, 90 Hun, 298 (1895). Where a part of the consideration of a contract in regard to voting stock in a certain way is that one of the parties shall be given an official position in the corporation at a salary, the contract is void and unenforceable. Gage *v.* Fisher, 5 N. D. 297 (1895). In the case of Witham *v.* Cohen, 100 Ga. 670 (1897), a stockholder who had obtained proxies from most of the other stockholders, on an agreement by which he was to become president on a certain salary, was held to have a right of damages against a stockholder whose stock he had purchased, but who, nevertheless, had given a proxy to some other person. A person who contracts to purchase stock may defend against an action for the price by setting up that the vendor falsely represented that the vendee was about to be deprived of the presidency of the company; and that thereby the vendee was induced to make the contract of purchase at an unconscionable price. Delano *v.* Rice, 23 N. Y. App. Div. 327 (1897). Where the agreement was to keep the vendor in a professorship, the court will not aid the parties. The agreement is against public policy. Jones *v.* Scudder, 2 Cin. Super. Ct. 178 (1872).

[1] Borland *v.* Prindle, etc. Co., 144 Fed. Rep. 713 (1906). In the case

in selling a majority of the stock to another person, it is legal to provide in the contract that the vendors shall continue to be officers for five years at specified salaries, all creditors having been paid.[1] Even though the statute provides that each stockholder shall have as many votes as he owns shares of stock, a by-law and contract that certain persons shall name two out of five directors are legal.[2] An agreement of persons as a condition of their election that the bank should extend to a certain party credit for loans at a specified rate of interest is illegal.[3] But a stockholder in a bank in selling some of his stock may agree that the purchaser shall be cashier five years, and may agree to take back the stock at the end of that time at the same price, where such agreement is in good faith and for the purpose of benefiting the bank and does benefit it.[4] Where part of the con-

Warren *v.* Pim, 66 N. J. Eq. 353 (1904), Mr. Justice Swayze said: "Can it be contended that, if a corporation finds it necessary to borrow money upon bonds issued for a long term of years, the stockholders cannot, consistently with public policy, in order to secure the loan, vest the management of the corporation in hands satisfactory to the lenders and for a term commensurate with the loan." Where minority stockholders agree to finance the company if they are given control of its business and under such agreement do finance the company and the majority stockholders then take control, the minority stockholders may have a receiver appointed, if the company is not able to repay money advanced on their credit. Wood, etc. Co. *v.* American, etc. Co., 62 Atl. Rep. 768 (N. J. 1906). A company cannot contract not to alter a by-law which provides that a certain vendor of property to the corporation shall be governing director and shall have the power to appoint other directors and to remove them at any time, even though such contract is contained in the by-laws themselves. Punt *v.* Symons & Co., Ltd., [1903] 2 Ch. 506. An agreement between the corporation and some of its stockholders, by which the latter contribute a part of their stock as treasury stock, on condition that they shall continue to be directors and officers for a certain time is illegal under a statute requiring such officers to be elected annually by the stockholders, and hence even if the corporation accepts the stock and sells it and does not retain such persons in their offices, they cannot hold it liable in damages, nor in claim and delivery, nor for conversion, nor on contract. Glass *v.* Basin, etc. Co., 31 Mont. 21 (1904). See also Holt *v.* California, etc. Co., 161 Fed. Rep. 3 (1908).

1 Kantzler *v.* Benzinger, 214 Ill. 589 (1905).

2 Colonist, etc. Co. *v.* Dunsmuir, 32 Can. S. C. Rep. 679 (1902).

3 Blue *v.* Capital Nat. Bank, 145 Ind. 518 (1896). A person who loans a sum of money to a corporation on the agreement of its directors that he was to be assistant secretary at a specified salary, may recover back the money. Meridian, etc. Co. *v.* Eaton, 81 N. E. Rep. 667 (Ind. 1907).

4 Bonta *v.* Gridley, 77 N. Y. App. Div. 33 (1902). In a suit by a vendee for fraud inducing the purchase of stock it may be proved that the vendor promised that the corporation would employ the vendee as secretary and treasurer at a specified salary, and that this promise was not carried out, such promise not being the main fraud complained of. McDonald *v.* Smith, 139 Mich. 211 (1905).

sideration in the sale of stock is that the vendor resign an office in the company, and the vendee be elected in his place, and this has been carried out, the vendee cannot rescind for fraud unless he resigns the position or does something towards restoring the vendor to his former position.[1] An agreement by a stockholder to give a person part of his stock if such person accept the position of a director is not necessarily against public policy.[2] A contract by which stock is contributed for the purpose of developing the business of the company is legal.[3] But the common undertaking must be a legal one.[4] The vendor of stock may of course agree to vote as the vendee wishes.[5]

Closely connected with the above principles of law is the question whether a director or stockholder may vote his stock in favor of a corporation from, another corporation in which such director or sale of corporate property to, or a purchase of property for the stockholder is interested as a stockholder. The general rule is that a contract between two corporations having certain stockholders or directors in common will be sustained by the courts if the contract is fair towards the minority stockholders. If it is so unfair as to amount to a fraud, the courts will set it aside upon the complaint of the minority stockholders.[6]

§ 622*b*. ***Restrictions on the right to vote.***—At common law it is legal for a corporation, upon issuing preferred stock, to impose a condition that such stock shall not have any right to vote.[7] It is

1 Gassett *v.* Glazier, 165 Mass. 473 (1896). A going corporation may purchase stock owned by its president in order to terminate his contract of employment and obtain his resignation as president, where the contract is a fair one and another party had agreed to purchase such stock from the corporation at once and subscribe for further capital stock. Joseph *v.* Raff, 82 N. Y. App. Div., 47 (1903); aff'd, 176 N. Y. 611.

2 Almy *v.* Orne, 165 Mass. 126 (1896).

3 See §§ 76, 334, *supra.*

4 If the purpose is to rob a railroad and bribe a judge, the court will aid no one. Tobey *v.* Robinson, 99 Ill. 222 (1881). *Cf* § 39, *supra.*

5 An agreement by a vendor of stock, which is to be delivered after an election, that he will vote as the vendee desires, is legal. Mobley *v.* Morgan, 6 Atl. Rep. 694 (Pa. 1886). One corporation issuing its stock as security to another may agree that the latter shall hold and vote the stock of and in the former. Tonawanda, etc. R. R. *v.* New York, etc. R. R., 42 Hun, 496 (1886).

6 See § 662, *infra.* A stockholder may vote on a question in which he has a personal interest other than his interest as a stockholder. Middleton *v.* Arastraville, etc. Co., 146 Cal. 219 (1905).

7 Preferred stock may by the terms of its original issue be deprived of voting power, even though the statutes provide for each stockholder casting as many votes as he has shares. State *v.* Swanger, 190 Mo. 561 (1905). It is legal, upon the issue of preferred stock, to provide that it shall not

legal also for the corporation, with the assent of all stockholders, to give to bonds a voting power,[1] although a contrary rule has been reached in Illinois under a statute to the effect that elections shall be by the stockholders and not otherwise.[2] There is no rule of public policy which forbids a corporation and its stockholders from making any contract they please in regard to restrictions on the voting power.[3] If the agreement is made by unanimous consent it is legal. Such restrictions, however, generally are, and always should be, printed on the certificates of stock, so that a purchaser may take with full notice. A provision in a certificate of incorporation that directors named therein shall continue until they become incapacitated, resign, or die, is void and does not prevent an election.[4] But where the statutes allow the incorporators to insert in the charter any provision relative to the powers of the company, or of its stockholders and directors, the right to vote may be withheld from the stockholders until a certain date, thus leaving the first directors in office during the intervening time, and a further provision that during that time the directors may do any act which the stockholders might do enables them to sell all the property, where that was the chief purpose of the corporation, and the corporation was unable to develop the property.[5] A by-law passed at the time of the organization of the company may limit the number of votes which a single stockholder may cast;[6] unless, of course, the statutes provide to the contrary.[7] Under the partnership association statute of Pennsylvania, a

vote at corporate elections. Such a provision will be upheld. Miller *v.* Ratterman, 47 Ohio St. 141 (1890). See also § 269, *supra.*

1 In State *v.* McDaniel, 22 Ohio St. 354 (1872), the bondholders on a reorganization were given by contract the power to vote, and the court upheld such contract right. In Phillips *v.* Eastern R. R., 138 Mass. 122 (1884), the court passed upon a statutory scheme in which the creditors of a railroad company, by the terms of a mortgage, chose two-thirds of the directors and the stockholders chose one-third until the debt was reduced to a certain figure.

2 A contract and by-law giving a voting power to bondholders at corporate elections is void as against public policy and the statutes, where the statutes prescribe that the directors shall be elected by the stockholders and shall not be elected in any other manner. Durkee *v.* People, 155 Ill. 354 (1895), aff'g s. c., 53 Ill. App. 396 (1893).

3 Quoted and approved in State *v.* Swanger, 190 Mo. 561 (1905).

4 State *v.* Anderson, 31 Ind. App. 34 (1903).

5 Union T. Co., etc. *v.* Carter, 139 Fed. Rep. 717 (1905).

6 A by-law may provide that stockholders shall have one vote for each share held by them up to ten shares, and may fix the proportion which their votes shall bear to their shares above that number. Commonwealth *v.* Detwiller, 131 Pa. St. 614 (1890). *Cf.* notes below.

7 A by-law restricting the right of members of a church to vote as authorized by statute is void. People

by-law may be enacted taking away the voting power from any stock which is sold, even though it is purchased by an existing member.[1] All this is a matter of private contract.[2] Where the charter limits the number of votes which one stockholder may cast, the provision cannot be evaded by transfers to various persons. The courts will enjoin the voting of the stock.[3] Under the reserved right to amend,

v. Phillips, 1 Denio, 388 (1845). A by-law restricting the right of electors in a town to vote is not good. Rex *v.* Spencer, 3 Burr. 1827 (1766); Rex *v.* Head, 4 Burr. 2515, 2521 (1770). See also § 4*a*, *supra;* People *v.* Kip, 4 Cow. 382, note (1822), holding that a corporation has no power, by a by-law, to demand an oath of a stockholder in order to test his qualifications as a voter. Where the charter authorizes the depositors and stockholders to elect new members, the directors cannot by by-law exclude the former from elections and give a vote to stockholders only. Commonwealth *v.* Gill, 3 Whart. (Pa.) 228 (1837).

1 Carter *v.* Producers' Oil Co., 182 Pa. St. 551 (1897).

2 Subscribers to stock may make a contract by which they divide their subscriptions with others and agree that no person should hold more than a certain amount of stock. Hladovec *v.* Paul, 222 Ill. 254 (1906).

3 Mack *v.* De Bardeleben, etc. Co., 90 Ala. 396 (1890). Where stock has been transferred in order to give it a vote, the transferrer having already all the stock that the charter allows one stockholder to vote, the transfer being merely nominal and for voting purposes only, an injunction will issue against its being voted. Webb *v.* Ridgely, 38 Md. 364 (1873), where stock had been colorably transferred without consideration for the purpose of controlling an election, there being a provision in the charter prohibiting a single stockholder from voting on more than twenty shares. Where valuable privileges other than voting attach to stock, a nominal transfer to obtain these privileges will not be sustained as regards them. Baker's Appeal, 108 Pa. St. 510 (1885), where free admission to a theatre was given to stockholders. Although a person transfers stock to another in order to evade a statute which prohibits any one stockholder from voting on any more than one-eighth of the capital stock, yet the person to whom it is transferred may make a valid agreement to retransfer the same and the court will enforce this agreement. Scott *v.* Scott, 68 N. H. 7 (1894). Although the charter limits each person to one hundred votes, yet a person voting a hundred votes in his own name may vote another hundred as proxy for his wife, if it is *bona fide* her property. Conant *v.* Millaudon, 5 La. Ann. 542 (1850). Where the charter limits the amount of stock which a single person may hold, his vote is limited to that amount, and the provision cannot be evaded by his holding and voting stock in the name of another person. Bartlett *v.* Fourton, 115 La. 26 (1905). A statute which confines the right to vote to stockholders who are citizens of the state by which the corporation is chartered cannot be evaded by colorable transfers of shares to residents of the state merely for the purpose of having them voted upon. State *v.* Hunton, 28 Vt. 594 (1856). Such a statute would now, however, probably be held to be unconstitutional. See § 813, *infra*, relative to statutes prohibiting citizens of other states from being trustees. But see Campbell *v.* Poultney, 6 G. & J. 94 (1834). In England it is not illegal to transfer or procure shares before a meeting so as to multiply votes at it; nor can votes so obtained be disregarded. They may be cast. Pen-

the legislature may change the charter of a library corporation, so that each share shall have one vote, instead of restricting the vote of those who held more than five shares.[1] A by-law that all purchasers of stock shall agree that the stock shall be voted in favor of increasing the capital stock is void as in restraint of trade and as an unreasonable limitation on the voting power of a stockholder.[2]

A statute prohibiting a stockholder from voting "whose liability is past due and unpaid" refers to a subscription liability and not to a commercial liability.[3] Even though the purchaser of forfeited stock may not be liable for unpaid calls, yet, under the charter, he may be unable to vote such stock, unless he pays such unpaid calls.[4] The right to vote is generally restricted by the charter to those who are registered stockholders.[5] In some states the right to vote is limited to those who have been stockholders of record for a certain number of days before the election.[6] Where a company attaches conditions to its acceptance of a subscription, the subscriber is not entitled to vote until the conditions are complied with.[7]

§ 622c. *Contracts between stockholders not to sell their stock except to each other.*—A stockholder has a right to sell his stock at any time and to whomsoever he pleases without regard to other stockholders. Even though he owns a majority of the stock there is no principle of law obliging him to provide for the sale of others' stock when he sells his own.[8] Hence, contracts are often entered into between a portion or all of the stockholders of a corporation to the effect that they will hold and sell their stock together. Such a contract is legal.[9] The difficulty with such a contract, however, is that upon a breach thereof only the actual loss suffered and not the full

der *v.* Lushington, L. R. 6 Ch. D. 70 (1877); *Re* Stranton Iron, etc. Co. L. R. 16 Eq. 559 (1873); Cannon *v.* Trask, L. R. 20 Eq. 669 (1875); Moffatt *v.* Farquhar, L. R. 7 Ch. D. 591 (1878); and see North-West Transp. Co. *v.* Beatty, L. R. 12 App. Cas. 589 (1887).

1 Rankin *v.* Newark, etc. Assoc., 64 N. J. L. 625 (1900).

2 McNulta *v.* Corn Belt Bank, 164 Ill. 427 (1897).

3 U. S. *v.* Barry, 36 Fed. Rep. 246 (1888).

4 Randt, etc. Co. *v.* Wainwright, [1901] 1 Ch. 184.

5 See § 611, *supra.*

6 See § 611, *supra.*

7 Spitzel *v.* Chinese Corporation, 80 L. T. Rep. 347 (1899).

8 "We do not understand that one stockholder is, by virtue of his ownership of stock, bound to continue in the holding of it in order to allow another stockholder to make a profit out of negotiations then pending. . . . We do not understand that a stockholder is under obligations, legal or moral, to sacrifice his personal interests in order to secure the welfare of the corporation of which he is a stockholder, or to enable another stockholder to make gains and profits." Farmers' L. & T. Co. *v.* Chicago, etc. Ry., 163 U. S. 31, 44 (1896).

9 In Havemeyer *v.* Havemeyer, 43 N. Y. Super. Ct. 506 (1878); s. c., 45 N. Y. Super. Ct. 464 (1879); aff'd, 86 N. Y. 618 (1881), it was held that

value of the stock of the injured party is recoverable in damages.[1] Hence, such a contract should contain a provision obligating the selling stockholder to buy the stock of the others.[2]

Another form of contract is to the effect that before any of the stockholders sell their stock they shall first offer it to the other stockholders. This kind of a contract also is legal and will be enforced by the courts.[3] A contract whereby a stockholder desiring

an agreement of several stockholders not to sell their own stock except in connection with that of the other parties to the contract was not in restraint of trade and was not contrary to public policy, as restricting the right of alienation, but the measure of damages for breach of such a contract is only the actual loss suffered by a decline in the value of the stock by reason of the breach. See also Griffith *v.* Jewett, 15 W. L. Bull. 419 (1886).

1 See pp. 1711–1712, *infra.*

2 The following is a form of contract on this subject:

Whereas, ——— ———, party of the first part, is the owner of —— shares of the capital stock of the —— Company, and —— ——, party of the second part, is the owner of —— shares of said capital stock; and

Whereas, said party of the first part has agreed that in case he hereafter sell any or all of the said stock owned by him, he will at the same time make it a part of such contract of sale that the party purchasing shall extend to said party of the second part the option to sell his said —— shares of stock, or any part thereof, to said purchaser at the same price and on the same terms:

Now: therefore, it is hereby agreed between said parties for a valuable consideration, receipt of which is hereby acknowledged by said party of the first part, that in case said party of the first part sell or cause to be sold his said shares of stock or any part thereof, he will at the same time make it a part of such contract of sale that the party purchasing shall purchase from said party of the second part at the same price and on the same terms such part of said shares of stock belonging to said party of the second part as the party of the second part may care to sell at that time at that price and on those terms. In case said party of the first part fails to make such provision in any sale or transfer made by said party of the first part, said party of the second part may tender to the party of the first part the certificates for any or all of said —— shares of stock owned by the party of the second part, and thereupon may demand and collect therefor from the party of the first part, by suit, a sum per share, for the stock so tendered, equal to the highest price per share at which said party of the first part may have prior thereto sold the shares of stock, or any part thereof, belonging to the party of the first part. This agreement shall bind the heirs, representatives, agents, and assigns of the party of the first part, and shall continue in force for the period of —— years from the date hereof.

Dated, New York, —— —, 1908.

3 In the case of Jones *v.* Brown, 171 Mass. 318 (1898) in a close corporation, the stockholders made a contract, the essential parts of which are set forth in the opinion of the court, providing for the purchase of the stock of a certain stockholder in case of his death, and for the purchase of the stock of any other stockholder who ceased to be connected with the corporation. The former stockholder having died, the court granted specific performance of the contract and compelled his estate to deliver the stock upon payment of the specified price.

Where one person advances money to another to purchase a certain stock on an agreement that they will cooperate, and in case the latter wishes to sell he will not sell to unfriendly parties without giving the former the first chance to purchase, and the stock is in the possession of the former as security for the loan, a sale by the latter to an unfriendly party with notice of the facts is not sufficient to sustain a bill in equity to compel the first-named party to transfer the

to sell must first offer his stock to the other stockholders is not contrary to public policy.[1]

stock to such purchaser. The court said: "One or more stockholders in a corporation may agree to stand together in carrying out an honest business policy consistent with what they believe to be to the best interests of all the stockholders. This was not a pooling agreement, to vest the government of the corporation for a time in certain members of it, or to yield the control to a few who might dominate, regardless of the interests of the many. It was intended to maintain a status of independence for the railway company that it might be operated under the purposes of its charter." Rigg *v.* Reading, etc. Ry., 191 Pa. St. 298 (1899).

Where, in order "to enable the company to keep its stock in the ownership of stockholders of its own choosing," each stockholder enters into an agreement with the corporation that in case he wishes to sell his stock it shall first be appraised and then offered to the corporation before it is offered to any one else, the refusal of the board of directors to make an appraisal, in accordance with the agreement, does not render the corporation liable in damages, inasmuch as it is clear that, even though the stock were appraised, the corporation would not buy it. Whiton *v.* Batchelder, etc. Corp., 179 Mass. 169 (1901). A court will enjoin a party from voting upon or disposing of his stock in the corporation *pendente lite* where the plaintiffs show that they transferred the stock to the defendant on the latter's agreement not to sell the same, except with the consent of the former, and that when he did sell the stock three-fourths of the proceeds should apply to the former, and it appearing further that the defendant had given the stock to his sister without consideration. Weston *v.* Goldstein, 39 N. Y. App. Div. 661 (1899). Where the majority stockholders agree in writing that for three years they will give each other proxies on their stock to vote at elections, and during that time will not sell their stock unless all agree thereto, and further, that if any one desires to sell he will first offer his stock to the others, specific performance by way of injunction against a sale without the consent of the others will not be granted where at the time of trial the three years have already elapsed. The remedy, if there is any, is at law. Brown *v.* Britton, 41 N. Y. App. Div. 57 (1899). Where a partnership is transformed into a corporation and the two partners agree that one shall have 1,000 shares of the stock and the other 998 shares and a third person two shares, and the first partner agrees that in case he sells his 998 shares he will transfer the other two shares to his partner, such agreement does not prevent the first partner from transferring single shares to qualify new trustees, inasmuch as the agreement does not prohibit his selling less than 998 shares. Burden *v.* Burden, 159 N. Y. 287 (1899). Where a corporation having treasury stock in its treasury sells all its assets to another corporation, excepting its patent rights, such sale is not a sale of the treasury stock within the meaning of a prior stock-pooling contract of the old corporation that certain other stock should be sold before such treasury stock was sold. Myers *v.* Buell, 67 N. Y. App. Div. 290 (1901). Even though stockholders agree not to offer their stock to others without first offering it to each other, yet, if subsequently some of them authorize the others to do as they think best in regard to the matter, and the latter dispose of some of the joint stock, they are protected in so doing. Smith *v.* Bierce, 104 La. 96 (1900).

1 The various stockholders of a company may give interchangeably a first

An agreement, however, between the stockholders of a corporation that no one of them will sell, assign or dispose of his stock without having first given the other parties to the agreement an opportunity to purchase, does not disable a party from transferring a legal title to the stock without the consent of the other parties and in violation of the agreement, and this although the transferee was cognizant of the agreement at the time of the transfer.[1] It is a

option of thirty days to purchase their shares of stock whenever any one desires to sell, each contracting for himself, the contract further providing that such thirty days were to commence in case of the death of a stockholder, so far as his stock was concerned; and they may further contract that another person is to have a similar option in case the first option is not exercised. A party entitled to such option may have specific performance of it. The mutual covenants of the contract are a sufficient consideration to support it. The court said: "It is contended that the contract is void as prohibiting the right to alienate this stock. Such is not the fact. The right to sell it was not fettered for an instant. Indeed, by the terms of the contract provision is made for the exercise of such right. The only limitation, if there was a determination to sell, was the privilege by the other party to buy upon certain conditions and such conditions have never been held invalid. This case does not fall within the principle announced in Fisher *v.* Bush (35 Hun, 641) and similar cases. Therein there was an express agreement not to sell for any purpose, and it was held void as against public policy. Here there was no limitation of the right to sell; it was only subject for a limited period to the right of the other party to buy. And an agreement which seeks to control the stock of a corporation for purposes of management, lawful in itself, is not subject to any infirmity, but is the exercise of a legal right." Scruggs *v.* Cotterill, 67 N. Y. App. Div. 583 (1902).

A person who makes a contract with other stockholders by which none are to sell their stock to outsiders except by mutual consent, and that any stock so sold shall be furnished equally by all the parties, and that in case any one wishes to sell the other shall have the first opportunity to buy, cannot maintain a suit to have the agreement annulled and the arrangement dissolved as being a copartnership. It is merely a personal contract by majority stockholders to control the corporation. Whittingham *v.* Darrin, 45 N. Y. Misc. Rep. 478 (1904).

[1] The enforcement of specific performance of such an agreement by a court of equity rests in the discretion of the court; it may not be demanded as a right. The fact that the transferee holds the stock subject to the enforcement of the equitable remedy does not in any way interfere with his legal title, nor does it preclude the corporation from treating him as, and according to him all the rights of, a stockholder, including the right to vote upon the stock at a stockholders' meeting. *Re* Argus Co., 138 N. Y. 557 (1893). An agreement of the holder of a majority of the stock that he will retain control is no defense by the corporation to an action by the receiver of such stockholder to transfer the stock on the corporate books. Weller *v.* Pace Tobacco Co., 25 N. Y. Week. Dig. 531 (1886). A contract of a stockholder not to transfer or sell his stock does not bind a *bona fide* purchaser. Brinkerhoff-Farris, etc. Co. *v.* Home Lumber Co., 118 Mo. 447 (1893). Where all the stockholders

breach of contract, but the remedy is usually at law for damages.[1] A corporation cannot refuse to transfer stock on the ground that the vendor had agreed with others not to sell his stock.[2] Such also is the rule as to a contract that a stockholder before selling his stock to others, shall first offer the stock to the corporation itself. A personal agreement between the incorporators, promoters, and proposed subscribers to the stock of a proposed corporation, by which agreement the corporation is to have the first right to buy the stock of any one who wishes to sell, does not prevent a sale by a stockholder without offering the stock to the corporation. Hence the corporation cannot refuse to transfer the stock.[3]

Specific performance of such a contract, however, will be granted by the courts, where there are special reasons therefor and performance is possible.[4]

agree to a consolidation, but before it is carried out one of them sells his stock, the purchaser, if he knew of the agreement, is bound by it, but is entitled to a transfer of the stock to himself on the books. Senn *v.* Union, etc. Co., 115 Mo. App. 685 (1906).

1 A contract whereby the vendee of bank stock agrees not to sell it until he has first offered it to the vendor at the book value of the stock, sustains a suit for damages if the vendee sells without first making such offer. The damage is nominal unless special damage is proved, and damage cannot be recovered for loss of control of the corporation by reason of such breach. Cothran *v.* Witham, 123 Ga. 190 (1905).

2 Sylvania, etc. R. R. *v.* Hoge, 59 S. E. Rep. 806 (Ga. 1907).

3 Ireland *v.* Globe, etc. Co., 20 R. I. 190 (1897); s. c., 21 R. I. 9 (1898). Where, according to contract, stock sold to the corporation is appraised by the corporation, and the appraised price is actually paid to and received by the stockholder, he cannot maintain a bill to obtain a larger price, but must either rescind or sue at law. Tuttle *v.* Batchelder, etc. Co., 170 Mass. 315 (1898). Where, in order "to enable the company to keep its stock in the ownership of stockholders of its own choosing," each stockholder enters into an agreement with the corporation that in case he wishes to sell his stock it shall first be appraised and then offered to the corporation before it is offered to any one else, the refusal of the board of directors to make an appraisal, in accordance with the agreement, does not render the corporation liable in damages, inasmuch as it is clear that, even though the stock were appraised, the corporation would not buy it. Whiton *v.* Batchelder, etc. Corp., 179 Mass. 169 (1901).

4 The stockholders in a private trading corporation may agree that, upon the death of any one or more of them, the remainder shall have the right to purchase the stock of the decedent at its value. This is not invalid as against public policy or as an improper restraint of the power of alienation. The court may grant specific performance of such contract. Fitzsimmons *v.* Lindsay, 205 Pa. St. 79 (1903). Where all the stockholders make a contract that the stock of any one who might die or withdraw should first be offered to the remaining stockholders at a fair price or its book value, to be ascertained by arbitrators, such contract may be enforced in equity, and dividends declared after the death go to the pur-

It has been held by a lower New York court that an agreement of several stockholders not to sell their stock, except upon the concurrent consent of all the signers to the agreement, is illegal and void as in restraint of trade and against public policy.[1]

The New York court of appeals, however, reached a different conclusion.[2]

chasers and the award bears six per cent. interest from the date of the death. The good will is to be included in the value. *In re* Lindsay's estate, 210 Pa. St. 224 (1904). A court of equity will enforce a contract between stockholders by which if any one wishes to sell he must first offer his stock to the other stockholders ratably, the price to be determined by the holders of a majority of the stock. If one stockholder is excluded from participating he may enjoin the sale. Boswell *v.* Buhl, 213 Pa. St. 450 (1906). A transfer of stock by several persons to a trust company for five years under an agreement by one of them to buy the stock at that time if the other parties wished, is not enforceable if they wait over a year after the expiration of the five years before giving notice of their wish to sell. Hollis *v.* Libby, 101 Me. 302 (1906). Where in the organization of a mercantile corporation some of the principal employees become stockholders, under a contract between all the stockholders, by which a majority might declare a stockholder to be undesirable, and thereupon he was to be paid the cash value of the stock as appraised, the stock to be then divided among the other stockholders, a suit in equity lies to compel an employee to give up stock so appraised, and the appraisal is the actual cash value of the assets without anything for good will, and the fact that there is preferred stock is immaterial, if it is redeemable at any time, it being shown also that the common stock had never been sold on the market. Boggs *v.* Boggs & Buhl, 66 Atl. Rep. 105 (Penn. 1907). Where a stockholder agrees to transfer his stock to the company at an appraisal to be made by the directors, the decision of the directors cannot be impeached by showing that they committed errors of judgment in the appraisal. A stockholder may be forced to specifically perform a contract to convey his stock to the corporation, according to an appraisal made by the directors, to be disposed of by them as they may see fit, where the evidence shows that none of the stock of said corporation has ever been sold on the market or otherwise than by transfer to the directors, and no fraud in the appraisal is charged, and the remedy by an action for damages would be inadequate. New England Trust Co. *v.* Abbott, 162 Mass. 148 (1894).

1 Fisher *v.* Bush, 35 Hun, 641 (1885). See also § 320, *supra*.

2 Williams *v.* Montgomery, 148 N. Y. 519 (1896), practically reversing 68 Hun, 416 and 74 Hun, 427. See also p. 1720, *infra*. Thus, where two patentees agree to own their patents in common, and then contract with a corporation to convey the patents to it for stock to be issued to them jointly, each to have one-half, and each to name one-half the dividends thereof, the certificates not to be changed, sold, or pledged for ten years, except upon their joint consent, the instrument may also provide that one of them shall vote the stock as proxy for the ten years, unless both agree otherwise. The court held that such a contract is legal, being practically a contract to become partners in the ownership of stock for ten years. Hey *v.* Dolphin, 92 Hun, 230 (1895).

It is to be borne in mind that an oral contract on this subject may be void by the statute of frauds,[1] and that a unilateral contract, amounting to an option without consideration already paid, may not be legally binding.[2] A corporation in selling its stock may do so on condition that the certificates therefor are not to be issued for five years, the purpose being to pool the stock for that length of time.[3]

§ 622*d*. *Charter provisions and by-laws restricting the right to sell stock.*—The by-laws of a corporation cannot legally prohibit or limit the right of a stockholder to sell his stock.[4]

1 An oral agreement whereby one party makes a loan to the corporation in consideration of the other party keeping the former in control and giving him an option on the latter's stock does not sustain a suit for damages, even if broken by the latter, inasmuch as it is void, under the statute of frauds, as not to be performed within a year. Gazzam *v.* Simpson, 114 Fed. Rep. 71 (1902). See § 339, *supra*.

2 A unilateral contract is not binding. A consideration must exist or the covenants be mutual. Jordan *v.* Indianapolis, etc. Co., 61 N. E. Rep. 12 (Ind. 1901). As to options, see § 334, *supra*. An option to sell mining stock with no definite time fixed as to the duration of the option may be revoked three months later, no sale having been made in the meantime, and a subsequent sale by the owner of the stock at an advanced price to a party whom the party receiving the option had been negotiating with, does not entitle such party receiving the option to any interest in the sale. Rees *v.* Pellow, 97 Fed. Rep. 167 (1899), the court holding that such an option may be terminated at any time in good faith. The mutual covenants contained in a contract between a railroad company and a telegraph company, by which they join in defraying the expense of a line of telegraph on a railroad right of way, to be operated for their joint benefit, is a sufficient consideration for sustaining the contract, where there has been part performance of such consideration. Western Union, etc. Co. *v.* Pennsylvania Co., 129 Fed. Rep. 849 (1904).

3 Williams *v.* Ashurst Oil, etc. Co., 144 Cal. 619 (1904).

4 Morgan *v.* Struthers, 131 U. S. 246, 252 (1889); Feckheimer *v.* National Exch. Bank, 79 Va. 80 (1884), where a by-law prohibiting transfers except with the consent of the directors was declared void; Bank of Attica *v.* Manufacturers', etc. Bank. 20 N. Y. 501 (1859); Orr *v.* Bigelow, 14 N. Y. 556 (1856); aff'g s. c., 20 Barb. 21 (1854); Sargent *v.* Franklin Ins. Co., 25 Mass. 90 (1829); Moore *v.* Bank of Commerce, 52 Mo. 377 (1873). A by-law limiting the amount of stock which a single person may hold, and also forbidding a transfer to an outside person, except with the consent of the board of directors, is illegal. Miller *v.* Farmers', etc. Co., 110 N. W. Rep. 995 (Neb. 1907). A by-law to the effect that a transfer of stock shall be allowed only upon consent of all the other stockholders is void as in restraint of trade. *Re* Klaus, 67 Wis. 401 (1886). As regards corporate liens herein, see ch. XXXI, *supra*. See also, as to the general policy of the law to discountenance restrictions on right to sell, Moffatt *v.* Farquhar, L. R. 7 Ch. D. 591 (1878). In this case the directors were compelled to allow a transfer, although the purpose of the transfer was to multiply votes. A secretary cannot refuse to register a transfer on account of the

It has been held in Massachusetts, however, that a by-law, recited on the face of a certificate of stock, to the effect that a stockholder

motive of the transferrer. *Re* Klaus, 67 Wis. 401 (1886). A by-law providing that, if any stockholder shall desire to dispose of his stock, he shall give written notice of his intention to sell, and that the other stockholders shall thereupon have the option to purchase the stock at the price named, is an invalid restraint on alienation. Victor, etc. Co. *v.* Bloede, 84 Md. 129 (1896). A by-law that no stockholder shall sell his stock or have a transfer of it unless he shall first have offered it for sale to the directors is illegal and void. Brinkerhoff-Farris, etc. Co. *v.* Home Lumber Co., 118 Mo. 447 (1893). A by-law that all purchasers of stock shall agree that the stock shall be voted in favor of increasing the capital stock is void as in restraint of trade and as attempting to limit the voting power of a stockholder. McNulta *v.* Corn Belt Bank, 164 Ill. 427 (1897). Where a stockholder purchases certificates of stock which provide that they are transferable only to the company, and at an appraisal to be made by its directors, as provided in the by-laws printed on the back of the certificates, and signs a receipt therefor, "subject to the conditions and restrictions therein referred to, and to the by-laws of the company, to which I agree to conform," he is bound by the provisions of the certificates, though, when considered as by-laws, they may be void. In such case the records of a directors' meeting showing that, by vote of the directors present, a stockholder's shares were appraised at a certain price and taken for the use of the company, sufficiently shows an appraisal, although no notice of hearing was given the stockholder. New England Trust Co. *v.* Abbott, 162 Mass. 148 (1894). Where by the bylaws any stockholder wishing to sell his stock must first offer it to other stockholders, and a stockholder dies and one of his heirs brings suit against the executors for his proportion of the stock, and another heir claims that the stock should be sold, the corporation itself and all the other stockholders are necessary parties. Champollion *v.* Corbin, 71 N. H. 78 (1901). The fact that the by-laws require a stockholder, in case he wishes to sell, to first offer the stock to the corporation or other stockholders before selling to others, does not affect the validity of another bylaw authorizing assessments on the stock. Farmers' etc. Co. *v.* Smith, 74 Conn. 625 (1902). A by-law requiring stockholders to offer their stock to the corporation itself before selling such stock elsewhere is illegal, and a purchaser of a certificate of stock is entitled to a transfer on the books, even though his transferrer agreed to the by-law and did not comply therewith. Ireland *v.* Globe, etc. Co., 21 R. I. 9 (1898). Where a stockholder in a national bank indorses his certificate in blank, and causes it to be sold at public auction, and the auctioneer sells it to the cashier of the bank, and takes it to the bank, and presents it to such cashier for transfer, and for four years dividends thereon are paid to the cashier, the vendor is no longer liable, even though the stock was not transferred on the bank books, and even though a bylaw of the bank prohibited any officer from holding stock in the bank except by permission of the board of directors. Earle *v.* Coyle, 97 Fed. Rep. 410 (1899). A by-law that the stock shall not be transferable except to the corporation itself is illegal, even though it is expressed on the face of the stock certificates; and hence a stockholder cannot compel a corporation to purchase his

will not sell his stock without first offering it to the directors at the same price, prevents the stockholder transferring the stock to his principal, he not having disclosed that he was acting as agent. Such a by-law is legal, and the corporation may refuse to transfer the stock in violation of the by-law.[1] A resolution of the stockholders that the company should not allow any further transfers of stock until the company is out of financial difficulties does not bind a stockholder who did not take part in the meeting.[2]

The right of transfer is sometimes limited by statute, as where stock cannot be transferred until all calls thereon shall have been fully paid. Where the charter or a statute forbids transfers before the full capital stock is paid in, any transfer before such payment has been held to be void.[3] The Illinois statute against options does not apply to a contract by which the vendor of stock agrees to buy it back at the end of five years if the vendor so desires, the vendee on his part agreeing not to sell the stock to any one in the meantime, without first offering it to the vendor.[4]

In England sometimes express authority is given to the directors by the articles of association, to refuse to permit a transfer unless the same is satisfactory to them.[5] They have this power, however, only by express authority, and it is not extended by implication.[6]

stock, even though the corporation has purchased the stock of other members, and even though the corporation is essentially a community of property affair, having a capital stock. Herring *v.* Ruskin, etc. Assoc. 52 S. W. Rep. 327 (Tenn. 1899).

1 Barrett *v.* King, 181 Mass. 476 (1902). A by-law authorizing a corporation to buy the stock of a member who wishes to sell is a contract binding on a stockholder who wishes to sell, the corporation having been organized to purchase household supplies for the members and interest being paid instead of dividends. Such a purchase by the corporation is legal, even though it has no profits, it being practically not a purchase but a repayment. Lindsay *v.* Arlington, etc. Assoc., 186 Mass. 371 (1904). Even though the charter gives the corporation the prior right to purchase its stock when sold by its shareholders, yet by allowing a transfer, the corporation waives this provision. Bartlett *v.* Fourton, 115 La. 26 (1905).

2 Smith *v.* Bank, etc. Scotia, 8 S. C. Rep. (Can.) 558 (1883).

3 Merrill *v.* Call, 15 Me. 428 (1839). The case of Quiner *v.* Marblehead Social Ins. Co., 10 Mass. 476 (1813), holds that, nevertheless, such a transfer vests in the transferee all the transferrer's interest in the stock. *Cf.* Kahn *v.* Bank of St. Joseph, 70 Mo. 262 (1879). The statutes of a state cannot restrict or interfere with the transferability of certificates of stock in national banks. Doty *v.* First Nat. Bank, 3 N. Dak. 9 (1892).

4 Ubben *v.* Binnian, 182 Ill. 508 (1899).

5 Shortridge *v.* Bosanquet, 16 Beav. 84 (1852); Bargate *v.* Shortridge, 5 H. L. Cas. 297 (1855); *Re* Joint-stock Discount Co., Shepherd's Case, L. R. 2 Eq. 564 (1866); aff'd, L. R. 2 Ch. App. 16.

6 Weston's Case, L. R. 4 Ch. 20 (1868); Gilbert's Case, L. R. 5 Ch. App. 559 (1870); Chappell's Case, L.

The power must be reasonably exercised, and its exercise must be free from fraud, caprice, and arbitrary power.[1] The corporation

R. 6 Ch. App. 902 (1871); *Re* Stranton Iron, etc. Co., L. R. 16 Eq. 559 (1873); Moffatt *v.* Farquhar, L. R. 7 Ch. D. 591 (1878); Slee *v.* International Bank, 17 L. T. Rep. 425 (1867). Judge Dillon, in Johnson *v.* Laflin, 5 Dill. 65, 78; s. c., 13 Fed. Cas. 758 763; aff'd, 103 U. S. 800 (1880), said: "Such a power is so capable of abuse and so foreign to all received notions, and the universal practice and mode of dealing in these stocks, that it cannot, in the absence of legislative expression, be held to exist." See also Farmers', etc. Bank *v.* Wasson, 48 Iowa, 336 (1878), the court holding that a by-law that transfers of stock shall not be valid unless approved by the board of directors cannot restrain transfers. "Its enforcement would operate as an infringement upon the property rights of others, which the law will not permit. It would, besides, operate as a restraint upon the disposition of property in the stock of the corporation, in the nature of restraint of trade, which the courts will not tolerate." A transferee is liable on an unpaid subscription where the transfer has been recorded on the books, even though the transferee did not comply with the by-law requiring the names of transferees to be submitted to the board of directors and the approval of such board and requiring transferees to sign the by-laws. The corporation may waive such requirements. People's, etc. Bank *v.* Rickard, 139 Cal. 285 (1903).

1 They cannot refuse to allow any transfers. Robinson *v.* Chartered Bank, L. R. 1 Eq. 32 (1865). And an objection, not to the transferee, but to the purpose of the transferrer in respect to the voting, is not sufficient. Moffatt *v.* Farquhar, L. R. 7 Ch. D. 591 (1878). But the board may refuse to give its reasons for refusing to allow the transfer, and in that case it will be presumed to have had sufficient reason for the refusal. *Ex parte* Penney, L. R. 8 Ch. App. 446 (1872). Directors cannot refuse to allow a transfer on account of hostility to the transferee, even though the transfer does not set out the address of the transferrer or the particular number of the share transferred, the transferrer having only one share. *Re* Letheby, etc. Ltd. [1904] 1 Ch. 815. Where the by-laws limit the right of transfer of stock, and give the directors the power to pass upon the same, the court will presume that their action in refusing a transfer was based on good reasons, even though no reason was given. *Re* Coalport China Co., [1895] 2 Ch. 404. If misrepresentations are made in inducing the directors to allow transfer, they, having discretion, may avoid the same. Payne's Case, L. R. 9 Eq. 223 (1869); Master's Case, L. R. 7 Ch. 292 (1872); Bishop's Case, L. R. 7 Ch. 296 (1869). Although a transfer is rejected by the directors, the transferee is nevertheless entitled to dividends and the title to the stock. Poole *v.* Middleton, 29 Beav. 646 (1861). Where the company may accept or reject a transferee, and rejects him, the transferee cannot recover back from the transferrer the consideration of the transfer. London Founders' Assoc. *v.* Clarke, 20 Q. B. 576 (1888). See Healey, Companies Law (3d ed.), p. 90. Where the directors are authorized by the articles of incorporation to reject a transfer of stock on the ground that they do not approve of the transferee, "the discretionary power is of a fiduciary nature and must be exercised in good faith; that is, legitimately for the purpose for which it is conferred. It must not be exercised corruptly, or fraudulently, or arbitrarily or capriciously, or wantonly. It may

cannot refuse to allow a registry on the ground that there was no consideration for the transfer;[1] nor because a claimant of the stock notified it not to make the registry.[2]

Similar to a charter restriction on the sale of stock is a provision in the articles of association of an unincorporated joint-stock association to the effect that no stockholder shall sell his stock except on specified conditions or that he shall not sell it at all, except to a party satisfactory to the other stockholders. Such provisions are legal, being merely matters of private contract.[3]

not be exercised for a collateral purpose. In exercising it the directors must act in good faith in the interest of the company and with due regard to the shareholder's right to transfer his shares, and they must fairly consider the question of the transferee's fitness at a board meeting." It is not a sufficient reason that the transferee is not a member of a particular family, and the directors will be ordered to make the transfer. *Re* Bell, 65 L. T. Rep. 245 (1891).

1 Helm *v.* Swiggert, 12 Ind. 194 (1859).

2 *Ex parte* Sargent, L. R. 17 Eq. 273 (1874). *Cf.* § 387, *supra.*

3 Thus where the articles prohibited sales of the stock, a purchaser has no right to vote or participate in the association, but is merely entitled to the dividends. Harper *v.* Raymond, 3 Bosw. (N. Y.) 29 (1858). See Kingman *v.* Spurr, 24 Mass. 235 (1828). See also Taft *v.* Harrison, 10 Hare, 489 (1853), as to liability after an offer to sell to the company. A provision in the articles of association of a joint-stock association to the effect that no member nor his executors, administrators, or other legal representatives should sell or transfer his stock until after it had been offered to the association or other members, does not prevent an executor transferring the stock to the residuary legatee. Lane *v.* Albertson, 78 N. Y. App. Div. 607 (1903). Under the Pennsylvania statutes relative to joint-stock companies to the effect that a purchaser of stock who is not thereafter elected to partnership shall be paid the value of his stock, the company, by admitting him as to some of the stock, admits him as to all, but the fact that he is already a holder of some stock does not entitle him to be admitted as to new stock purchased by him. Carter *v.* Producers' Oil Co., 200 Pa. St. 579 (1901). Where an unincorporated partnership issues so-called certificates of stock representing a specified interest in such partnership, and one of the partners assigns his certificates as collateral security and afterwards sells them, the purchaser is entitled to his share of the partnership property and to demand an accounting, even though the certificates provided that they were not transferable. The transfer of such certificates as security need not be recorded as a chattel mortgage. Ronnerdahl *v.* Jackson, 102 Wis. 444 (1899). Although an unincorporated association's articles provide that transfers of stock shall be made only with consent of the directors, yet, where such provision is for many years disregarded, a stockholder who so transferred his stock at a time when the assets equaled the liabilities cannot be held liable as a stockholder. Wadsworth *v.* Duncan, 164 Ill. 360 (1896); Wadsworth *v.* Laurie, 164 Ill. 42 (1896). The foreclosure and sale of a pledge of stock in the Western Associated Press has been refused where it was shown that the stock merely entitled the holder to receive news; that no transfer was allowed except by consent of the association, and such

§ 622e. *Irrevocable proxies.*—The plan of trying to tie up the contract of a corporation by obtaining irrevocable proxies from the holders of a majority of the stock had to be abandoned, because the so-called "irrevocable" proxies, although irrevocable by their terms, were held by the courts to be revocable at any time.[1] This plan of depositing the certificates of stock with trustees, without a transfer on the books of the corporation, and then giving irrevocable proxies to the trustees, was one of the first plans tried. The courts, however, held that inasmuch as the proxies were revocable, the plan of the trust itself had failed, and hence the certificates might be demanded back.[2]

§ 622f. *Deposit of certificate of stock with trustees, either with or without a transfer of same to the trustees.*—This is the usual and most important method of tying up the control of a majority of the stock of a corporation. It has given rise to much litigation and more or less conflicting decisions. Each case turns largely on the peculiar form of the particular contract under consideration, and yet there are certain general features and principles of law applicable to this form of contract, which are gradually defining the limit between legal and illegal contracts of this nature. It has been

consent had never been given, and the association was not made a party to the suit. Metropolitan Nat. Bank *v.* St. Louis Dispatch Co., 36 Fed. Rep. 722 (1888); aff'd, 149 U. S. 436. In this case it is to be noticed that no profits or dividends could arise from the stock.

1 See § 610, *supra.* "It is against the settled rules governing the control of corporations that an irrevocable power of voting or directing votes on stock should be vested in a person who is neither interested in the stock nor a representative of persons interested." Clowes *v.* Miller, 60 N. J. Eq. 179 (1900). A stockholder may transfer his certificate to his children who at the same time may give him an irrevocable power to vote the stock during his life and to receive and keep the dividends on the stock. Such an agreement is enforceable, even though the stock is transferred into the name of the children, the certificates, however, not being actually delivered to them. Matter of Brandreth, 58 N. Y. App. Div. 575 (1901), rev'd on another point in 169 N. Y. 437.

2 Woodruff *v.* Dubuque, etc. R. R., 30 Fed. Rep. 91 (1887); Hafer *v.* New York, etc. R. R., 14 W. L. Bull. 68 (1885). See Griffith *v.* Jewett, 15 W. L. Bull. 419 (1886); Vanderbilt *v.* Bennett, 6 Pa. Co. Ct. Rep. 193 (1887); Starbuck *v.* Mercantile Trust Co., 60 Conn. 553 (1891). See also an excellent article and careful review of the cases by Professor Baldwin in 1 Yale L. J. 1 (1891). In the case Consumers', etc. Co. *v.* Quinby, 137 Fed. Rep. 882 (1905), a natural gas company was so organized that all the stock was placed in the names of five trustees selected from the stockholders with irrevocable power to vote the stock as owners and elect a board of nine directors, and after the dividends had repaid to the stockholders their investment with eight per cent. interest, the price of gas was to be reduced to cost, so that there should be no further profits on the stock. The gas having given out the

objected that this mode of tying up the stock of a corporation violates the statute against restraint on the alienation of personal property; that it is contrary to public policy, which favors a free transfer of property; that it is unfair towards minority stockholders, and that it separates the voting power from the ownership of the stock. The leading cases on this subject are as follows:

The New York court of appeals has held that an agreement of several holders of stock to deposit their stock in a trust company for a term of six months and not to sell it during that time is legal, there being no provision depriving any party of his right to vote on the stock. The court held also that where compensation in damages for a breach would be inadequate, a court of equity might grant specific performance of such a contract by enjoining a breach thereof. Such a contract is not void as suspending the power of alienation, nor is it against public policy as being a restraint upon trade, the purpose of the contract being to prevent a sacrifice of the stock.[1]

court held that the stockholders had a right to have the corporation wound up and its assets distributed to them.

1 Williams *v.* Montgomery, 148 N. Y. 519 (1896), practically reversing 68 Hun, 416, and 74 Hun, 425. See § 812, *infra.*

The following decisions have also been rendered in New York state. The directors of a New Jersey holding corporation owning a majority of the stock of a New York insurance company cannot place the stock in a voting trust for a period of years, because it is the duty of such directors to manage and control the property of the corporation instead of delegating such control to outside individuals. Knickerbocker, etc. Co. *v.* Voorhees, 100 N. Y. App. Div. 414 (1905). In the case of Sullivan *v.* Parkes, 69 N. Y. App. Div. 221 (1902), the holders of a majority of the stock of a Delaware corporation entered into a written agreement, by which the certificates were deposited with a trust company for fifteen years, together with irrevocable proxies to two specified persons to vote the stock during that time, and in case they disagreed they were to select a third party who was to decide between them, the proxies to be renewed every three years, the owners retaining the right to sell or pledge their stock, subject always, however, to the agreement, and the purchaser to come into the agreement and execute similar proxies, and the agreement further providing that before any party sold his stock he should first offer it to the others at the same price at which he intended to sell. The two proxies failed to agree and could not agree on an arbitrator and one of them filed a bill for an injunction to prevent the other from voting his own stock in violation of the agreement. The court held that the injunction would not lie because the contract had become impossible of performance, by reason of the arbitrator not being provided for, and on the further ground that the agreement did not prohibit each stockholder voting his own stock, in case the proxies could not agree, and the court doubted the validity of the irrevocable proxies, and doubted the validity of a provision against the stockholder voting his stock, even if there had been such a provision. The court intimated also

In 1901 the legislature of the state of New York declared the public policy of that state, as to the "pooling" of stock, by enacting a statute under which stockholders may pool their stock by transferring the same to a person to vest in him the right to vote

that an agreement preventing the sale of stock for fifteen years would be void under the Personal Property Law of New York (L. 1897, ch. 417, § 2), and that the spirit of the statute militated against an agreement to give proxies for that length of time.

A court will enjoin a party from voting upon or disposing of his stock in a corporation *pendente lite* where the plaintiffs show that they transferred the stock to the defendant on the latter's agreement not to sell the same, except with the consent of the former, and that when he did sell the stock three-fourths of the proceeds should belong to the former, and it appearing further that the defendant had given the stock to his sister without consideration. Weston *v.* Goldstein, 39 N. Y. App. Div. 661 (1899). In the case of United, etc. Co. *v.* Omaha, etc. Co., 164 N. Y. 41 (1900), where a reorganization committee, in carrying out the reorganization agreement, tied up the stock by giving to the committee the power to vote the same until certain dividends were paid, the court held that the committee had no such power under the original reorganization agreement. Trustees under a reorganization who are to hold a majority of the stock and vote the same for five years, unless they decide to distribute the same before that time, are not precluded from selling stock owned by themselves individually, and the fact that they sell their own stock is no ground for compelling a distribution of the remaining stock. Haines *v.* Kinderhook, etc. Ry., 33 N. Y. App. Div. 154 (1898). An agreement of stockholders not to sell their stock except by concurrent consent of all the signers to the agreement is void as in restraint of trade and against public policy. Fisher *v.* Bush, 35 Hun, 641 (1885).

The trustees are not purchasers and owners of the stock. People *v.* North River Sugar Ref. Co., 121 N. Y. 582 (1890). An outside stockholder cannot object to other stockholders uniting their interests in a "trust," and thereby obtaining control of the corporation. Zimmerman *v.* Jewett, 19 Abb. N. Cas. 459 (1886). An agreement of the holder of a majority of the stock that he will retain control is no defense by the corporation to an action by the receiver of such stockholder to transfer the stock on the corporate books. Weller *v.* Pace Tobacco Co., 25 N. Y. Week. Dig. 531 (1886). Where stock is deposited with a trustee for purposes of reorganization, and transferable certificates are issued therefor by the trustee, a claimant of stock which another person has deposited, and for which such other person has the trustee's certificate, cannot compel the trustee to deliver up the stock until the trustee's certificate is returned, even though the party holding it is a party defendant. Bean *v.* American Loan, etc. Co., 122 N. Y. 622 (1890). As to the nature of trustees' certificates in general, see § 888, *infra*.

Where a trustee holding stock votes himself into office and illegally votes to himself a large salary, the *cestuis que trust* may in a suit for his removal ask also that he account to such *cestuis que trust* for such salary. Elias *v.* Schweyer, 27 N. Y. App. Div. 69 (1898). Where the stockholders transfer a portion of their stock to one of their number to be disposed of by him for the interests of the company, and to raise money to carry on business, he may use a portion of the same to reimburse one of the

the stock for a time not exceeding five years, on such terms and conditions as therein set forth, provided other stockholders are allowed to come into the agreement. The stock may be transferred for that purpose on the books of the company, the new certificates and the corporate books to refer to such agreement, and the agreement itself to be filed with the corporation and to be open to the inspection of other stockholders.[1]

The supreme court of Massachusetts has rendered a logical and clear decision on this question. It holds that an agreement of various persons to purchase a majority of the stock of a corporation, the stock when purchased to be voted by a committee of five of the subscribers for at least three years, is not illegal even though the title to the stock is given to a trustee during that time. The court said: "We know nothing in the policy of our law to prevent a majority of stockholders from transferring their stock to a trustee with unrestricted power to vote upon it. . . . A stockholder has a right to put his shares in trust, whatever his motive. If the trust is an active one he cannot terminate it at will; and the attempt to cut himself off by contract, instead of by the imposition of duties, from ending it, certainly is not enough to poison the covenant with the plaintiff. It might be held that the duty of voting incident to the legal title made such a trust an active one in all cases. As to the arrangement for the trustees uniting to elect

stockholders for stock which the latter used in the interest of the company. Playa, etc. Co. *v.* Gage, 60 N. Y. App. Div. 1 (1901); aff'd, 172 N. Y. 630. Where a trustee or agent with whom bonds are deposited issues his certificate to the effect that he holds bonds specified in such certificate to be delivered to a person specified in such certificate, all coupons on such bonds belong to the person named in the certificate, although the certificate itself is not actually delivered until several years after the date of the certificate. If such coupons have been canceled and returned to the corporation issuing the bonds, and the trustee is held liable for such coupons, the trustee may hold the corporation liable. Kelly *v.* Forty-Second Street, etc. R. R., 37 N. Y. App. Div. 500 (1899). An agreement by which stockholders transfer their stock to one of their number to be sold in ten share lots and to be voted as a unit, as directed by four-fifths of the members, and in case of disagreement certain ones were to offer their stock for sale to the others, the purpose being to retain the management and control in the persons, who originally organized the enterprise, is valid so long as each party retains his original interest and no other rights intervene. The mutual promises of said agreement are a sufficient consideration. If some of the parties violate the agreement other parties may treat it as a rescision and may recover back their stock. Gray *v.* Bloomington & N. Ry. 120 Ill. App. Rep. 159 (1905).

[1] L. 1901, ch. 355. The voting trust agreement by which a majority of the stock of the Equitable Life Insurance Company of New York was placed in the hands of trustees was declared egal in Lord *v.* Equitable, etc. Society, 57 N. Y. Misc. Rep. 417 (1908).

their candidates, the decisions of other states show that such arrangements have been upheld, and we do not think that it needs argument to prove that they are lawful. If stockholders want to make their power felt they must unite. There is no reason why a majority should not agree to keep together."[1]

In New Jersey, also, the highest court has upheld a pooling agreement of stock of a terminal corporation, whereby for two and one-half years the stockholders turned over their certificates to certain persons, together with proxies, with power to vote on any question, including the sale of the property, and to exchange the stock for stock in other corporations or to hypothecate it, the stockholders agreeing in the meantime not to sell their stock, the object being to finance and complete the enterprise, and hence a bill filed by one of the depositing stockholders to reclaim his stock was held not to lie.[2]

1 Brightman *v.* Bates, 175 Mass. 105 (1900), enforcing a contract for commissions for services in purchasing such stock.

An unincorporated joint-stock association to buy, lease, and sell land is legal, even though the title to the land is held in the name of trustees who cannot act except upon a three-fourths vote of the stockholders. A stockholder cannot have a receiver appointed and the business wound up on the ground of its being illegal. Howe *v.* Morse, 174 Mass. 491 (1899). The contract of an agent to sell stock does not give the principal a right to damages for failure to sell, where the principal delivered trustees' receipts instead of the stock itself, the stock having been "pooled." Simmons *v.* Brooks, 159 Mass. 219 (1893). The fact is that Massachusetts has developed and elaborated this plan of pooling stock much more than in other states. In that state the trustees often issue trustees' certificates of stock in the usual form of stock certificates. See § 622 (*h*), *infra.* Where a reorganization has been completed, and a voting trust established and a release to the reorganization committee executed by the certificate holders, one of the certificate holders cannot hold them liable in damages on the ground that as trustees of the voting trust they controlled the board of directors and had mismanaged the new corporation, it appearing that they did not constitute a majority of the board of directors and that in managing the corporation they acted as stockholders and directors, and not as a reorganization committee. Lawrence *v.* Curtis, 191 Mass. 240 (1906).

2 The court said: "This instrument, which gave the defendants control over the complainant's stock, appears to have been for a common interest; it is consistent with the purposes for which the corporation was created, and its continuance appears to be necessary for the advantage of all who are interested in the development of the property. A power of attorney may become irrevocable whenever the object is to create an interest; and this is so, even if it is not stated in the instrument itself to be irrevocable. . . . The statute does not in terms prevent a stockholder from giving an irrevocable power of attorney to vote at stockholders' meetings, subject to the time limit as to elections, nor can we see any reason why a stockholder may not give such a proxy if he chooses, and be bound by it. He can easily avoid the effect of it by appearing and voting in person at all meetings. There is no statutory provision, nor can we perceive any

It has also been held in New Jersey that an agreement between two stockholders by which certain stock is issued to a trustee to be held by the trustee for eighteen months, unless sooner disposed of by consent of the parties, the stock in the meantime to be voted as directed by one of the parties, the stock at the termination of that period to be divided between them in a certain way, is legal.[1]

It is further held in New Jersey that an English company holding a majority of the stock of a New Jersey corporation, the American stockholders being excluded, and the holding company having the voting power without the legal title to the stock, may be compelled to give up the stock to the certificate holders.[2] It has been held by

reason offensive to public policy, preventing a stockholder from giving another powers over, or rights in, his shares in a corporation to the same extent that he might give in any property." The court also said: "No illegal purpose is manifest upon the face of this agreement, nor has any been alleged in the bill. It appears to be consistent with the purposes for which the company was created, and which continuance appears to be necessary for the advantage of all who are interested in the development of the property. It is expressly declared to be for the benefit of all who join in it. No stockholder is prevented from joining in this agreement, and no stockholder who has not availed himself of the opportunity to join in it is excluded from the benefit of it. No one appears to have been injured by it. The complainant does not allege in what way he is damaged by its continuance." Chapman *v.* Bates, 47 Atl. Rep. 638 (N. J. 1900), aff'g 60 N. J. Eq. 17 (1900).

1 If one of the parties, who had a right to prescribe how the stock should be voted, subsequently, but prior to the expiration of the agreement, sells his interest in the stock, such sale being made subject to the agreement, his right in regard to the voting of the stock does not pass to the purchaser, but vests in the trustee. "It is against the settled rules governing the control of corporations that an irrevocable power of voting or directing the votes on stock should be vested in a person who is neither interested in the stock nor a representative of persons interested." The court said in regard to the duty of the trustee in holding the stock, "it must exercise this right and power honestly and in its best judgment as trustee, giving such weight as in its judgment it is entitled to, to the fact that the complainant, the owner beneficially interested in the majority of the stock held in trust, is opposed to the change." The court said: "It must be observed that the trust agreement is not simply a deposit for the purpose of voting, but is a trust to hold the stock for a limited period, to await the result of certain options of purchase, which affect the ultimate disposal of the stock." Clowes *v.* Miller, 60 N. J. Eq. 179 (1900).

2 Warren *v.* Pim, 66 N. J. Eq. 353 (1904). The lower court in New Jersey said: "Voting trusts are not declared to be necessarily unlawful. They may or may not be lawful, according to the circumstances of the case. The general rule is that *prima facie* they are unlawful, but may be rendered lawful by the circumstances." Hence, where a majority of the stock of a New Jersey corporation is held abroad and a few of the foreign stockholders, in connection with a reorganization of the company, send a circular to the foreign stockholders

the lower court in New Jersey that a stock-pooling agreement by which for five years the holders of a majority of the stock transfer it to trustees in exchange for certificates of the trustees themselves, and the trustees are given power to formulate a plan for financing

only, stating that the foreign stockholders will not be allowed to enter the reorganization unless they consent to the new stock being pooled, the circular not specifying the duration of the pool, nor limiting the right of a stockholder to withdraw his stock, and such pool is thereupon made of the foreign stockholders only, and then the originators of it organize a trust company under English law, without a capital stock, to hold a majority of such new stock, they themselves and their nominees to be the trustees for fifty years, although they own but one-seventh of the entire stock, an American stockholder may enjoin such pool from voting such stock, especially where he also has purchased some of the trust certificates issued by such English corporation. This amounts to an absolute and irrevocable power in the few individuals to control and manage the New Jersey company for fifty years, whereas, under the original circular the stock turned in did not authorize such plan, and did not limit the right of the equitable owner to compel the trustee to vote his stock as he might direct, or to make a retransfer to him of his stock. Hence the American stockholder may file a bill to compel a transfer to him by the English corporation of the stock represented by his trust certificate and to compel the trustee to vote his stock as he directs. and to enjoin any action to the contrary. Warren *v.* Pim, 65 N. J. Eq. 36 (1903). This decision was practically affirmed in 66 N. J. Eq. 353 by a divided court of seven to six. The basis of the affirmance was that the English corporation had no title to the stock, but held it for voting purposes only. Mr. Justice Dixon stated that stockholders not participating in a voting trust could question it only under the general rules of law and equity. Mr. Justice Pitney pointed out the difference between a "holding company" and such a trust, as follows: "A holding company is owner of the stock itself. This association is not. It is only a sham owner, vested with a colorable and fictitious title for the sole purpose of permanently voting upon stock that it does not own. The officers of a holding company are responsible to the stockholders therein; are subject to be called to account annually, and to be refused re-election if their management of the concerns intrusted to them is not satisfactory to their constituents. But under the present voting trust there is no such responsibility, no such control by the constituents. The constituents—that is, the owners of the deposited shares —have disabled themselves from exercising by force of majorities any control over the discretion of the trustees. The only control that is at all reserved is either to terminate the trust outright, or else to simply oust one trustee and put another man in his place." He also pointed out that in the Chapman case the trustees had power to sell the stock held by them in trust. He also held that stockholders who had, as well as those who had not, participated in the trust could object thereto. Judge Greene in his opinion held that the validity of the voting trust is subject to two limitations: "(*a*) That the holders of all of the shares of the corporation shall have an equal privilege (after fair information) of availing themselves of the trust agreement, if they shall so choose; and (*b*) that the object and aim of the trust shall be the equal benefit of all the shares."

the company and submit the same to such stockholders, who shall be bound thereby unless they object in a certain way, and the trustees are then given power to carry out such plan, and stockholders who do not come into the agreement should not be entitled to any rights or benefits thereunder, the trustees to elect such directors as they see fit, is illegal, and a stockholder who has not come into the agreement may enjoin the trustee from voting such stock, even though some of the trustees are beyond the jurisdiction of the court.[1]

1 The court said: "If, however, the stockholder undertakes to make irrevocable his grant of power, and to denude himself for a fixed period of the power to judge and determine and vote as to the proper management and control of the affairs of the corporation, then whether the grant of power is good or not must depend on the purposes for which it is given. When the scheme devised does not embrace a grant of irrevocable powers by proxy, but seeks a similar object by the creation of a trust and the appointment of a trustee, to whom the titlo of the stock is conveyed, a like doctrine must be applied. If no provision is made for the conduct of the trustee, at least he would be bound to vote on the stock held in trust in accordance with the expressed wishes of the *cestui que trust;* but if the transfer of the legal title to the stock is made and accepted under an agreement of the stockholder which deprives him of all power to direct the trustee, and all opportunity to exercise his own judgment in respect to the management of the affairs of the corporation, then, whether the transaction is open to the objection of other stockholders, as depriving them of the right they have to the aid of their co-stockholders, must be dependent upon the purposes for which the trust was created, and the powers that were conferred. If stockholders, upon consideration, determine and adjudge that a certain plan for conducting and managing the affairs of the corporation is judicious and advisable, I have no doubt that they may, by powers of attorney, or the creation of a trust, or the conveyance to a trustee of their stock, so combine or pool their stock as to provide for the carrying out of the plan so determined upon. But if stockholders combine by either mode to intrust and confide to others the formulation and execution of a plan for the management of the affairs of the corporation, and exclude themselves by acts made and attempted to be made irrevocable for a fixed period, from the exercise of judgment thereon, or if they reserve to themselves any benefit to be derived from such plan, to the exclusion of other stockholders who do not come into the combination, then, in my judgment, such combination, and the acts done to effectuate it, are contrary to public policy, and other stockholders have a right to the interposition of a court of equity to prevent its being put into operation." The court also said: "The agreement discloses an intent to exclude stockholders who do not enter into it from whatever benefits could be claimed thereunder. This, in my judgment, shows a combination contrary to public policy, and one to which any non-assenting stockholder may object." Kreissl *v.* Distilling Co., etc., 61 N. J. Eq. 5 (1900). An agreement whereby $83,000 of stock is pooled in a trustee's hands, the latter issuing trustee's certificates therefor, and electing such directors as the certificate holders may direct, according to the trust agreement, may be annulled and set aside at the instance of purchasers of the remaining $17,000 of stock and of a majority of the trus-

In New Jersey the complaint may be made by a stockholder, who has deposited his stock in the trust, or by one who has not.[1]

It has been held in Missouri that where a person sells stock to two others, and the three agree to pool their stock so that all benefits should be shared equally, including the sales thereof and including any dividends received within a specified time on certain other stock owned by one of the parties, the agreement is valid and a suit for an accounting may be maintained thereon;[2] and in California, that where the holder of a majority of the stock had contracted to transfer it to a specified person with proxy irrevocable, authorizing the latter to vote the stock for five years for the benefit and protection of the corporation, and the party so contracting refused to fulfill and voted the stock himself and elected a board of directors, the court, having taken jurisdiction under the California statute authorizing the court to review elections, had jurisdiction to grant specific performance of such contract;[3] and in Maryland, that specific performance will not be granted at the instance of the purchaser of stock where the purchase is from the committee of a pool of such stock, and it is shown that the pooling agreement required a vote of three-fourths of the stock in the pool before a sale could be made, and it is also shown that the contract of purchase was partly an option, in that the purchaser was to forfeit a deposit he had already made in case he did not fulfill, and it being further shown that in another suit the complainant had stated the value of the stock, and it being further shown that the purpose of the contract was to obtain control of a large system of railroads, including the board of directors.[4]

tee's certificates. White v. Thomas, etc. Co., 52 N. J. Eq. 178 (1893).

1 In the cases White v. Thomas Inflatable Tire Company, 52 N. J. Eq. 178 (1893), and Kreissl v. Distilling Company, 61 N. J. Eq. 5 (1900), the complainants were stockholders who had not united in any voting trust. In the cases Cone v. Russell, 48 N. J. Eq. 208 (1891), and Chapman v. Bates, 60 N. J. Eq. 17; aff'd, 61 N. J. Eq. 658 (1900), the complainants were stockholders who had united in a voting trust, and had given proxies or powers of attorney irrevocable for a period of years. In the case Warren v. Pim, 55 Atl. Rep. 66 (N. J. 1903), the complaining stockholder sued in both capacities, he being the holder of stock which had not united in the trust and also the purchaser of trustee's certificates.

2 Green v. Higham, 161 Mo. 333 (1901).

3 Whitehead v. Sweet, 126 Cal. 67 (1899).

4 Ryan v. McLane, 91 Md. 175 (1900). Where an agreement for the pooling and voting of stock provides that any holder of trustee's certificates may on six months' notice demand from the trustee repayment of the price which he paid for the stock, such demand may be enforced by a suit and the money collected from the trustee. Waggaman v. Nutt, 88 Md. 265 (1898).

In Ohio it is held that it is legal for the stockholders to deposit their stock with a depositary, to be transferred to such depositary and voted by him as directed by a committee of the stockholders, such committee being named, the object of the deposit being to effect an adjustment of differences between the common and preferred stockholders;[1] and in Alabama and Iowa that where, in order to prevent the foreclosure and sale of a railroad, a reorganization agreement is entered into by the creditors and stockholders, whereby the claims of the creditors and the voting power of the stockholders are vested in trustees, the voting power to be exercised by the trustees until certain debts were paid, the stockholders cannot withdraw from the agreement and claim the right to vote upon their stock.[2] This decision was entirely correct, and in fact many of the voting trusts have been created as a part of the plans of reorganization of insolvent railroad systems.[3]

1 The agreement did not prevent any stockholder from demanding back his stock whenever he saw fit. The court held that this was not a "voting trust," and that it was merely "a convenient method by which distant and widely-separated shareholders became enabled, indirectly, to participate in the control and management of the company, and from which each could recede at any time and demand return of his stock without violating any term of the agreement. The depositary is a proxy required to vote the stock as directed by the committee." The contract of deposit is given in the report. The suit arose on *quo warranto* proceedings to oust the board of directors who were elected by the vote of the depositary, but whose title to office was denied by the company. Ohio, etc. Co. *v.* State, 49 Ohio St. 668 (1892); State *v.* O. & M. Ry., 6 Ohio Circ. Ct. 415 (1892). *Cf.* Hafer *v.* N. Y. etc. R. R., 14 W. L. Bull. 68 (1886).

2 Not even a subsequent change in the agreement so as to issue first-mortgage bonds to take up some of the debt will enable the stockholders to claim the right to vote upon their stock before the debts specified above have been paid. Mobile, etc. Co. *v.* Nicholas, 98 Ala. 92 (1893). Where a bondholder's reorganization agreement provided that plans should be formulated and should be binding on all the bondholders who signed unless a majority dissented within thirty days, and a majority does not so dissent, a single bondholder cannot object. Even though the agreement provides for an assessment for a certain amount for legal and other expenses an additional assessment may be levied to preserve the property. A provision in the agreement that bonds of a new corporation shall be issued in exchange for bonds of the old and that the stock shall be pooled until the company becomes self-supporting is legal. Cowell *v.* City, etc. Co., 130 Iowa, 671 (1906). See also Shelmerdine *v.* Welsh, 47 Leg. Int. 26 (Phila. Com. Pl. 1890).

3 The following from "Bradstreets" of September 6, 1902, is in point:

VOTING TRUSTS.

Recent events in the financial world have given rise to a good deal of discussion about the nature and bearings of what is known as voting trusts in connection with the stocks of railroads and other corporations. The definition of the term is a delegation of the right to elect directors and officers of such companies to certain trustees, either for a specified period or a length of time contingent upon other events, commonly the payment of dividends on the stocks held in

On the other hand, it has been held in Alabama that although many stockholders transfer their stock to a trustee to hold and vote for it three years, and agree not to sell until they have offered to sell to each other, yet any one may sell to an outsider, and the latter may demand back his stock from the trustee.[1]

In Maine it is held that a transfer of a controlling interest of stock of a railroad company to trustees to hold until the road is completed, and then to return the same to the transferrers, the object being to secure the co-operation of municipalities in obtaining an extension of the charter and the granting of municipal aid, is legal, the transaction being a fair one, and being known to the public, and insisted upon by the public before aid would be given.[2]

The federal court as early as 1867 held that an agreement by which various owners of stock place their stock in the hands of one person as trustee or agent to hold for a certain period of time, the parties agreeing not to sell their stock without having first offered to sell it to the rest of their associates at a price not above the then current market value, and, in case of their declining to take it, without next offering it to the trustee, but any one of the parties to be at liberty to withdraw at any time on those terms, is not "contrary to public policy, or any wise open to objection;"[3] and there have been many recent decisions in the fed-

trust. Arrangements of this kind are the outcome for the most part of the railroad reorganizations which have been so frequent during the past decade. When modern and correct principles began to be applied to the reconstruction of bankrupt corporations, it was found that one of the primary requirements was that bankers and capitalists should provide very large sums of money for the purpose of buying up claims against the company, for extinguishing the rights of non-assenting holders of stocks and bonds, and for the purchase of the equipment and completion of the improvements needed to put the plants in condition for profitable operation. The natural sequence of this was that the bankers or syndicates who supplied the capital desired to retain the management of the company in their own hands for a certain length of time, so that they might have the assurance that their plans would be carried out by a management nominated by themselves and in sympathy with their views. In matters of that kind continuity of management and an absence of liability to sudden changes in the control or policy are very important. Consequently, in nearly all of the large railroad reorganizations, like those of the Northern Pacific, Erie, Reading, and so forth, the plans under which the finances of the companies were readjusted included provisions by which the stocks of the reorganized road were to be deposited with three or more voting trustees, who would issue against the stock their certificates, carrying a beneficial interest to the holders of such certificates in the stocks so deposited. In most cases the voting trust was arranged to last for from three to five years, or until dividends had been paid on at least the preferred stock, either for a year or longer, at a specified rate. It was also generally set forth that the voting trustees themselves might terminate the voting trust of their own volition, and in at least two notable cases, those of the Northern Pacific and the Baltimore & Ohio, the voting trustees did actually end their trusteeship and deliver the stock itself to the holders of the voting trustees' certificates prior to the time when the arrangement would have been terminated.

1 Moses v. Scott, 84 Ala. 608 (1888).

2 Greene v. Nash, 85 Me. 148 (1892).

3 Brown v. Pacific Mail S. Co., 5 Blatchf. 525 (1867); s. c., 4 Fed. Cas. 420.

eral courts on various "pooling" agreements.[1] Most of the decisions on this subject, however, have been in the state courts, and

1 In the case of Levi *v.* Evans, 57 Fed. Rep. 677 (1893), three stockholders, by an instrument similar to a bill of sale, sold their stock to a fourth stockholder "for and during the period of six months, . . . in trust for the use and benefit of the grantors," with power to sell the same on certain terms, yet the court held that this instrument was not a sale or trust agreement, but merely a power of attorney. It did not prevent the fourth stockholder from selling his own stock on such terms as he chose, even though he did not sell the stock of the others, it not appearing that the sale of his stock prevented his selling the stock of the others. The instrument conveyed merely at most "only a dry legal title for the mere purpose of sale, and with the power of sale carefully circumscribed."

In the case of Ryan *v.* Seaboard & R. R. R., 89 Fed. Rep. 397 (1898), there was involved a pooling agreement by which the signers agreed for five years, or until thirty days after the agreement should be abrogated, not to sell nor dispose of their stock nor to delegate the voting power thereof to any person other than three specified persons and without the written consent of three-fourths of the aggregate shares of the signers to the agreement, and the agreement also authorized these three persons to vote as proxy for all signers of the agreement who should not be personally present at any meeting of the stockholders. The essential features of the agreement were that no stockholder would sell his stock for five years except upon the consent of three-fourths of the stock in pool, and in the meantime he would vote in person or through specified proxies. One of the signers, after sending in his certificate indorsed in blank, sold the same to the complainant in this suit without delivery of the certificate itself, such certificate having been canceled and a new certificate issued to the chairman of the pooling committee. This suit was instituted to compel the delivery of the stock called for by such certificate and sale and for other relief. The court held that the suit would lie, but that all the parties signing the agreement were necessary parties defendant in this suit to determine the validity of the agreement, excepting such of them as had sold their stock. The court held also that the suit was not multifarious, although it joined the company as a party defendant in order to obtain a transfer of the stock.

An injunction *pendente lite* against the voting of certain stock in connection with the formation of an alleged illegal pool will not be continued where it failed to accomplish its purpose at one annual meeting and will fail at the next meeting. Ryan *v.* Seaboard & R. R. R., 89 Fed. Rep. 385 (1898). The fact that one of the trustees of a voting trust is an officer in a certain railroad does not render illegal the voting of the stock in favor of consolidating with that railroad, there being no proof of wrong-doing or unfair terms. Dady *v.* Georgia, etc. Ry., 112 Fed. Rep. 838 (1900).

Where two stockholders make a contract by which the stock is placed in the name of one of them to be held in trust and voted by him as they agree, and in case of disagreement an arbitrator is to decide, and the stock is not to be sold until they agree to sell, the one so placing stock in the name of the other as trustee cannot sue the latter for refusal to deliver to the former his part of the stock. Louisville Trust Co. *v.* Stockton, 75 Fed. Rep. 62 (1896). Where stock is transferred to a trustee to sell with the stock of other persons, the trustee's power of sale is not revoked by the

as shown above, those decisions have quite uniformly sustained this mode of tying up for a term of years the control of a majority of the stock of a corporation. There are a few decisions to the contrary.[1]

death of the transferrer. Hiller *v.* Ladd, 80 Fed. Rep. 794 (1897).

A contract to combine to control the majority of the stock of a railroad company may be violated by a party to it, although by its terms it is irrevocable. Clarke *v.* Central R. R. etc., 50 Fed. Rep. 338 (1892). In this case, however, on the final hearing, the bill was dismissed. See 62 Fed. Rep. 328 (1894). Where stock is placed in a trustee's hands, and a trustee's certificate is taken therefor, a pledge of the trustee's certificate is not a pledge of the stock sufficient to cut off subsequent attachments of the stock. Bidstrup *v.* Thompson, 45 Fed. Rep. 452 (1891). A "trust" of stock was involved in Farmers' Loan, etc. Co. *v.* Chicago, etc. Ry., 27 Fed. Rep. 146 (1886), where Hugh J. Jewett, president of the Erie Railway, held as trustee the stock of the Chicago & Atlantic Railroad, the western connection of the former company. The court did not pass on the permanency of the trust. Where a third party holds the pledged stock and agrees with the pledgee that if the pledgee does not pay any assessments the third party may pay them and obtain repayment out of the dividends, holding the stock as security, and the third party pays the assessments without the pledgee being notified of such assessments, and the third party causes the identity of the stock to be lost, the pledgee can reclaim the stock without paying the assessment to such third party. Moore *v.* Bank of British Columbia, 125 Fed. Rep. 849 (1903). Even though by the statutes of a state (Arizona) a transfer of the stock is not good until recorded except as between the parties, yet where various stockholders have pooled their stock by turning in their certificates of stock to one person to hold, and one of the parties so pooling has sold his pool certificate, and the manager of the pool knowing that fact refuses to permit the stock itself to be correspondingly transferred on the books of the company, and later fraudulently obtains a judgment against the party who originally entered the pool, and sells out his stock under such judgment, he may be compelled by a court of equity to transfer the stock to the purchaser of the pool certificate, even though the stock has advanced in value and two years have intervened. Brissell *v.* Knapp, 155 Fed. Rep. 809 (1907). A syndicate operation was involved in Hogg *v.* Hoag, 107 Fed. Rep. 807 (1901), where certain stocks and property were transferred to a trustee, who issued certificates therefor to the members of the syndicate. A part of the subscribers did not pay, and the vendor of the property took the trustee's certificates of such non-paying subscribers, and on the death of the trustee a bill was filed to have the court substitute a new trustee and one of the subscribers filed a cross-bill for an accounting. The court decreed a winding up of the syndicate and appointed a receiver. The court held that a partial payment made to the vendor of the stocks was legal, even though all the property was not conveyed to the trustee, as contemplated, and that the vendor's acceptance of the certificates of non-paying subscribers obligated him to pay therefor, although such trustee's certificates had become worthless, the transaction being in connection with the Oregon Pacific Railroad Company. The court said that the syndicate was in substance, though not technically, a joint-stock company.

1 An agreement between stockhold-

The above decisions seem to lead to the conclusion that a deposit of certificates of stock with trustees for a specified period of time, either with or without a transfer of the same to the trustees, is legal, and is not in violation of the usual statute against restraints on the alienation of personal property; [1] and is not opposed to public policy as a restraint upon trade; [2] and is not an implied fraud

ers holding a majority of the shares to pool their stock by transferring it to trustees, and authorizing them to vote all such stock at corporate meetings, and to pledge it as collateral for loans, is void, as against public policy. Hence the holder of one of the trustee's certificates may demand his stock and may enjoin the trustee from voting his stock or disposing of it. Harvey *v.* Linville Imp. Co., 118 N. C. 693 (1896). A vendor of stock may collect the price even though the agreement contains a provision for pooling the stock which is illegal. Edgerton *v.* Power, 18 Mont. 350 (1896). A trust of stock for the benefit of both the bondholders and the stockholders cannot be broken up by one of the stockholders only. Shelmerdine *v.* Welsh, 47 Leg. Int. 26 (Phila. Com. Pl. 1890). A pool of stock does not prevent a creditor of one of the participants causing to be sold on execution his debtor's interest in the stock, such sale to be subject to the pooling contract if it is lawful. Hardin *v.* White, etc. Co., 26 Wash. 583 (1901). Where one street railway company takes a lease of the street railways of three other companies on an agreement whereby the stock of the latter companies is deposited with a trustee, and the lessee issues "stock trust certificates" therefor, being its obligation to pay a fixed rate of interest per year, with an option on its part to pay the principal sum or not at its option at a specified time, the stock being security therefor, to be sold by the trustee in case the principal and interest are not paid, this form of financing does not create a debt, and hence such certificates are not subject to taxation as a bond and mortgage, the transaction being really a guaranteed dividend or rental. Commonwealth *v.* Union, etc. Co., 192 Pa. St. 507 (1899).

1 Williams *v.* Montgomery, 148 N. Y. 519, 526 (1896), where the court said that under the New York statute the power of alienation is suspended only when there are no persons in being by whom an absolute title can be conveyed, and that "the test of alienability of real or personal property is that there are persons in being who can give a perfect title," and that "where there are living parties who have unitedly the entire right of ownership, the statute has no application," and that inasmuch as the agreement of several persons not to sell for a specified time may at any time be waived or canceled by unanimous consent, the statute does not apply. A trust deed is not void as suspending the power of alienation, inasmuch as by payment the mortgage may cease, or by agreement of all parties interested it may be canceled. Balfour-Guthrie, etc. Co. *v.* Woodworth, 124 Cal. 169 (1899). See to same effect, § 812, *infra*.

2 Williams *v.* Montgomery, 148 N. Y. 519, 526 (1896), where the agreement not to sell for six months was upheld, the court saying: "Nor was the agreement opposed to public policy, for a reasonable regulation as to the mode of selling the stock, so as to prevent the sacrifice thereof, was not a restraint upon trade. As an incident to the contract, making partition of the shares, it was competent for the parties to agree that the stock donated to the corporation, in which they had a

upon stockholders who are not allowed to participate; and is not an illegal separation of the voting power from the ownership of the stock; provided always that no actual fraud is involved in the transaction. In other words, such a pooling of stock is not illegal in itself, but, like all contracts, may be illegal if actual fraud is involved.[1]

It remains to add that while the agreement of the holder of a trustee's certificate, like the agreement of a holder of a certificate of stock, not to sell the same during a specified time, is legal, just as the agreement of a partner in a copartnership, not to sell his interest therein or dissolve the partnership for a term of years, is legal,[2] nevertheless such contracts do not actually prevent a sale. A sale made in violation of such a contract is upheld by the courts, but the party making such a sale in violation of his contract is liable in damages to the other parties.[3]

common interest, should be first offered for sale. This was no restraint upon the business freedom of the parties, but a promotion of the general interest, by temporarily withholding from the market shares owned by individuals in order to afford a reasonable opportunity to sell shares indirectly owned by all. The protection of the interests of all concerned, by preventing the market from suddenly becoming overcrowded and ruinously depressed, was a reasonable, just, and honest purpose, which the law does not condemn. There was no evil tendency in the arrangement, as it simply prevented a course of action that would have brought loss both to the common and the personal interests." See also cases on pp. 1723–1727, *supra;* also p. 1735, note 4, *infra.*

1 For an article on voting trusts, see 10 Harvard Law Rev. 428; also an article in 36 Am. Law Rev. 222.

2 Bagley *v.* Smith, 10 N. Y. 489 (1853). A contract to continue a partnership for a definite period of time is valid. Greenhood on Public Policy, p. 503.

3 Dart *v.* Laimbeer, 107 N. Y. 669 (1887); Bagley *v.* Smith, 10 N. Y. 489 (1853); Skinner *v.* Dayton, 19 John. 513, 537 (1822), where the court said: "Even where partners covenant with each other that the partnership shall continue seven years, either partner may dissolve it the next day by proclaiming his determination for that purpose; the only consequence being that he thereby subjects himself to a claim for damages for a breach of his covenant." Marquand *v.* New York, etc. Co., 17 John. 511, 529 (1819), where the court, in answer to the argument that a sale by a partner in violation of the partnership agreement should be declared void, said: "According to the doctrine on the part of the appellants a party may lock up his capital in a mercantile house by such an agreement as the one in this case, and it must remain untouched, without the consent of his copartners, during his life. If the creditors take it by assignment they must become partners in the firm, and can only touch the yearly profits, and must be liable to the yearly losses, and for all the engagements of the firm. This doctrine appears to me to be too unreasonable, and too inconvenient, to be endured." See also Bishop *v.* Breckles, Hoffman, Ch. 534 (1840); 3 Kent, Com. 58; Parsons on Partner-

§ 622*g*. *One corporation owning and holding the stock of other corporations.*—The latest method of tying up the majority of the stock of a corporation and thereby securing control is by organizing another corporation to purchase, own, hold, and vote the stock of the former corporation.[1] This plan is especially used where it is desired to unite the control of two or more competing railroad corporations or manufacturing corporations. Such was the plan adopted in the Northern Securities Company, which acquired a majority of the stock of the Northern Pacific Railroad Company and the Great Northern Railroad Company. Such also was the plan of the United States Steel Corporation, which acquired the control of a large number of competing steel manufacturing corporations. The Pennsylvania and the Union Pacific companies are examples of a combination of a holding company and a railroad company, and in certain respects those railroad companies are great railway stock investment trusts. Ordinarily one corporation has no charter power to purchase the stock of another corporation,[2] but the statutes of most of the states now allow incorporation for any legal purpose, and hence it is possible to organize a corporation for the purpose of owning and holding the stock of other corporations. The advantage of this plan is that the absolute title to the stock passes, whereas, in a pooling or trustee agreement, the stock is to be returned to the participating parties, and there is always danger that one or more of the participating parties may at any time bring suit to recover back such stock. The objection to the plan, however, is that it enables the directors of the stockholding corporation to sell the stock at any time, and it involves not merely temporary pooling of the stock, but the permanent parting with the title. Another objection is that the stockholding corporation itself is liable to be attacked by the state, on the ground that it is an illegal combination of competitors, in restraint of trade, and in violation of statutes prohibiting such combinations. Such was the result of the formation of the Northern Securities Company.[3] In the celebrated litigation

ship (4th ed.), sec. 280, 309, note; Am. & Eng. Ency. of Law, vol. XVII, pp. 1099, 1100.

1 An agreement of various stockholders in several street railway companies to form a new corporation and transfer their interest thereto and divide the new stock in a certain proportion does not constitute such a partnership as to entitle one to sue the others for an accounting of profits where the others had formed such a corporation with other parties, leaving out the first-named party. Schantz *v.* Oakman, 163 N. Y. 148 (1900).

2 See §§ 314–316, *supra*.

3 See § 317, *supra*. Under the Massachusetts statute prohibiting railroads from holding directly or indirectly the stock of any other corporation, a steam railroad cannot indirectly hold the stock of a street rail-

between Mr. Harriman and Mr. Fish for control of the Illinois Central Railroad Company, it was held that it was legal for a New Jersey holding company to own and vote stock in an Illinois railroad company, the New Jersey company having been organized to buy, own and sell shares of stock in other corporations.[1] A statute prohibiting insurance companies from investing in stock of other corporations does not prevent it voting stock which it already holds in favor of a consolidation, which will give it stock in a consolidated company in exchange for the stock which it already holds and is voting.[2] Where a director of a holding company serves as a director in a subsidiary company, his fees therefor do not belong to the holding company, even though the holding company provided him with qualification shares.[3]

§ 622*h*. ***Voluntary associations to acquire, hold and vote shares of stock.***—There is still another plan of organization, namely, a voluntary association for acquiring, holding and voting shares of stock in one or more corporations. Such a voluntary association may have for its chief object the investment of funds in the stocks of many corporations, for permanent investment purposes, or may have for its chief object the control of one or more corporations, or it may combine both of these purposes. The fundamental difference between such a voluntary association and a voting trust is that the former is to receive and distribute dividends, while the latter is merely to hold and vote stock in order to retain control; the former contemplates the purchase of stock in many corporations and may contemplate their sale and the reinvestment of the funds from time to time, while the latter generally pertains to but one stock, which is to be held during the period of the trust and is then to be distributed in kind; the former may or may not contemplate the control of one or more corporations, while the latter has as its sole object the control of a single corporation for a definite number of years; the former is an unincorporated joint-stock association while the latter is a bare agency for a single specific purpose, namely, to vote the stock.[4]

road by having a holding company as an intermediary. Attorney-General *v.* New York, etc. R. R., 84 N. E. Rep. 737 (Mass. 1908).

1 Edmunds *v.* Illinois Central R. R., 36 Natl. Corpn. Rep. (Chicago) 50 (1908). See the Preface to this book for the plan of a proposed "Governmental Railroad Holding Company."

2 Morse *v.* Equitable, etc. Soc., N. Y. App. Div. (1908).

3 *Re* Dover, etc. Ltd., 96 L. T. Rep. 837 (1907).

4 In England the voluntary association is often used for investment purposes. The trustees are authorized to invest the funds in the stocks and bonds of miscellaneous corporations. Generally they are limited in the amount which they may invest in any one direction. That which is lost in one investment is expected to be made

A voluntary association for investment purposes is an evolution. Originally the statutes of England, and most of the states in America, did not allow incorporation for investment purposes or even for general business purposes. Consequently unincorporated joint-stock associations arose. They were midway between partnerships, on the one side, which were too restricted in their capital, purpose and flexibility, and corporations, on the other, which had a limited liability. These unincorporated joint-stock associations were organized for all sorts of business, especially express company business. Then came the unincorporated joint-stock association for investment in stocks and bonds of corporations; in other words, a voluntary association for investment purposes, the most notable example of which is The Mackay Companies. This plan of a voluntary association to acquire, own and vote shares of stock has been especially developed in Massachusetts. In that state such associations for holding personal property, or real estate, or for carrying on business, have been uniformly upheld by the courts since the first decision in that state in 1827.[1]

up by profits in another. It is a mode of investment on a large scale, and is made on the principle of an average gain and loss. See Healey, Company Law and Practice (2d ed.), p. 191. For the form of articles of agreement of this kind of a "trust," and for a detailed statement of the various provisions that are made, varying according to the charter of the enterprise and the purposes of the participants, see Sykes *v.* Beadon, L. R. 11 Ch. D. 170 (1879); Smith *v.* Anderson, L. R. 15 Ch. D. 247 (1880); Wigfield *v.* Potter, 45 L. T. Rep. 612 (1882); Credit Mobilier *v.* Commonwealth, 67 Pa. St. 233 (1870), the last case being a "trust" created to construct a railroad, the *cestui que trust* being the stockholders of a designated corporation.

1 The following are the decisions in that state arranged in chronological order: A shareholder in an unincorporated association, formed in 1817, to own and operate a distillery, had the power to sell his share to another person without written assignment, even though the articles required a written assignment. Alvord *v.* Smith, 22 Mass. 232 (1827). Where the articles of agreement of an unincorporated stage coach association provide that no shareholder shall transfer his shares without the consent of the directors, a purchase of shares without such consent takes nothing except the right to collect dividends when paid. Kingman . Spurr, 24 Mass. 235 (1828). The articles of agreement of an unincorporated stage coach association may provide that a member may refuse to pay an assessment and abandon his shares. Clark *v.* Reed, 28 Mass. 446 (1831).

The Kennebec Lumber Company was organized in Massachusetts in 1835 to purchase a township of land in Maine and to cut and dispose of the lumber upon it. The shareholders were held liable as partners on a note given by an agent. Tappan *v.* Bailey, 45 Mass. 529 (1842). Subscribers to shares in a wharf improvement association are not liable beyond the amount of their subscription for debts contracted by a committee. Danforth *v.* Allen, 49 Mass. 334 (1844). Minority shareholders in a reservoir association may enjoin the majority from requir-

Such an association is similar in many respects to express coming pay for the use of the water, in violation of the agreement. Ballou *v.* Wood, 62 Mass. 48 (1851). A state tax on an English unincorporated insurance association, doing business in Massachusetts, was involved in Oliver *v.* Liverpool, etc. Ins. Co., 100 Mass. 531 (1868); aff'd, *sub nom.* Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. 566 (1870). Shares owned by a resident in an unincorporated association known as the McKay Sewing Machine Association, organized in Lawrence, Massachusetts, cannot be taxed thereon, because it is a partnership and its personalty is taxable in the town or city where its business is carried on. Hoadley *v.* County Com'rs, 105 Mass. 519 (1870). A shareholder in an unincorporated express company organized in New York is liable as a partner in Massachusetts, even though he claims that under the New York statutes a judgment must first be obtained against the association itself. Taft *v.* Warde, 106 Mass. 518 (1871); s. c., 111 Mass. 518 (1873); see also Bodwell *v.* Eastman, 106 Mass. 525 (1871). A shareholder in a ferry-boat association, who has been obliged to pay its debts, may have contribution from other shareholders. Whitman *v.* Porter, 107 Mass. 522 (1871). Shareholders in the Adams Express Company, organized in New York, are personally liable for the loss of a trunk, even though the New York statutes provided that judgment must first be obtained against the association itself. Gott *v.* Dinsmore, 111 Mass. 45 (1872). Where the trustees of an unincorporated land association execute a note reading: "We as trustees, but not individually, promise to pay," etc., they cannot be held personally liable. Proof must be given that they have trust property with which to respond. Shoe & L. Natl. Bank *v.* Dix, 123 Mass. 148 (1877). Citizens of Massachusetts who organize an unincorporated joint-stock association to manufacture lumber in North Carolina are liable as partners in Massachusetts. Machinists' Nat. Bank *v.* Dean, 124 Mass. 81 (1878). The members of a voluntary fire association are liable for its debts. Newell *v.* Borden, 128 Mass. 31 (1879). A Massachusetts shareholder in an express company is liable for its debts, even though it was organized in New York state. Boston, etc. R. R. *v.* Pearson, 128 Mass. 445 (1880). A member of a voluntary association to hold public exhibitions of poultry and pigeons is not liable for a premium awarded at the show. Volger *v.* Ray, 131 Mass. 439 (1881). Contracts entered into by the trustees of a trust deed for many shareholders bind the latter but not the former personally, where the trustees were authorized to make the contracts and did so as trustees. It is immaterial that the contracts are under seal. Cook *v.* Gray, 133 Mass. 106 (1882). The statute of 1878 taxing unincorporated associations the same as corporations is unconstitutional, because the former have no franchises to tax and they pay taxes on their tangible property, and hence the tax is not "proportional" as required by the constitution of the commonwealth. Gleason *v.* McKay, 134 Mass. 419 (1883). In a suit involving the liability of a member of a voluntary association, called the Ryder Reciprocal Grate Association, the defense was set up that the organization was illegal. The court said, per Judge Oliver Wendell Holmes, Jr. (now of the supreme court of the United States: "It is too late to contend that partnerships with transferable shares are illegal in this commonwealth. They have been recognized as lawful by the court, from Alvord *v.* Smith, 5 Pick, 232, to Gleason *v.* McKay, 134 Mass. 419. Even if the question were a new one, we should come to the same result. The grounds upon

panies, nearly all of which are unincorporated joint-stock associa-

which they were formerly said to be illegal in England, apart from statute, have been abandoned in modern times." Phillips *v.* Blatchford, 137 Mass. 510 (1884). Where all the business of a car trust is carried on in Boston, and no part elsewhere, and all meetings of the trustees are held there, the partnership resides there, and, under the Massachusetts statutes, the rolling stock owned by such a voluntary association and leased by the American Loan & Trust Company of Boston, as the representative of the car trust, is taxable in Boston, where the trust company resides. Ricker *v.* American L. & Trust Co., 140 Mass. 346 (1885). Where trustees holding patents and having power to dispose of them issue scrip to the parties in interest, the latter are *cestuis que trust*, and hence a bill in equity to hold them liable for the debts and to sell the estate does not lie, the proper remedy being a suit at law against the trustees. Mayo *v.* Moritz, 151 Mass. 481 (1890). An unincorporated association to acquire, rent and sell land does not violate the rule against perpetuities nor create an illegal restraint upon alienation. A shareholder cannot have it wound up as illegal, even though it might continue beyond lives in being and twenty-one years, there being a provision that it might be terminated at any time after five years on a three-fourths vote of the association. Howe *v.* Morse, 174 Mass. 491 (1899). The court said (pp. 504, 505):

"The entire ownership is never for a moment uncertain, nor unvested, and at every moment each owner can freely dispose of his property, and at each moment it can be transferred to his creditor by the ordinary processes of the law, and at each moment the trust can be terminated at the will of the owners of the equitable interest. . . . The provision in the present trust, that the shareholders are not to have any interest or title in the trust property itself, and no right to call for partition, and that the share shall be personal property, is not a restraint upon alienation, since the alienation of the legal and the equitable ownerships are provided for."

A trustee of a Massachusetts voluntary association cannot transfer its property to a corporation in exchange for stock of the corporation, even though the trust agreement authorizes a sale, it appearing that the trust agreement has a further provision that the proceeds of the sale shall be divided among the beneficiaries, the latter provision being equivalent to a requirement that the sale be for cash. In a suit to enjoin such sale an action to hold members of the executive committee personally liable for conspiracy cannot be joined. Moody *v.* Flagg, 125 Fed. Rep. 819 (1903). Even though an unincorporated association for the investment, management and use of real estate, shares of stock, bonds and other securities, becomes insolvent, yet a suit at law does not lie at the instance of a creditor against the trustees as "Trustees of the Boston Associates." Even if the trustees are certificate holders, a suit at law cannot reach their interest as certificate holders, the remedy being in equity. The creditor might have sued the trustees personally at law, unless his contract provided against their personal liability. Hussey *v.* Arnold, 185 Mass. 202 (1904). In this case the business was investment, management and use of property and real estate, shares in trusts and corporations, bonds secured by mortgage on real estate, and other similar securities, with a view to obtaining income and profit for the owners. The trustees could be removed and successors appointed by three-fourths in value of the shareholder, and if not removed, they could fill va-

tions, and have wide powers to invest their surplus profits in the stocks and bonds of corporations.[1]

cancies in their board caused by death or resignation or otherwise. The trust could be terminated by three-fourths in interest of the shareholders; otherwise it was to continue for twenty years, after the death of the last subscriber to the agreement. The court said (p. 204):

"Whether the trustees in this case, in dealing with the petitioners, provided against personal liability in accordance with the direction of the agreement, as they might do, does not appear. If they did, these petitioners cannot maintain an action at law against anybody. As agents and trustees under the agreement they were not authorized to contract any debt which should charge the certificate holders. Of course, if an action at law cannot be maintained, there can be no effectual attachment in such a suit as the petitioners originally brought. If the trustees contracted in the usual way, without referring to anything which would limit the liability resulting from an ordinary contract, they are personally liable to these petitioners, and judgment can be obtained and enforced against them individually; but the trust property cannot be held under an attachment nor sold upon an execution for their personal debts. If, as we presume to be the fact, the trustees were also certificate holders having equitable interests in the property, these are not attachable in an action at law. They can be reached only through proceedings in equity."

Where a consolidated railroad in Massachusetts and Connecticut owns all the stock of a Connecticut holding company, and that holding company forms an unincorporated association to acquire Massachusetts street railway company stocks, and the holding company guarantees dividends on the stocks of the unincorporated association, the steam railroad is indirectly holding stock of the street railway companies. The supreme court said: "All who have any proprietary interest in it have rights of property as individual owners, subject to such restraints upon the management and use of it as are legally imposed by the contracts under which it is held. They are equitable tenants in common. By the terms of the agreement the association must be wound up and liquidated at the end of 20 years and 11 months." Attorney-General *v.* New York, etc. R. R., 84 N. E. Rep. 737 (Mass. 1908). The opinion of the supreme court of Massachusetts in the case Smith *v.* Smith, handed down in 1908, to the effect that a trustee of an estate could not legally invest in the stock of a voluntary association formed to own street railway stocks, was afterwards withdrawn by the court. The validity of such an organization depends upon the laws of the state wherein it is organized. Thus where stock in several corporations is put in trust by a deed acknowledged, delivered and accepted by the trustees in New York where the grantor resided, the trust deed is governed by the law of New York, without reference to the residence of the trustees or the subsequent residence of the grantor. Mercer *v.* Buchanan, 132 Fed. Rep. 501 (1904). A voluntary association, of course, is not legal where it is organized for the purpose of combining and actually does combine competing corporations so as to prevent competition and to control rates or prices. See § 503*a*, *supra*. See also Northern Securities Co. *v.* United States, 193 U. S. 197 (1904), aff'g United States *v.* Northern Securities Co., 120 Fed. Rep. 720.

1 For instance, the United States Express Company, an unincorporated

The general legal status of such a voluntary association, and the liability of its shareholders and trustees, and the powers of its trustees, and the principles of law governing suits by or against it, as well as the principles governing its dissolution, are similar to those of the ordinary unincorporated joint-stock associations.[1] Inasmuch as, in such association, the title to the property is nearly always vested in trustees, the principles of law applicable to trust estates are to be considered. At common law the placing of personal property in trust for the purpose of carrying on business in the name and under the management of the trustees is legal and allowable.[2]

association, was organized in 1854 under an agreement which provided that the property and business should be vested in and controlled and managed by a board of five directors to hold their offices until others should be chosen in their stead, and that in case of a vacancy in the board prior to a call for an election by the stockholders, such vacancy might be filled by the board of directors, and that whenever the shareholders, to the amount of two-thirds in interest, should, in writing, request an election of one or more directors, a meeting should be held for that purpose. See People *v.* Wemple, 117 N. Y. 136 (1889), as reported in 1033 Cases in Court of Appeals. Practically the directors are self-perpetuating under such an agreement. The National Express Company was organized in 1853 on very much the same plan. See People *v.* Coleman, 133 N. Y. 279 (1892), as reported in 1255 Cases in Court of Appeals. In the case Ricker *v.* American L. & T. Co., 140 Mass. 346 (1885), a taxation case, the agreement under which a car trust association was formed named the original board of managers who were to hold their position subject to the shareholders removing them and electing others at any time. The court said: "The car trust association was not a corporation. It was a mere voluntary association. There is no intermediate form of organization between a corporation and a partnership, like the joint-stock companies of England and of some of the United States, known to the laws of this commonwealth. Since this association is not a corporation its members must be partners, unless, indeed, as the defendant contends, they are simply co-owners. But we cannot look upon them as simply co-owners."

1 See ch. XXIX, *supra.*

2 For decisions at common law to the effect that property may be vested in trustees for the purpose of carrying on business, see *Ex parte* Garland, 10 Ves. Jr. 110 (1804); Scott *v.* Izon, 34 Beav. 434 (1865). In Holmes *v.* Mead, 52 N. Y. 332, 344 (1873), the court said: "A trust in personal property, which is not in conflict with the tatute regulating the accumulation of interest and protecting the suspension of absolute ownership in property of that character, is valid when the trustee is competent to take, and a trust is for a lawful purpose well defined, so as to be capable of being specifically executed by the court. Trusts of personal property are not affected by the statute of uses and trusts, which applies only to trusts in real property." In Gott *v.* Cook, 7 Paige, 521, 534 (1839), the chancellor said: "The Revised Statutes have not attempted to define the objects for which express trusts of personal estate may be created, as they have done in relation to trusts of real estate. Such trusts, therefore, may be created for any purposes which are not illegal." See also Graff *v.* Bonnett, 31 N. Y. 9 (1865). In Power *v.*

The statutes of the various states, however, must be consulted in reference to this point.[1] There is little doubt that merchandise, land, and shares of stock may be placed in trusts. The law is clear that "every kind of valuable property, both real and personal, that can be assigned at law may be the subject-matter of a trust." [2]

It is the policy of the law to limit the time during which a person may tie up his personal property or real estate. Generally this time is fixed as the life-time of the survivor of any two persons then living and designated by the person creating the trust. Each state, by its statutes, generally limits the time during which property may be tied up by a trust, and if a trust is formed for a period longer than that allowed by statute the trust itself is void.[3]

This possible objection to such a voluntary association, however, is disposed of by the fact that at any time the trust may be dissolved by the unanimous consent of the shareholders or trustees, and generally, by the terms of the trust agreement, may be dissolved on the vote of less than all of the shareholders and trustees. Hence, the

Cassidy, 79 N. Y. 602, 613 (1880), the court said: "The law does not limit or confine trusts as to personal property except in reference to the suspension of ownership, and they may be created for any purpose not forbidden by law." To the same effect, Bucklin *v.* Bucklin, 1 Keyes (N. Y.), 141 (1864); Goebel *v.* Wolf, 113 N. Y. 405 (1889). Under the statutes of New York a trust of property consisting of *real estate* is void unless the purpose of the trust is to sell the land for the benefit of creditors; or to sell, mortgage, or lease it for the benefit of annuitants or for satisfying a lien on the land; or to receive the rent and use it for the support of a certain person; or to accumulate the rent for a certain person. L. 1896, ch. 547, § 76. Accordingly a modern "trust" whose property consists of real estate in New York, might be void. But as to personal property the law is generally different. As to New York, see Gerard, Titles, p. 235. *Cf.* §§ 812, 822*f*.

1 Many of them, including Michigan, Wisconsin, Minnesota, California, Dakota, North Carolina, Georgia, Pennsylvania, Connecticut, Kentucky, and Vermont, have statutes expressly specifying the objects for which a trust may be created. See Stimson, American Statute Law, § 1703.

2 1 Perry, Trusts, § 67.

3 Gerard, Titles to Real Estate (3d ed.), p. 223. Moreover, if the time is to be measured by the life of a person then living, a trust which is to exist for a fixed period, however short, without reference to the life of a person then living, is void. Gerard, Titles to Real Estate (3d ed.), pp. 224, 225. In New York the suspension can be for only two lives in being, and, in certain cases, twenty-one years thereafter. § 1 R. S. 773, 1; L. 1896, ch. 547, § 32. These statutes apply to real and personal property. Gerard, Titles to Real Estate (3d ed.), p. 235; Hone *v.* Van Schaick, 7 Paige, 221 (1838). Compare §§ 812, 822*f*, *infra;* Holmes *v.* Mead, 52 N. Y. 332, 344 (1873). The statutory prohibition against the accumulation of the income of trust property, except in the case of infants, applies both to real estate and personalty. Gerard, Titles to Real Estate (3d ed.), pp. 233, 235.

usual statute against restrictions on the alienation of property do not apply to such a voluntary association.[1]

More difficult questions arise in regard to the liability of the trustees and shareholders. At common law a trustee who carries on any kind of business is liable personally, and to the entire extent of his private fortune, for all the debts incurred in the management and execution of the trust.[2] It is possible, however, that the use of the words "as trustee," in the contract entered into, will protect him against the liability.[3]

The supreme court of Massachusetts has recently held that where a trust agreement provides that neither the trustee nor the holders of shares shall be personally liable for the debts of the trust, no action at law lies against the trustee for such debts, the only remedy being in equity to reach the trust property, even though the association is insolvent.[4] There is little doubt that the creditors of the trust

1 See note 1, p. 1732, *supra*. See also Howe *v.* Morse, 174 Mass. 491 (1899).

2 Thompson *v.* Brown, 4 Johns. Ch. 619 (1820); Wild *v.* Davenport, 48 N. J. L. 129 (1886); Stephens *v.* James, 77 Ga. 139 (1886); Rogers *v.* Wheeler, 43 N. Y. 598 (1871); Jones *v.* Seligman, 81 N. Y. 190 (1880). A person dealing with executors who are continuing the business and who know they are acting in that capacity cannot hold the beneficiaries liable, but are confined to the property actually involved. Manhattan Oil Co. *v.* Gill, 118 N. Y. App. Div. 17 (1907). Where trustees, who are bound to wind up the affairs of a corporation, sell its property with a covenant that they had authority to sell, they are liable personally if the assignment was void, there being no covenant against personal liability. Shannon *v.* Mastin, 108 S. W. Rep. 1116 (Mo. 1908).

3 Contracts entered into by the trustees of a trust deed for many shareholders bind the latter but not the former personally, where the trustees were authorized to make the contracts and did so as trustees. It is immaterial that the contracts are under seal. Cook *v.* Gray, 133 Mass. 106 (1882). But see Stephenson *v.* Polk, 71 Iowa, 278 (1887); 1 Pars. Cont. (6th ed.), *122. As to the mode of compelling payment of a debt incurred by a trustee who has issued scrip to represent the property, see Mayo *v.* Moritz, 151 Mass. 481 (1890), holding that the remedy is not by a receiver to wind up the trust. On this subject of the liability of trustees compare the respective liabilities of promoters in § 705; of officers of unincorporated associations, § 508; of committeemen, § 888; and of persons who sign their names and add an official title, § 724, *infra*.

4 Hussey *v.* Arnold, 70 N. E. Rep. 87 (Mass. 1904). The trusteeship referred to in the preceding case was one of the kind which has become quite common in Massachusetts. The court said: "The object of it, apparently, was to obtain for the associates most of the advantages belonging to corporations, without the authority of any legislative act, and with freedom from the restrictions and regulations imposed by law upon corporations. . . . As agents and trustees under the agreement, they were not authorized to contract any debt which should charge the certificate holders. . . . If the trustees contracted in the usual way, without referring to anything which would limit the liability

may collect their debts from its property. This has been a doubtful point, but it is now reasonably well settled. It matters not whether the trustees have expressly bound the trust property to pay the debts. Especially where the trustee is insolvent, a creditor of the trust may proceed against its property to procure payment of a debt incurred in the execution of the trust.[1]

As a general rule the *cestui que trust,* the beneficiary, cannot be held liable for debts created by the trustees, or for debts incurred in the execution of the trust. This question has arisen chiefly in cases where trustees have carried on the business of an insolvent person for the benefit of the creditors of the latter.[2] And the same conclusion is reached in cases where an executor, administrator, or trustee carries on a business for the benefit of a beneficiary.[3]

resulting from an ordinary contract, they are personally liable to these petitioners, and judgment can be obtained and enforced against them individually." The court stated that it did not pass on whether all of the provisions of the agreement were enforceable in the courts. In the case Hibbs *v.* Brown, 112 N. Y. App. Div. 214 (1906); aff'd, 190 N. Y. 167, the court said (p. 219): "There can be no doubt, however, that it is competent for the members of a joint-stock association to have the contracts so drawn as to confine the liability to the assets, and thus create the same situation as to their rights and liabilities as if the joint-stock association were a corporation and they were stockholders." See also § 508, *supra.*

1 Cater *v.* Eveleigh, 4 Desaus. (S. C.) 19 (1809); James *v.* Mayrant, 4 Desaus. (S. C.) 591 (1815); Montgomery *v.* Eveleigh, 1 McCord Ch. (S. Car.) 267 (1826); Magwood *v.* Johnston, 1 Hill (S. Car.) Ch. 228 (1833); Gaudy *v.* Babbitt, 56 Ga. 640 (1876); Tennant *v.* Stoney, 1 Rich. Eq. (S. C.) 222, 243 (1845); Wylly *v.* Collins, 9 Ga. 223 (1851); Frost *v.* Shackleford, 57 Ga. 261 (1876); Ferrin *v.* Myrick, 41 N. Y. 315 (1869). *Contra,* Worrall *v.* Harford, 8 Ves. Jr. 4 (1802); Mulhall *v.* Williams, 32 Ala. 489 (1858); Jones *v.* Dawson, 19 Ala. 672 (1851). See also New *v.* Nicoll, 73 N. Y. 127 (1878); Noyes *v.* Blakeman, 6 N. Y. 567 (1852). *Cf.* Mayo *v.* Moritz, 151 Mass. 481 (1890).

2 Storrs *v.* Flint, 46 N. Y. Super. Ct. 498 (1880); Cox *v.* Hickman, 1 H. L. Cas. 268 (1860); *Re* Stanton Iron Co., 21 Beav. 164 (1855); Selwyn *v.* Harrison, 2 Johns. & H. 334 (1862). See Bingaman *v.* Hickman, 115 Pa. St. 420 (1887).

3 In *Ex parte* Garland, 10 Ves. Jr. 110 (1804), where a testator directed that a certain sum be used to carry on a business, and the executor so used it, and the business became insolvent, *held,* per Lord Eldon, that no other part of the testator's property was liable for the debts thereby incurred; overruling Hankey *v.* Hammond, 1 Cooke's Bankr. Law, 67 (1785). Lord Eldon further said: "On the other hand, the case of the executor is very hard. He becomes liable, as personally responsible, to the extent of all his own property, . . . though he is but a trustee. But he places himself in that situation by his own choice." In *Re* Johnson, L. R. 15 Ch. D. 548 (1880), the cases are reviewed. Lord Eldon's decision that it is not the general estate of the testator which is liable, but only so much as he has authorized to be employed in the business, is stated to be still the law. See also Strickland *v.* Symons, L. R. 26 Ch. D.

It has been held also that the trustee cannot render the *cestui que trust* liable, even though the trustee contracts with the creditor to that effect.[1] In England it has been decided that these old principles of law are applicable to a voluntary association for acquiring, holding and voting shares of stock. The courts of England have decided that such an organization is not a partnership or mere association, but is similar to an old common-law trust estate. This conclusion was reached in construing an English statute which prohibits certain partnerships or associations from doing business.[2] In Massachusetts,

245 (1884). An estate is not liable for debts created by a partnership continued by order of the will. Stewart *v.* Robinson, 115 N. Y. 328 (1889).

1 Stanton *v.* King, 8 Hun, 4 (1876); aff'd, 69 N. Y. 609. See 15 Am. L. Rev. 456; Burch *v.* Breckinridge, 16 B. Mon. (Ky.) 488. (1855); New *v.* Nicoll, 12 Hun, 431 (1877); aff'd, 73 N. Y. 127.

2 In England a statute exists which forbids any company, association, or partnership consisting of more than twenty persons from carrying on any business for the acquisition of gain, unless it is registered as a company under the Joint-stock Companies Act, and complies therewith as regards reports, etc. It has been held that an "investment trust" is not a "company, association, or partnership," and consequently is not affected by this statute. Wigfield *v.* Potter, 45 L. T. Rep. 612 (1882); Crowther *v.* Thorley, 32 W. R. 330 (1884); *Re* Siddall, L. R. 29 Ch. D. 1 (1885); Smith *v.* Anderson, L. R. 15 Ch. D. 247 (1880). The last case cited was an action to have the "trust" dissolved, on the ground that it was a partnership, and was doing business in violation of the statute. The court refused to grant the relief desired, and said that the certificate-holders were not partners and did not form an association. "There has never been anything creating any mutual rights or obligations between those persons. They are from the first entire strangers, who have entered into no contract whatever with each other, nor has either of them entered into any contract with the trustees or any trustee on behalf of the other, there being nothing in the deed pointing to any mandate or delegation of authority to anybody to act for the certificate-holders as between themselves and nothing, as it appears to me, by which any liability could ever be passed upon the certificate-holders either as between themselves or as between themselves and anybody else. . . . If there is any business at all, it is to be carried on by the trustees. Whatever is to be done is to be done by the trustees." And Cotton, L. J., said: "The trustees here are the only persons who are dealing with the investments, and they are dealing not as agents for some principal, but as trustees in whom the property and the management of it are vested, and who have the power of changing the investments and securities. That is just like the case which often occurs where the executors or trustees of a will are directed to carry on a business. The fact that they are to account to others for the profits made is a matter utterly immaterial as between them and those with whom they deal. They deal with those persons as the only persons contracting, and hold themselves out as personally liable. Those persons have no right whatever as against the persons beneficially entitled." This case was one involving an "investment trust." See also dicta to the same effect in Credit Mobilier *v.* Commonwealth, 67 Pa. St. 233 (1870), and see People *v.* North

however, these voluntary associations are held to be partnerhips and the shareholders are liable as partners unless their liability has been expressly restricted in some way.[1] Any person may serve as a trustee, provided that person is competent to take the legal title to the property.[2]

The trustees of a "voluntary association" correspond somewhat to the directors of a corporation. They generally are elected annually by the certificate-holders at a regularly called meeting. The instrument creating the "voluntary association" usually provides for the election of trustees, and for their succession and term of office. There is nothing in the old law of trust estates which forbids this change of trustees.[3]

River, etc. Co., 121 N. Y. 582 (1890). In other cases it is intimated that these voluntary associations are like unincorporated joint-stock associations, and that the relation between the shareholders and the trustees or directors is more like that of principal and agent than of *cestui que trust* and trustee. See Hogg *v.* Hoag, 107 Fed. Rep. 807 (1901); Levi *v.* Evans, 57 Fed. Rep. 677 (1893).

1 See note 1, p. 1736, *supra*.

2 1 Perry, Trusts, § 39.

3 "The person who creates the trust may mould it into whatever form he pleases; he may therefore determine in what manner, in what event, and upon what condition the original trustees may retire and new trustees may be substituted. All this is fully within his power, and he can make any legal provisions which he may think proper for the continuation and succession of trustees during the continuation of the trust." Perry, Trusts, § 287. In England, under the vesting acts, the court held that it had power to vest the estate of such a "trust" in new trustees where one of the old trustees was dead, another was insane, and under the trust agreement the certificate holders had elected new trustees. *Re* Siddall, L. R. 29 Ch. D. 1 (1885). A similar power was given to the court in regard to trusts of personal property in New York by L. 1882, Ch. 185. As regards the common law rules and powers of the courts herein, see Perry, Trusts, § 276 *et seq.* At common law, upon the death of the surviving trustee, his executor or administrator becomes the trustee. Boone *v.* Citizens' Sav. Bank, 84 N. Y. 83, 87 (1881); DePeyster *v.* Beekman, 55 How. Pr. 90 (1877). In the cost-book company case of Johnson *v.* Goslett, 18 C. B. 728 (1856), the following provision appears: "The trustees of the said lease shall, when and if required by the directors, execute a deed declaring that they hold the said mine under and by virtue of such lease as trustees for the benefit of the shareholders in the said company, according to their respective shares and interests therein; and if any or either of the said trustees, or any future trustees, shall resign, or die, or become incapable or unwilling to act, then new trustees or a new trustee may be appointed by any of the general meetings of shareholders hereinafter provided for, in the place of the trustees or trustee so resigning, or dying or becoming incapable or unwilling to act, as aforesaid; and the said premises shall be forthwith assigned to and vested in the said new trustee or trustees jointly with the continuing trustee or trustees, or in such new trustees only, as the case may require, at the expense of the said company."

Where, by the trust deed, a majority of the *cestui que trust* have power to fill a vacancy caused by the incapacity or inability of the trustee, they may substitute a new trustee when the old trustee removes to and becomes a resident of a foreign country.[1] The trustee has no powers beyond those which are expressly conferred by the trust instrument.[2] Thus trustees, who hold stock in various corporations, are trustees and not vendees of the stock.[3] Trustees ordinarily have no power to sell stock held in trust.[4] The trustees may sue and be sued in their own names on all matters and contracts pertaining to the trust.[5] They are not liable to the *cestui que trust* for losses incurred by their management of the property of the trust. They are bound merely to exercise ordinary discretion and to obey the directions of the instrument creating the trust. It is only for a breach of trust that they may be made to account to the *cestui que trust.*[6]

1 Farmers' L. & T. Co. *v.* Hughes, 11 Hun, 130 (1877). In this case the deed of trust provided that the trustees or their survivor might be removed by the vote of a majority in interest of the holders of the bonds referred to in the trust deed, at any meeting called for that purpose; and further, by a separate and distinct provision, that in case of the death, removal, resignation, incapacity or inability of both or either of said trustees to act in the execution of the trust, then a majority of the holders of such bonds might designate and select, in writing, one or more competent persons to fill the vacancy so occurring. The property may be made to vest in new trustees without transfer, if the trust instrument is so drawn. 1 Perry, Trusts, § 284.

2 1 Perry, Trusts, §§ 454, 460.

3 People *v.* North River, etc. Co., 121 N. Y. 582 (1890)..

4 See ch. XIX, *supra.* The trustees of the American Cattle Trust cannot sell shares of stock which they hold. Gould *v.* Head, 38 Fed. Rep. 886 (1889); s. c., 41 Fed. Rep. 240 (1890). A trustee holding property for various persons cannot transfer it to a corporation in exchange for stock of the latter, even though the trust agreement authorizes a sale but provides that the proceeds of the sale shall be divided among the beneficiaries. In a suit to enjoin such sale an action to hold members of the executive committee personally liable for conspiracy should not be joined. Moody *v.* Flagg, 125 Fed. Rep. 819 (1903).

5 In this respect the trustee is not the same as the director of a corporation. "A trustee is a man who is the owner of the property, and deals with it as principal, as owner, and as master, subject only to an equitable obligation to account to some persons to whom he stands in the relation of trustee, and who are his *cestuis que trust.* . . . The office of director is that of a paid servant of the company. A director never enters into a contract for himself, but he enters into contracts for his principal; that is, for the company of whom he is a director and for whom he is acting. He cannot sue on such contracts, nor be sued on them unless he exceeds his authority. That seems to me to be the broad distinction between trustees and directors." Smith *v.* Anderson, L. R. 15 Ch. D. 247 (1880).

6 Simonton *v.* Sibley, 122 U. S. 220 (1887). Where a railroad construction contract is assigned to trustees to be carried out and the profits to

The trustees of an unincorporated bank, however, are liable for depositing its money with a stock brokerage house even though the agreement exempted them from liability except for willful misconduct.[1] The compensation of the trustee is usually fixed by the trust deed. If not it falls within the provisions of the statutes, or a reasonable compensation is allowed by the common law.[2] The property of the voluntary association cannot be seized for the individual debts of the trustee,[3] but the interest of the certificate-holder may be reached, so as to subject it to the payment of his debts.[4] In this respect the certificates resemble shares of stock.

The trust property where it consists of personal property in the nature of bonds, stocks, notes, or evidences of indebtedness, or corresponds to the capital stock of a corporation, may be taxed at the place where the main office or place of business of the voluntary association exists. The extent of the taxation depends, of course, upon the statutes of the state wherein the tax is laid.[5]

There is little difficulty in determining whether a certificate-

be paid to the stockholders of a designated corporation, the stockholders may compel the trustees to pay over such profits. The trustees cannot set up that they were also directors of the railroad. Hazard *v.* Dillon, 34 Fed. Rep. 485 (1888). Where a reorganization has been completed, and a voting trust established and a release to the reorganization committee executed by the certificate holders, one of the certificate holders cannot hold them liable in damages on the ground that as trustees of the voting trust they controlled the board of directors and had mismanaged the new corporation, it appearing that they did not constitute a majority of the board of directors and that in managing the corporation they acted as stockholders and directors, and not as a reorganization committee. Lawrence *v.* Curtis, 191 Mass. 240 (1906).

1 Holmes *v.* McDonald, 80 N. E. Rep. 714 (Ill. 1907). As to a limitation of their liability, see §§ 805, 815, *infra*.

2 2 Perry, Trusts, § 917.

3 Gibson *v.* Stevens, 7 N. H. 352 (1834), where a trustee was authorized to continue the testator's business. The property was held not subject to the trustee's personal debts.

4 As to rule at common law, see 2 Alb. L. J. 261, 288. In New York, by statute, all transfers of personal property made in trust, for use of the person making the same, are void as against his creditors, existing or subsequent. 2 R. S. 135, § 1 (7th ed., p. 2327, and cases there cited). See also Graff *v.* Bonnett, 31 N. Y. 9, 14, 18 (1865).

5 In the case Oliver *v.* Liverpool, etc. Ins. Co., 100 Mass. 531 (1868), aff'd, *sub nom.* Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. 566 (1870), it was held that a Massachusetts statute imposing a license fee on foreign insurance companies "incorporated or associated" under the laws of foreign governments was applicable to an English unincorporated joint-stock association. In the case Ricker *v.* American L. & T. Co., 140 Mass. 346 (1885), it was held that a car trust association having its chief place of business in Boston was subject to taxation on its personal property at that place, even though the certificates of interest issued by the

holder may terminate his interest in the voluntary association and demand his proportion of the property. In certain deposits with trustees of certificates of shares of stock he sometimes may.[1] But in general a single certificate-holder cannot have the whole association dissolved and wound up before the time fixed by the trust agreement for its dissolution has arrived.[2] If the voluntary association itself is forbidden by the statutes of the state wherein it exists, it will not be wound up by the courts. The law will not compel a trustee to account for property or transactions which grow out of a contract which was prohibited by statute. It is outside of the protection of the law.[3] If, however, the voluntary association is

trustees were owned by non-residents as well as residents.

The following is the New York law on this subject: The Constitution, § 107, prescribes that the term corporations as used in a particular article in that Constitution, shall be construed to include "all associations and joint-stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships." The statutory construction law, § 5, prescribes that the term person shall include a corporation and a joint-stock association. The New York Tax Law, § 4, (16), prescribes that a stockholder "in an incorporated company liable to taxation on its capital shall not be taxed as an individual for such stock." In People *v.* Wemple 117 N. Y. 136 (1889), it was held that a statute levying a tax upon corporations, joint-stock companies, and associations organized under the laws of the state, apply to a common law joint-stock association organized in the state, even though not organized under any statute of the state. In People *v.* Coleman, 133 N. Y. 279 (1892), it was held that the city of New York could not tax an unincorporated joint-stock company under a tax statute applicable to "stock corporations." See also Hoey *v.* Coleman, 46 Fed. Rep. 221 (1891); Sanford *v.* Gregg, 58 Fed. Rep. 620 (1893); Gregg *v.* Sanford, 65 Fed. Rep. 151 (1895). In the case Matter of Jones, 172 N. Y. 575 (1902), it was held that shares of an unincorporated joint-stock association are personal property and subject to an inheritance tax thereon, even though the property of the association consisted of real estate. By reason of the statutory construction law, referred to above, the New York tax statute applicable to all persons is applicable to a joint-stock association, and hence it is taxable as such, and in this respect differs from a partnership. Being taxable as such, it would seem that the shareholders in New York are exempt from taxation under the statute mentioned above. It has been held in New York that where the sinking fund of a Massachusetts corporation consists of personal property and is held by trustees in New York, such sinking fund may be taxed in New York, so far as it has a value in excess of the debt to be paid from it. People *v.* Assessors of Albany, 40 N. Y. 154 (1869).

1 See § 622*f*, *supra*.

2 Smith *v.* Anderson, L. R. 15 Ch. D. 247 (1880). The same rule prevails in unincorporated joint-stock associations. See Smith *v.* Virgin, 33 Me. 148 (1851). See also Waterbury *v.* Merchants' Union Exp. Co., 50 Barb. 157 (1867), holding that such a company will not be wound up merely because the directors have been guilty of a breach of trust. See also Howe *v.* Morse, 174 Mass. 491 (1899).

3 *Re* Padstow, etc. Assoc., L. R. 20 Ch. D. 137 (1882).

legal, it may be terminated at any time by a decree of a court, upon the consent of all the parties who are interested in it.[1] But a voluntary association will not be dissolved and wound up merely because the trustees have been guilty of a breach of trust. The remedy in such a case is to enjoin or remove the trustees.[2] Where, however, the trust is insolvent and incapable of proceeding, a dissolution and winding up of its business will be decreed by a court.[3]

A contributor to a fund to be invested by syndicate managers in stocks and other property has not such an interest in the stocks as enable him to maintain a suit in the state where the corporations are organized as against the non-resident syndicate managers.[4] A national bank which has taken as security for a debt and then acquired shares of stock in an unincorporated association, formed for speculative purposes, is not liable on said stock, its acquisition having been *ultra vires*.[5]

Perhaps the most notable instance of a voluntary association to acquire, hold and vote shares of stock is "The Mackay Companies." Somewhat similar is the plan of having trustees hold property for

1 Perry, Trusts, § 920.

2 Perry, Trusts, §§ 816–853.

3 See Baring *v.* Dix, 1 Cox, Ch. 213 (1786); Bailey *v.* Ford, 13 Sim. 495 (1843); Jennings *v.* Baddeley, 3 K. & J. 78 (1856), where insolvent copartnerships were wound up, though the time for which they were to exist had not yet expired. See also Sieghortner *v.* Weissenborn, 20 N. J. Eq. 172 (1869); Howell *v.* Harvey, 5 Ark. 270 (1843); Van Ness *v.* Fisher, 5 Lans. 236 (1871); Brien *v.* Harriman, 1 Tenn. Ch. 467 (1873); Holladay *v.* Elliott, 8 Oreg. 84 (1879); Bagley *v.* Smith, 10 N. Y. 489 (1853). In Sibley *v.* Minton, 27 L. J. (Ch.) 53 (1858), the court held that, in an action by an adventurer in a cost-book mining company to wind up the company and adjust the losses, all the co-adventurers were necessary parties. A syndicate operation was involved in Hogg *v.* Hoag, 107 Fed. Rep. 807 (1901), where certain stocks and property were transferred to a trustee, who issued certificates therefor to the members of the syndicate. A part of the subscribers did not pay, and the vendor of the property took the trustee certificates of such non-paying subscribers, and on the death of the trustee a bill was filed to have the court substitute a new trustee, and one of the subscribers filed a cross-bill for an accounting. The court decreed a winding up of the syndicate and appointed a receiver. The court held that a partial payment made to the vendor of the stocks was legal, even though all the property was not conveyed to the trustee, as contemplated, and that the vendor's acceptance of the certificates of non-paying subscribers obligated him to pay therefor, although such trustee's certificates had become worthless, the transaction being in connection with the Oregon Pacific Railroad Company. The court said that the syndicate was in substance, though not technically, a joint-stock company.

4 Jones *v.* Gould, 141 Fed. Rep. 698 (1905); aff'd, 149 Fed. Rep. 153.

5 Merchants' National Bank *v.* Wehrmann, 202 U. S. 295 (1906).

many certificate holders, as is the case of the "Great Northern Iron Ore Properties." [1]

§ 623. *Who may be a director or corporate officer—Qualification shares.*—If the charter or statutes require a director to be a stockholder, one who holds stock transferred to him in trust for the express purpose of qualifying him for the position, may serve.[2] And

1 The following is the form of the transferable certificates issued by that organization:

100 Shares. 100 Shares.

Total Number of Shares 1,500,000.

No. 2175. Shares 100.

GREAT NORTHERN IRON ORE PROPERTIES.

Trustees Certificate of Beneficial Interest.

The undersigned, as trustees under a certain indenture entered into between them and the Lake Superior Company, Limited, on the seventh day of December, A. D. One Thousand, Nine Hundred and Six, do hereby certify that ——— ——— is the owner of One Hundred shares of the beneficial interest therein specifically described. This certificate is transferable only upon the books of the trustees in person or by attorney and upon the surrender of this certificate. This certificate shall not become valid until countersigned by the Registrar of Transfers.

In testimony whereof the trustees have signed this certificate this 16th day of March, A. D. 1907.

LOUIS W. HILL,
JAMES N. HILL,
WALTER I. HILL,
EDWARD T. NICHOLS, } Trustees.

By

JAS. N. HILL,
EDWARD T. NICHOLS,
Trustees and as Attorneys for the Other Trustees.

Countersigned and registered this 18th day of March, 1907.

MANHATTAN TRUST COMPANY,
Registrar of Transfers.
By ——— ———, Secretary.

2 Budd *v.* Munroe, 18 Hun, 316 (1879). *Contra*, Bartholomew *v.* Bentley, 1 Ohio St. 37 (1852). Where an agent of a corporation purchases with corporate funds, without authority, stock in another company, and sells one of the shares to a person in order to enable the latter to qualify as a director in such company, the person receiving the one share is protected in his title, and the first-named corporation cannot compel him to give it up, even though the agent had no power to sell, the purchaser having purchased in good faith. Hence, his acts as a director are valid. Scarlett *v.* Ward, 52 N. J. Eq. 197 (1893). Although the statute requires a director to be a stockholder, it is no objection that a qualification share was put in a director's name merely for the purpose of qualifying him. *Re* Leslie, 58 N. J. L. 609 (1896). In a stockholder's suit to enjoin the corporation from entering into a consolidation, he cannot question the right of the directors to hold office on the ground that the qualification shares did not really belong to them. Langan *v.* Francklyn, 20 N. Y. Supp. 404 (1892). Stock may be given to a person to qualify him as a director. Louisville, etc. Co. *v.* Kaufman, 105 Ky. 131 (1898). Where four shares of stock are transferred to a person by the corporation to qualify him as a director, and he agrees to return the same to the corporation when ceasing to be a director, but thereafter, and before he ceases to be a director, he agrees with the indorsers of his note that they shall have the stock as collateral security, they are protected, even though the stock was actually delivered to them after they had notice of the first agreement, it being shown, however, that they had no notice of such agreement at the time they became sureties. Dueber, etc. Co. *v.* Daugherty, 62 Ohio St. 589 (1900). Where one share of stock is transferred to a person to qualify him as a director and he knows nothing about

where a person has the right to vote on stock as a stockholder, he is eligible to any corporate office to which any stockholder is eligible, and accordingly may be elected a director, even though an assignee in bankruptcy has been appointed of his estate.[1] He may obtain stock in any way and become thereby qualified.[2] Although the charter requires the directors to be stockholders, it has been held that the transferee and holder of a certificate of stock is qualified, even though the stock itself stands on the books of the company in the name of his transferrer.[3] But a person who has merely an executory contract for the delivery of stock is not a stockholder sufficient to be a director, as required by statute.[4] In general, any one who may be an agent may be elected a director of a private corporation; and at common law it is not necessary that a director be a stockholder.[5] A director need not be a citizen of the state by which

it, he is not a legal director. Bartholomew *v.* Bentley, 1 Ohio St. 37 (1882).

1 State *v.* Ferris, 42 Conn. 560 (1875).

2 A stockholder may have purchased stock with a view of becoming a director, or have obtained it by gift, or he may hold it upon a trust, and be qualified to be a director. He is qualified unless the "title was put in him colorably, with a view to qualify him to be a director for some dishonest purpose, in furtherance of some fraudulent scheme touching the organization or control of the company, or to carry into effect some fraudulent arrangement with the company." *Re* St. Lawrence Steamboat Co., 44 N. J. L. 529 (1882). A person is qualified who buys stock in his own name with his wife's money and transfers the certificate to her, but afterwards, and before registry, keeps the stock for himself. *Re* St. Lawrence Steamboat Co., 44 N. J. L. 529 (1882). If the director has sufficient stock registered in his name, it is immaterial that he does not own it. Pulbrook *v.* Richmond, etc. Co., L. R. 9 Ch. D. 610 (1878); Bainbridge *v.* Smith, 41 Ch. D. 462 (1889). Where stock is transferred to a man by his wife, in order to qualify him to act as a director in a national bank, the agreement between them that the stock shall still continue to be hers is legal. Citizens' Nat. Bank *v.* Sturgis Nat. Bank, 81 S. W. Rep. 550 (Tex. 1904).

3 State *v.* Smith, 15 Oreg. 98 (1887). The corporate books are not conclusive as to the qualification of a person to act as a director. If he owns stock he is qualified, even though he does not appear as a stockholder on the corporate books, and *vice versa.* The inspectors cannot reject votes on the ground that the candidate is not qualified. *Re* St. Lawrence Steamboat Co., 44 N. J. L. 529 (1882). Under the statutes of North Dakota an unregistered holder of stock is not qualified to be elected a director. *Re* Argus Printing Co., 1 N. D. 434 (1891).

4 Heartt *v.* Sherman, 82 N. E. Rep. 417 (Ill. 1907).

5 State *v.* McDaniel, 22 Ohio St. 354, 367 (1872); McDowall *v.* Sheehan, 129 N. Y. 210 (1891); Wight *v.* Springfield, etc. R. R., 117 Mass. 226 (1875); *Re* St. Lawrence Steamboat Co., 44 N. J. L. 529 (1882); Hoyt *v.* Bridgewater, etc. Co., 6 N. J. Eq. 253, 274 (1847); Bristol, etc. Trust Co. *v.* Jonesboro, etc. Trust Co., 101 Tenn. 545 (1898); *Ex parte* Stock, 33 L. J. (Ch.) 731 (1864); Bartholomew *v.* Bentley, 1 Ohio St. 37 (1852); People *v.* Northern R. R., 42 N. Y. 217

the corporation is created.[1] The constitutionality of a statute which prohibits the citizens of other states from being directors in a corporation may well be doubted.[2]

An alien may be a stockholder and director in a corporation if the statutes do not prohibit it.[3] A married woman is not at common law qualified to act as an incorporator nor as treasurer,[4] but under the usual statutes conferring rights upon her she is qualified to act as a director or officer.[5] An executor may be a director.[6] A trustee is qualified to act as a director, even though the charter required each director to hold stock "in his own right," but where a director's trustee in bankruptcy claims the stock the director is no longer qualified.[7]

Votes cast for a person not eligible to the office cannot elect him. He is not even a *de facto* director, and he may be ousted by legal proceedings.[8] Such votes, however, are not to be ignored so as to

(1870); Cammeyer *v.* United, etc. Churches, 2 Sandf. Ch. 186, 249 (1844); Hurrell & Hyde on Directors and Officers, 2; State *v.* Swearingen, 12 Ga. 23 (1852)—a municipal corporation case. The charter or by-laws may, however, provide otherwise. Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205 (1841). See also Cumming *v.* Prescott, 2 Younge & C. (Exch.) 488 (1837). It is not necessary that the directors should be either subscribers to the stock or corporators. Densmore Oil Co. *v.* Densmore, 54 Pa. St. 43 (1877); *Re* British Provident, etc. Assoc., L. R. 5 Ch. D. 306 (1877). It has been doubted whether the by-laws of a company may require directors to be stockholders. People *v.* Albany, etc. R. R., 55 Barb. 344, 373 (1869); aff'd, 57 N. Y. 161. *Cf.* Cross *v.* West Virginia, etc. Ry., 37 W. Va. 342 (1892).

1 Kerchner *v.* Gettys, 18 S. C. 521 (1882). A citizen of one state may be a stockholder and director in a corporation incorporated in another state. Commonwealth *v.* Detwiller, 131 Pa. St. 614 (1890). Directors of a national bank "are not required to reside at the bank's place of business." Robinson *v.* Hall, 59 Fed. Rep. 648 (1894). The directors of a corporation need not be residents of the state unless the statutes expressly require it. North, etc. Rolling-stock Co. *v.* People, 147 Ill. 234 (1893).

2 See § 813, *infra*, to the effect that such a statute as regards trustees in a mortgage deed of trust is unconstitutional and void. A constitutional provision requiring directors to be stockholders does not apply to a consolidated railroad company existing as one corporation in two states. Ohio, etc. Ry. *v.* People, 123 Ill. 467 (1888).

3 Commonwealth *v.* Hemmingway, 131 Pa. St. 614 (1890).

4 9 Ry. & Corp. L. J. 197. *Cf.* p. 44, *supra*.

5 People *v.* Webster, 10 Wend. 554 (1833).

6 *Re* Santa Eulalia S. Min. Co., 4 N. Y. Supp. 174 (1889). An executor may be a director even though the stock does not stand in his name. Schmidt *v.* Mitchell, 101 Ky. 570 (1897); *Re* Santa Clara, etc. Co., N. Y. Daily Reg., June 19, 1888.

7 Sutton *v.* English, etc. Co., [1902] 2 Ch. 502.

8 The election of a person not qualified does not make him even a *de facto* director. *Re* Newcomb, 18 N. Y. Supp. 16 (1891); Hamley's Case, L. R. 5 Ch. D. 705 (1877); Jenner's Case,

elect a candidate who receives a minority of all the votes cast.[1]

L. R. 7 Ch. D. 132 (1877). A director who is not a stockholder cannot complain that a meeting of the directors was held without notice to him. Anderson, etc. Co. *v.* Pungs, 127 Mich. 543 (1901). In a stockholder's suit in behalf of the corporation, a request to the legal board of directors to bring the suit is necessary, even though it is alleged that a majority of the directors are involved in the fraud complained of, where it appears that such directors were not qualified to act as directors by reason of not being stockholders, and never had acted as such. Loomis *v.* Missouri, etc. Ry., 165 Mo. 469 (1901). Where a director was not qualified and a new director has been elected in his place, he cannot have *mandamus* to allow him to inspect the company's books and exercise other rights of a director, even though for a time he was permitted to act as director. People *v.* N. Y., etc. Co., 34 N. Y. Misc. Rep. 326 (1901). Where cumulative voting prevails, and the statutes require three directors to be residents, and all votes cast are cumulated on non-residents excepting thirty-two, which are cast for three residents, the three residents are elected, and the remaining directors are those of the non-residents who received the highest number of votes. Horton *v.* Wilder, 48 Kan. 222 (1892). Where directors must be stockholders qualified to vote, a stockholder not qualified to vote by reason of not owning his stock for thirty days before the election is not qualified to be a director. His election does not make him even a *de facto* director. *Re* Newcomb, 18 N. Y. Supp. 16 (1891). Where an election is "conceived in fraud and conducted contrary to law," the call being insufficient, the notice concealed, the instigators having sold and transferred their certificates of stock, the purpose of the election being to steal the control from one who really owned all the stock, and two of the alleged new directors not being stockholders as required by law, there are no directors *de facto*, even though they take possession and drive away the contractor who is building the road. Johnston *v.* Jones, 23 N. J. Eq. 216 (1872). In Barber's Case, L. R. 5 Ch. D. 963 (1877), arising under similar facts, the court said: "Mr. Barber was not qualified to be elected a director, and his election was absolutely null and void. . . . If he had acted as a director, there might have been an estoppel." The board of directors cannot, even under a by-law authorizing them to fill vacancies, oust a director on the ground that he was ineligible when elected, and then proceed to fill his place. Commonwealth *v.* Detwiller, 131 Pa. St. 614 (1890). A director who is not a stockholder cannot sign a statutory notice of a meeting to increase the capital stock. *Re* Wheeler, 2 Abb. Pr. (N. S.) 361 (1866). It formerly was held in England that the election of one not a shareholder as a director in a corporation in which it is required that the directors be owners of a certain amount of stock is valid; and such a person, upon acceptance of the directorship, is bound to take and pay for the required number of shares. But the later decisions have established the rule that by accepting the directorship he does not thereby become liable as a subscriber for stock to the amount of qualification shares. See § 52, *supra*. The election of a disqualified person as director is voidable, not void. People *v.* Albany, etc. R. R., 55 Barb. 344, 373 (1869); aff'd, 57 N. Y. 161.

1 See § 620, *supra*. Even though the statutes require directors to be stockholders, yet the fact that a man is a director does not prove that he is a stockholder in a suit by a judgment creditor of the corporation to hold him liable as a stockholder. McFar-

The election is good as to those who were eligible.[1] Even though the board of directors consists of five, and the stockholders at an election cast all their votes for two, those two are elected, leaving three vacancies.[2] Although the statutes require a director to be a stockholder, yet a person not a stockholder may be elected, and may then acquire one or more shares of stock before acting as director. This satisfies the law.[3] A statute requiring directors to be stockholders does not apply to directors named in the certificate of incorporation for the first year.[4]

Where a person not eligible to the office is declared elected, and no stockholder objects or takes legal proceedings to test the right to the office, and such person is allowed to perform the duties of his office, he becomes an officer *de facto*. As such his acts cannot be objected to on the ground that he was not a legally-elected director. Neither corporate creditors, nor the corporation, nor the stockholders, nor the director himself, are allowed to raise this objection in that manner. The remedy is to oust him by *quo warranto*

land *v.* Martin & Moodie, 86 S. W. Rep. 639 (Tex. 1905). Even though the directors who were declared elected were ineligible, because in violation of the New Jersey statute they did not produce the stock-books at the election, yet the court will not necessarily declare elected those who received a minority of the votes, but will order a new election if there was no fraud or improper motive in failing to obey the statute. Stratford *v.* Mallory, 70 N. J. L. 294 (1904).

1 Schmidt *v.* Mitchell, 101 Ky. 570 (1897). In the case *In re* Jersey City Paper Co., 69 N. J. L. 594 (1903), where the directors were ineligible under the statute by reason of their not producing the transfer books at the election, the court ordered a new election.

2 Gilchrist *v.* Collopy, 119 Ky. 110 (1904). See also § 608, *supra*.

3 Greenough *v.* Alabama, etc. R. R., 64 Fed. Rep. 22 (1894). Where directors must be stockholders, a person elected director without his knowledge and owning no stock, and who never acted as a director for ten years, is not a director, even though a share of stock was given to him shortly after his election and he took the same. Hence he may purchase corporation property at a judicial sale. Rozecrans Gold Min. Co. *v.* Morey, 111 Cal. 114 (1896). A person who is a registered holder of stock, but has no interest in it, is not eligible, under the New York statute, even though he acquires the full title thereto after the election. Matter of Elias, 17 N. Y. Misc. Rep. 718 (1896).

4 Hamilton T. Co. *v.* Clemes, 163 N. Y. 423 (1900); Camden, etc. Co. *v.* Burlington, etc. Co., 33 Atl. Rep. 479 (N. J. 1895); McDowall *v.* Sheehan, 129 N. Y. 200 (1891); Partal *v.* Emmons, L. R. 1 C. P. D. 664, 667 (1876). The New York statue that only one incorporator need be a resident repeals by implication the prior statute that two directors for the first year must be residents. People *v.* McDonough, 28 Misc. Rep. 652 (1899). Even though there are but three stockholders, and the law requires the directors to be stockholders, yet if there has been no election of directors the three stockholders are not directors. Grand Rapids, etc. Co. *v.* Grand, etc. Co., 11 Wyo. 128 (1903).

or to enjoin him as a usurper. But after he is allowed to become a *de facto* director, his title to office cannot be attacked collaterally, nor can his acts be repudiated on that ground.[1] A director, as a *de facto* director, may bind the company by his acts, if allowed to continue in his position.[2]

Where the charter requires the directors to be stockholders, a director must continue to hold stock during his term of office. If he sells all his stock in the company, he thereby becomes disqualified and ceases, *ipso facto*, to be a director.[3] But even though the

1 See § 713, *infra*.

2 Quoted and approved in Werle *v.* Northwestern, etc. Co., 125 Wis. 534 (1905). A director who sells his stock ceases to be a *de jure* director. If he continues and is permitted to act he is a director *de facto*. Beardsley *v.* Johnson, 121 N. Y. 224 (1890). Even though an amendment to the charter whereby the number of directors is increased is not for several months recorded in a public office, as required by statute, yet if the increased number of directors is elected their acts bind the corporation. Werle *v.* Northwestern, etc. Co., 125 Wis. 534 (1905). Where a consolidation of a domestic with a foreign railroad company is to be in accordance with the laws of the other state, irregularities as to making up the board of directors, etc., as required by the laws of such other state, will not be inquired into collaterally. Smith *v.* Cleveland, etc. Ry., 81 N. E. Rep. 501 (Ind. 1907). A citizen of a city cannot maintain a suit to have a waterworks company put in the hands of a receiver on the ground that all of its stock is owned by the city and the city has not elected directors having the necessary qualification. Kirch *v.* City of Louisville, 101 S. W. Rep. 373 (Ky. 1907). The legality of an election and the regularity of its procedure as well as the qualifications of its directors cannot be attacked collaterally by a stockholder trying to enjoin a proposed sale of property by such directors. Jones *v.* Bonanza, etc. Co., 91 Pac. Rep. 273 (Utah, 1907).

3 Quoted and approved in Oudin, etc. Co. *v.* Conlan, 34 Wash. 216 (1904). Where the statutes require the director to be a stockholder, it follows "that as soon as a director parts with all beneficial interest in, and control over, the stock which he is required to hold, and causes the officers of the corporation to have knowledge of such fact by a request that a proper transfer be made on the books of the company, he no longer possesses the qualifications which the statute declares to be essential," and hence he ceases *ipso facto* to be a director and is no longer liable on a director's statutory liability. "The statute executing itself operated to divest him of title to the office." Chemical Nat. Bank *v.* Colwell, 132 N. Y. 250 (1892). Notes issued by directors who are disqualified by having sold their stock and as a scheme to create a liability on the part of the stockholders are not good, especially where the meeting of the directors was not properly called. Close *v.* Potter, 155 N. Y. 145 (1898). Where a director must be a stockholder, and there is a statutory liability attached to the directorship, the director may transfer his stock in order to cease to be a director and in order to avoid such liability. Sinclair *v.* Fuller, 158 N. Y. 607 (1899). Where directors must be stockholders, and some of them sell their stock, they cease to be directors, and are not liable on the

statutes require directors to be stockholders and a director has parted with his stock, yet if he continues to act, his acts are not void as to third persons.[1] The provision formerly in the New York statutes that "if a director should cease to be a stockholder his office shall become vacant" was self-executing.[2] Where the charter requires directors to be stockholders, and three of the seven are clerks, to each of whom one share of stock is transferred, and the certificate therefor is at once retransferred to the real parties in interest, this is good ground for a forfeiture of the charter.[3] The director does not become disqualified by reason of his pledging his stock.[4] The secre-

statutory liability of directors. Stafford *v.* St. John, 164 Ind. 277 (1905). A dummy director in whose name on the books one share of stock stands, but who has endorsed it in blank and delivered it back, cannot maintain a suit for a receiver of the corporation. Hoopes *v.* Basic Co., 69 N. J. Eq. 679 (1905). The fact that a director sells his stock does not *ipso facto* vacate his office as director. Howle *v.* Scarbrough, 138 Ala. 148 (1903). Nathan *v.* Tompkins, 82 Ala. 437 (1887), holds that he may be removed, but does not cease to be a director by the mere act of selling his stock. To same effect, Atlas Nat. Bank *v.* F. B. Gardner Co., 8 Biss. 537 (1879); s. c., 2 Fed. Cas. 187. Although the statute requires three directors, who shall be stockholders, and one assigns his stock, and the other two authorize and execute a corporate mortgage at a meeting held without notice to the other, yet the mortgagee, having no knowledge of these facts, is protected. Kuser *v.* Wright, 52 N. J. Eq. 825 (1895), rev'g Wright *v.* First Nat. Bank, 52 N. J. Eq. 392. Where a director sells and delivers all his stock, he ceases to be an officer *de jure*, the statute requiring him to be a stockholder; and where the whole board of directors have sold their stock, their acts as a board of directors are not binding on the corporation. Orr, etc. Co. *v.* Reno Water Co., 17 Nev. 166 (1882). "Can a director part with his qualification shares?" See on this subject, 8 Ry. & Corp. L. J. 99. A person may purchase stock although such stock constitute the qualification shares of the vendor as a director. Kern *v.* Day, 45 La. Ann. 71 (1893). A motion declaring the office vacant and electing another person before the director has really sold his stock is void. Craw *v.* Easterly, 54 N. Y. 679 (1873). As to injunctions, see Moir *v.* Prov. etc. Soc., 127 N. Y. App. Div. — (1908).

1 Robinson *v.* Blood, 91 Pac. Rep. 258 (Cal. 1907).

2 Sinclair *v.* Fuller, 158 N. Y. 607 (1899). A statute that, upon an officer in a bank borrowing money of the bank without security, his office shall become vacant and he shall cease to become a director, is self-executing. His continuance in office may bind the corporation by his acts, but does not prevent a creditor attacking an assignment for creditors made by him in behalf of the bank. Cupit *v.* Park City Bank, 20 Utah, 292 (1899).

3 Lorillard *v.* Clyde, 142 N. Y. 456 (1894).

4 Cummings *v.* Prescott, 2 Y. & C. Exch. 488 (1837). This was held in a case where the qualification shares were to be held by the directors in their own right. Pulbrook *v.* Richmond, etc. Mining Co., L. R. 9 Ch. D. 610 (1878). The court, in *Ex parte* Littledale, 24 L. J. (Bankr.) N. S. 9 (1855), assumed that a director became disqualified where he had

tary, treasurer, or other officer of a corporation need not be a stockholder or resident or citizen unless the statute requires it.[1] "It is not uncommon for a single individual to hold several offices in a corporation." [2]

A corporation may pass a by-law prescribing the qualifications of its directors, and may prescribe that a person who is an attorney against it in a suit shall not be a director.[3]

§ 624. *Acceptance and resignation of office and failure to elect directors — Removal of directors.*—An acceptance of the office by one who is elected director is necessary to constitute him a director. Some direct and positive act of acceptance is necessary.[4]

A director may resign, and no formal acceptance or entry thereof on the minute-book of the corporation is necessary to complete the

pledged his stock, even though the transfer was not recorded.

1 Kerchner *v.* Gettys, 18 S. C. 521 (1882); McCall *v.* Byram Mfg. Co., 6 Conn. 428 (1827). But in Matthews *v.* Trustees, 2 Brewst. (Pa.) 541 (1869), the court enjoined the company from compelling its resident treasurer to turn over funds to a newly elected non-resident treasurer. Neither the president nor the treasurer of an unincorporated joint-stock association need be stockholders unless the charter so provides. National Casket Co. *v.* Stolts, 135 Fed. Rep. 534 (1905).

2 Manhattan Co. *v.* Kaldenberg, 165 N. Y. 1 (1900).

3 Cross *v.* West Virginia, etc. Ry., 37 W. Va. 342 (1892).

4 Osborne, etc. Co. *v.* Croome, 14 Hun, 164 (1878); aff'd, 77 N. Y. 629; Cameron *v.* Seaman, 69 N. Y. 396 (1877); Rozecrans, etc. Co. *v.* Morey, 111 Cal. 114 (1896). An "honorary director," who sits with the board, makes up a quorum and accepts pay, is subject to the disabilities and liabilities of a director as to being interested in contracts with the company. There is no such thing in law as an "honorary director." *Ex parte* Stears, Johns. V.-C. 480 (1859). It is a question for the jury whether a person accepted a directorship. The mere fact that as an adviser he met with the directors and made motions is not conclusive if he declined to accept. Blake *v.* Bayley, 82 Mass. 531 (1860). Acceptance is presumed. Lockwood *v.* Mechanics', etc. Bank, 9 R. I. 308 (1869). But may be disproved, even though the person attended directors' meetings. Blake *v.* Bayley, 82 Mass. 531 (1860). The fact that a director does not attend meetings or signify his acceptance of the office does not justify the board in declaring his office vacant. Acceptance is presumed. Halpin *v.* Mutual, etc. Co., 20 N. Y. App. Div. 583 (1897). Notice of a directors' meeting need not be given to a director who has never accepted the office. United Growers' Co. *v.* Eisner, 22 N. Y. App. Div. 1 (1897). Directorship is not proved by an annual report signed and sworn to by the president. Bank, etc. *v.* Faber, 38 N. Y. App. Div. 159 (1899); aff'd, 167 N. Y. 184. A director who acts as such cannot defend against his statutory liability on the ground that he was irregularly elected. Union, etc. Bank *v.* Scott, 53 N. Y. App. Div. 65 (1900). A person who is elected director, but who does not accept or qualify or act as director, except that several years afterwards he attended a meeting and later represented that he was a director, is not a director. Bramblet *v.* Commonwealth, etc. Co., 83 S. W. Rep. 599 (Ky. 1904).

resignation.[1] Even though an officer resigns for the purpose of preventing service being made upon him, yet such resignation is sufficient.[2]

A director may resign by an oral statement to that effect, and his resignation may be accepted in the same manner by the president.[3] But a mere statement of a director that he will have noth-

1 Movius *v.* Lee, 30 Fed. Rep. 298 (1887); aff'd, 141 U. S. 132; Smith *v.* Danzig, 64 How. Pr. 320 (1883); Chandler *v.* Hoag, 2 Hun, 613 (1874); aff'd, 63 N. Y. 624; Blake *v.* Wheeler, 18 Hun, 496 (1879); aff'd, 80 N. Y. 128. A resignation to take effect on the termination of the term for which a director is elected is effectual, and he does not hold over though no successor is elected. Van Amburgh *v.* Baker, 81 N. Y. 46 (1880). A resignation releases a director if laid before the board of directors, and it is effective, though not accepted, where it has been duly presented. Maitland's Case, 4 De G., M. & G. 769 (1853). Even though an officer resigns for the purpose of preventing service upon the company, yet, if the resignation is accepted, service cannot be made upon him. Sturgis *v.* Crescent, etc. Co., 10 N. Y. Supp. 470 (1890). A director may resign after the company and officers have been enjoined from interfering with the corporate assets, and may then pursue his remedies as a corporate creditor. Mexican, etc. Co. *v.* Mexican, etc. Co., 47 Fed. Rep. 351 (1891). A resignation takes effect upon its delivery, even though not accepted. International Bank *v.* Faber, 86 Fed. Rep. 443 (1898). A resignation may be effective without acceptance. Noble *v.* Euler, 20 N. Y. App. Div. 548 (1897). Where a treasurer and general manager tenders his resignation to take effect upon acceptance, his salary ceases upon the date of acceptance. Savannah C. Mills *v.* Cunningham, 100 Ga. 468 (1897). Even though a director resigns for the sole purpose of avoiding a statutory liability and causes his son to be elected director in his place and continues to be the agent and manager of the business, nevertheless he is not liable under the statute. Brown *v.* Clow, 158 Ind. 403 (1902). A resignation is complete when it is tendered, and its validity does not depend upon acceptance by the directors or the election of a successor. Manhattan Co. *v.* Kaldenberg, 165 N. Y. 1 (1900).

2 Continental, etc. Co. *v.* Lewis Voight, etc. Co., 106 Fed. Rep. 550 (1900). Where by the by-laws an officer shall continue to hold office until his successor is elected and qualified, an officer does not cease to be an officer by a mere resignation, and hence service of process may still be made upon him as such officer. Colorado, etc. Corp. *v.* Lombard, etc. Co., 66 Kan. 251 (1903). But not where the by-laws are silent on this question. Yorkville Bank *v.* Henry, etc. Co., 80 N. Y. App. Div. 578 (1903). Even though a secretary has resigned, yet if he continues to act as secretary and is treated as such by the stockholders, service of process may be upon him. Cameron & Co. *v.* Jones, 90 S. W. Rep. 1129 (Tex. 1905). Process served on the president after he has resigned is not good. Yorkville Bank *v.* Zeltner B. Co., 80 N. Y. App. Div. 578 (1903). Service may be on a director who has resigned, if his resignation was never acted upon and he continued to act as director. Venner *v.* Denver, etc. Co., 90 Pac. Rep. 623 (Col. 1907).

3 Briggs *v.* Spaulding, 141 U. S. 132, 150 (1891). A resignation may be oral, and the election of an officer constitutes an acceptance of such resignation. Johnson *v.* Griswold, 177 Mass. 34 (1900). A director of a corpora-

ing more to do with the office is not a sufficient resignation.[1] A resignation may be effectual even though it is not accepted; but it has been doubted whether all the directors can resign, thereby leaving the corporation helpless.[2] A managing director having presented his written resignation cannot then withdraw it except with the consent of the directors.[3]

A director whose resignation has been accepted cannot afterwards vote at a meeting as a director.[4] The fact of the resignation need not be published or made known to corporate creditors.[5]

In England it has been held that the resignation of a director must be presented to a meeting of the stockholders in order to be effective, unless the by-laws allow the directors to accept it. It is not sufficient to present the resignation to a meeting of the board of directors. Hence, although a resignation is sent in in the middle of the year, and is not accepted until the stockholders' meeting later in the year, the director continues to be such until such acceptance.[6] The stockholders may fill a vacancy in the board of directors caused by death.[7] The by-laws generally give the board of

tion may resign at any time. His resignation may be oral or in writing. The fact that a statute says directors shall continue until their successors are appointed does not prevent a director resigning at any time. Fearing *v.* Glenn, 73 Fed. Rep. 116 (1896). Service upon the president is good although he testifies that he had resigned, there being proof to the contrary and that he afterwards acted as president. Mott Iron Works *v.* West Coast, etc. Co., 113 Cal. 341 (1896).

1 A mere statement by one director to another that he would have no more to do with the office is not a resignation. Kindberg *v.* Mudgett, 24 N. Y. Week. Dig. 229 (1886). A statement by a director to the secretary and treasurer at the time of transferring all his stock that he severed all connection with the company is not a resignation, so far as corporate creditors' rights are concerned. Chemical Nat. Bank *v.* Colwell, 9 N. Y. Supp. 285 (1890); Chemical Nat. Bank *v.* Colwell, 9 N. Y. Supp. 288 (1890); reversed on other grounds, 132 N. Y. 250. Application to sue may be made to the president though he claims to have resigned. Averill *v.* Barber, 6 N. Y. Supp. 255 (1889).

2 Carnaghan *v.* Exporters', etc. Co., 11 N. Y. Supp. 172 (1890). Resignations of all the officers and directors, in order to have a receiver appointed under the New York statute and wind up the corporate affairs, are illegal. Zeltner *v.* Zeltner, etc. Co., 174 N. Y. 247 (1903).

3 Glossop *v.* Glossop, 97 L. T. Rep. 372 (1907). See also Moir *v.* Prov. etc. Soc., 127 N. Y App. Div. — (1908).

4 Wickersham *v.* Crittenden, 93 Cal. 17 (1892).

5 Bruce *v.* Platt, 80 N. Y. 379 (1880).

6 Municipal, etc. Land Co. *v.* Pollington, 63 L. T. Rep. 238 (1890). Where the by-laws give the directors power to fill vacancies in the board, they may fill vacancies due to the original directors refusing to serve. La Compagnie de Mayville *v.* Whitley, [1896] 1 Ch. 788.

7 Sylvania, etc. R. R. *v.* Hoge, 59 S. E. Rep. 806 (Ga. 1907). Where a majority of the directors have sold and transferred their stock the stock-

directors the power to accept resignations and to fill vacancies in the board.[1] It is legal for the board of directors to resign and substitute in their places the purchasers of a majority of the stock, provided no actual fraud is involved.[2] A statutory provision that directors may fill any vacancy in the board for the unexpired portion of the term, does not give the directors power to elect new directors on an increase of the number.[3]

The insolvency of a director does not vacate his office.[4] A director does not lose his seat by absence.[5] But the by-laws may provide otherwise.[6] Where the by-laws provide that "the office of director is vacated if a director be concerned in any contract," a director ceases *ipso facto* to be a director upon his being secretly interested in the profits of a contract with the corporation, but if he is re-elected at the next election he then again becomes a director, and hence the company cannot recover back the salary paid to him except for a period from the date of the contract to the next election.[7]

A director, unless he has resigned, continues to be such until his successor is elected, even though he never attends meetings and is never consulted.[8]

A reduction in the number of trustees may be valid, although the statutory certificate is not filed, so far as corporate creditors are concerned.[9] The failure to have the number of directors required by statute does not invalidate their acts.[10]

The stockholders have no power to remove directors before the expiration of their term of office unless the charter or by-laws expressly give that power.[11] Nor can they remove the president.[12]

holders may at a meeting called for that purpose elect their successors. Sovereen, etc. Co. *v.* Whiteside, 8 Ont. W. R. (Can.) 582 (1906).

1 See § 603, *supra.*

2 See § 622*a*, *supra.*

3 Gold Bluff, etc. Co. *v.* Whitlock, 75 Conn. 669 (1903).

4 Atlas Nat. Bank *v.* F. B. Gardner Co., 8 Biss. 537 (1879); s. c., 2 Fed. Cas. 187.

5 Phelps *v.* Lyle, 10 Ad. & E. 113 (1839).

6 Wilson *v.* Wilson, 6 Scott, 540 (1838), holding that an absconding director becomes "unable to act" within the meaning of the by-laws. Sturges *v.* Vanderbilt, 73 N. Y. 384 (1878); s. c., below, *sub nom.* Sturgis *v.* Drew, 11 Hun, 136.

7 *Re* Bodega Co., Ltd., [1904] 1 Ch. 276.

8 First Nat. Bank *v.* Lamon, 130 N. Y. 336 (1891).

9 Wallace *v.* Walsh, 125 N. Y. 26 (1890).

10 See § 713*a*, *infra.*

11 See § 711, *infra.* Laughlin *v.* Geer, 121 Ill. App. 534 (1905). A director cannot be excluded from his duties as such, nor can his election be declared invalid, merely because of what he may contemplate doing as a director. Ohio, etc. Co. *v.* State, 49 Ohio St. 668 (1892). A charter provision giving the stockholders power to remove the "officers" refers to directors only. Deposit Bank, etc. *v.* Hearne, 104 Ky. 819 (1898).

12 Ohio, etc. Co. *v.* State, 49 Ohio St.

The president is elected by the directors,[1] and after election the directors cannot remove him.[2] Nevertheless, the stockholders are not always helpless in such circumstances as these. The stockholders may, at a meeting called for that purpose, amend the by-laws so as to increase the number of directors, and at the same meeting may elect such additional directors where the number of directors is not fixed by the charter.[3] The stockholders may also, at a special meeting duly called, amend the by-laws so as to authorize the board

668 (1892). A contract between a company and a person that he shall be the managing director for ten years does not prevent the corporation from dismissing him. Bainbridge *v.* Smith, L. R. 41 Ch. D. 462 (1889). A voluntary unincorporated association, without articles, constitution, or rules, may remove its president or other officer at any time and without notice, except that the meeting held for that purpose must be duly held, and cannot expel a member without notice. Ostrom *v.* Greene, 161 N. Y. 353 (1900), the court saying: "The holding of an office unprotected by rules is not an individual right, but is subject to change at the pleasure of the association."

1 The stockholders have no power to elect the president. Their action is a nullity. Walsenburg Water Co. *v.* Moore, 5 Colo. App. 144 (1894). Nor the state. See 116 N. W. Rep. 900 (Wis. 1908).

2 Where three out of five directors met without notice to the other two, and deposed the president and authorized a mortgage, their acts are void. Hatch *v.* Johnson L. & T. Co., 79 Fed. Rep. 828 (1895). Where the statute prescribes that officers and agents shall hold their places during the pleasure of the board, the board may oust the secretary and treasurer at any time. Darrah *v.* Wheeling, etc. Co., 50 W. Va. 417 (1901). A going corporation may purchase stock owned by its president in order to terminate his contract of employment and obtain his resignation as president, where the contract is a fair one and another party had agreed to purchase such stock from the corporation at once and subscribe for further capital stock. Joseph *v.* Raff, 82 N. Y. App. Div. 47 (1903); aff'd, 176 N. Y. 611. Where a treasurer has been expelled by the board of directors for irregularities in his accounts, the corporation may maintain *quo warranto* to oust him from office and obtain possession of its money and books. Commonwealth *v.* Jankovic, 216 Pa. St. 615 (1907). Where a treasurer was elected in June at an annual salary and the by-laws provide that the directors should elect officers in September, which, however, they fail to do, they may remove him in January of the following year, especially where the statutes authorize the corporation to remove officers at any time. O'Neal *v.* F. A. Neider Co., 118 Ky. 62 (1904). A secretary and treasurer elected for a year cannot be arbitrarily removed and his salary stopped, if the salary is by the year. Even if he takes part in selling out the company, yet if it is understood that the new company was to continue him he may collect the salary. Daspit *v.* Holmes Co., 44 S. Rep. 993 (La. 1907). A by-law authorizing *directors* to remove any one of the directors is illegal, and a director may enjoin his being removed under such a by-law. Laughlin *v.* Geer, 121 Ill. App. Rep. 534 (1905).

3 *In re* Griffing Iron Co., 63 N. J. L. 168 (1898); aff'd, 63 N. J. L. 357 (1899). Stockholders may amend the by-laws so as to increase the number of directors, and may at the same meeting elect the additional directors. Gold Bluff, etc. Co. *v.* Whitlock, 75 Conn. 669 (1903).

of directors to remove the president and treasurer, and the board of directors may subsequently make such removal under the amended by-laws.[1]

In New York under the statute authorizing the attorney-general to bring suit to remove directors and other corporate officers for misconduct, he may commence suit to remove them as directors and also as officers for issuing stock without consideration.[2] The express authority of an officer to execute a contract is not affected by a change in the board of directors.[3] A failure to elect directors at the stated time does not work a dissolution of the corporation. The old directors continue in office until their successors are duly elected.[4] But in England it is held that where the by-laws provide that the directors shall be elected annually, and shall hold office for one year, they cannot hold over. They cease to be directors at the end of the year, and insurance assessments levied by them after the year are invalid.[5]

1 *In re* Griffing Iron Co., 63 N. J. L. 168 (1898); aff'd, 63 N. J. L. 357 (1899). Where a directors' by-law, confirmed by the stockholders, fixes their term of office at one year, the stockholders cannot, by amending the by-law, turn the directors out during the year. Stephenson *v.* Vokes, 27 Ont. (Can.) 691 (1896). Where the by-laws authorize the board of directors to discharge an officer for a cause, they may discharge the vice-president upon his selling all his stock. Selley *v.* American, etc. Co., 119 Iowa, 591 (1903).

2 People *v.* Lyon, 119 N. Y. App. Div., 361 (1907); aff'd, 189 N. Y. 544.

3 Kidd *v.* New Hampshire, etc. Co., 66 Atl. Rep. 127 (N. H. 1907).

4 State *v.* Bonnell, 35 Ohio St. 10, 17 (1878), in which an election of directors being held invalid, those previously in office were restored to office as being entitled to hold until their successors were qualified. Huguenot Nat. Bank *v.* Studwell, 6 Daly, 13 (1875); reversed on other grounds, 74 N. Y. 621 (1878); and see § 631, *infra.* Holding over may also arise from acting as a director. Sanborn *v.* Lefferts, 58 N. Y. 179 (1874). Hold-over directors may hold meetings, fill vacancies in the board, and vote to sell property, the same as though regular elections had been held. Kent County Agr. Soc. *v.* Houseman, 81 Mich. 609 (1890). Directors who hold over are liable on the statutory liability of directors. Jenet *v.* Nims, 7 Colo. App. 88 (1895). A hold-over president and manager for sixteen years may institute a suit in behalf of the corporation. Lucky Queen Min. Co. *v.* Abraham, 26 Oreg. 282 (1894). For purposes of making service a director and president of a railroad company is presumed to continue as such, even though elected annually and the year has expired. Buell *v.* Baltimore, etc. R. R., 39 N. Y. App. Div. 236 (1899). A hold-over director is liable on a statutory liability, and the fact that he was a director may be proved by the corporate books. St. George, etc. Co. *v.* Fritz, 48 N. Y. App. Div. 233 (1900). Hold-over directors may continue to act. Hatch *v.* Lucky Bill Min. Co., 25 Utah, 405 (1903). Where the annual report required by the statutes to be filed within thirty days after an election of directors, giving their names, is not filed, the presumption is that the directors' named in the last report that was filed are holding over. Appleton *v.* American Malting Co., 65 N. J. Eq. 375 (1903).

5 Tyne, etc. Assoc. *v.* Brown, 74 L. T. Rep. 283 (1896).

Even though the failure to elect has extended over a period of several years, and there are by reason thereof no directors in office, the old directors having wholly abandoned their trust, the stockholders may at any time, in a lawful manner, proceed to the election of a new board of directors.[1] But if the majority fail or refuse to hold an election, and the corporate property is thereby endangered, a court of equity may appoint a receiver to take charge of it,[2] and will in a proper case authorize a winding up.[3]

A director is an "officer" of the corporation in the usual meaning of that term.[4] No officers are necessary other than directors where the stockholders acquiesce in the directors transacting all the business.[5] A director is entitled at all times to examine the books and papers of the company.[6]

Questions relative to the meetings of directors are considered elsewhere.[7] Where the treasurer of a corporation uses its money for his own purposes he may be sued therefor, even though he continues to be treasurer.[8] The cost of defending an unsuccessful suit to oust an officer may be paid by the corporation.[9]

§ 625. *Stockholders can act only at corporate meetings.*—Stockholders can hold elections and transact the other business which they as a body are qualified to transact only at a corporate meeting duly called and convened. Consequently, all votes taken elsewhere than at such a meeting, and all separate consents, either oral or in writing, whereby the stockholders assume to bind the company, are invalid and void.[10] A stockholder may object to a vote being taken by mail.[11]

1 People *v.* Twaddell, 18 Hun, 427 (1879). In Reilly *v.* Oglebay, 25 W. Va. 36, 43 (1884), it is held that where there is no board of directors the stockholders themselves may, pending a regular election, lawfully assume and perform the duties which ordinarily belong to a board of directors. But see § 709, *infra*.

2 Lawrence *v.* Greenwich F. Ins. Co., 1 Paige, 587 (1829). See also § 617, *supra*. Under the statutes of California where a bank becomes insolvent the court may appoint directors to fill vacancies. Braslan *v.* Superior Court, etc., 124 Cal. 123 (1899).

3 Brown *v.* Union Ins. Co., 3 La. Ann. 177, 182 (1848), in which the neglect for nearly ten years to appoint officers being to the injury of the creditors, the court appointed a manager to wind up the affairs of the company.

4 See § 10, *supra*. A statute authorizing the directors to remove any officer does not authorize them to remove one of the directors. Laughlin *v.* Geer, 121 Ill. App. Rep. 534 (1905).

5 Buck *v.* Troy, etc. Co., 76 Vt. 75 (1903).

6 See § 511, *supra*.

7 See § 713*a*, *infra*.

8 Marlborough Assoc. *v.* Peters, 179 Mass. 61 (1901). See also § 648, *supra*.

9 Stendell *v.* Longshoremen's, etc. Assoc., 116 La. 974 (1906).

10 Commonwealth *v.* Cullen, 13 Pa.

11 McMillan *v.* Le Roi, etc. Co. Ltd., [1906] 1 Ch. 331.

§§ 626, 627. *Stockholders cannot carry on the business of or enter into contracts for the corporation.*—This subject is fully considered elsewhere.[1]

St. 133 (1850); Finley Shoe, etc. Co. *v.* Kurtz, 34 Mich. 89 (1876); Peirce *v.* New Orleans Building Co., 9 La. 397, 404 (1836); Livingston *v.* Lynch, 4 Johns. Ch. 573, 597 (1820); Torrey *v.* Baker, 83 Mass. 120 (1861); *Ex parte* Johnson, 31 Eng. L. & Eq. 430 (1854); Shortz *v.* Unangst, 3 Watts & S. (Pa.) 45 (1841). *Cf.* Graham *v.* Boston, etc. R. R., 118 U. S. 161 (1886); Granger *v.* Grubb, 7 Phila. 350 (1870). For the rule relative to directors' meetings, see § 713*a*, *infra.* An assignment of all the company's property would not be within the power of the stockholders, even though all signed it, without formal action at a meeting held for that purpose. De La Verge, etc. Co. *v.* German, etc. Inst., 175 U. S. 40 (1899). A lease authorized upon a two-thirds vote of the stockholders cannot be effected by two-thirds consenting thereto in writing without a meeting. Reiff *v.* Western, etc. Tel. Co., 49 N. Y. Super. Ct. 441 (1883). The separate assent of stockholders to an act is not valid. Their acts must be in meeting assembled. Duke *v.* Markham, 105 N. C. 131 (1890). The agreement of a majority of the stockholders separately, that the corporation should pay for certain work and that they would vote for a resolution to that effect at the next meeting, does not bind the corporation. Nicholstone City Co. *v.* Smalley, 21 Tex. Civ. App. 210 (1899). An actual meeting of the stockholders is not necessary if all consent, even though the statute require a meeting. A subsequent creditor cannot complain. Coe *v.* East, etc. R. R., 52 Fed. Rep. 531 (1892). In *Re* George Newman & Co., [1895] 1 Ch. 674, 686, the court said: "Individual assents given separately may preclude those who give them from complaining of what they have sanctioned; but, for the purpose of binding a company in its corporate capacity, individual assents given separately are not equivalent to the assent of a meeting." A separate consent of stockholders is not sufficient. Hill *v.* Atlantic, etc. R. R., 143 N. C. 539 (1906). Where there are but a few stockholders in a corporation and without any formal corporate action they turn a part of the capital stock into preferred stock and thereafter divide the profits among themselves without declaring technical dividends with the knowledge and consent of all the stockholders, no one of them nor the corporation itself can subsequently complain and defeat a suit by one of them for the amount so credited to him on the books, corporate creditors not being injured. Breslin *v.* Fries-Breslin Co., 70 N. J. L. 274 (1904). The court said: "In the present case we apply this doctrine to the non-observance of legal forms respecting the creation of preferred stock, the abandonment by preferred stockholders of voting powers, the resignation of directors, the reduction of the number of directors from six to three, and the apportionment of dividends as between the stockholders entitled thereto. In respect to these matters the jury was fully justified in finding that unanimous consent of the stockholders of the defendant company had been given, and had been acted on in good faith by the plaintiff and others concerned during a course of years, and that plaintiff could not be restored to the *status quo ante* were the assent of his fellow stockholders and of the company to be now withdrawn." See also § 709, *infra.*

[1] See § 709, etc., *infra.*

CHAPTER XXXVIII.

DISSOLUTION, FORFEITURE, AND IRREGULAR INCORPORATION.

§ 628. *Methods of dissolution.*—The dissolution of a corporation may be brought about by reason of (1) the forfeiture of its franchises by the adjudication of a court; [1] (2) the loss of its charter by a charter provision to that effect, in case the corporation fails to do certain things within a certain time; [2] (3) the repeal of its charter under the reserved power of the state; [3] (4) the voluntary surrender of the franchises by the stockholders; or (5) the expiration of the time limited for its existence in the charter.[4] Upon dissolution by any one of these methods the stockholders have certain rights in the corporate assets. Where a special charter is granted, and nothing

1 See §§ 632–637, *infra.*

2 See § 638, *infra.*

3 This subject is considered in § 639, *infra.*

4 "The dissolution of corporations is or may be effected by expirations of their charters, by failure of any essential part of the corporate organizations that cannot be restored, by dissolution and surrender of their franchises with the consent of the state, by legislative enactment within constitutional authority, by forfeiture of their franchises and judgment of dissolution declared in regular judicial proceedings, or by other lawful means." Swan, etc. Co. *v.* Frank, 148 U. S. 603, 611 (1893). In Michigan all charters except those of railroads, canals, and turnpikes are limited by the constitution to thirty years. "The evident intent of this section was to prevent the perpetuation of corporate power and corporate wealth so as to place it practically beyond the reach of the people or the legislature." It does not apply to a county-fair corporation Kent County Agr. Soc. *v.* Houseman, 81 Mich. 609 (1890).

is prescribed as to the duration of the corporation, the charter is perpetual.[1]

§ 629. *Dissolution by the stockholders—A court of equity has no power to dissolve a corporation—Receiver, and distribution of assets by court of equity—Statutory dissolution.*—It is an unquestioned rule that all the stockholders, by unanimous consent, may effect a dissolution of the corporation by the surrender of the corporate franchises.[2]

Greater difficulty is found in determining whether a majority of the stockholders may dissolve a corporation. It has been held that the majority in interest of the stockholders of a corporation may dissolve it by a voluntary surrender of its franchises, even though a minority of the stockholders are opposed to the dissolution.[3]

Such, undoubtedly, is the case where the corporation is insolvent or is doing a failing business, and is manifestly unable to accomplish the purposes of its organization.[4] But where such is not the

1 State *v.* Ladies of Sacred Heart, 99 Mo. 533 (1889). A corporation without limit of time in its charter as to duration is perpetual. Snell *v.* Chicago, 133 Ill. 413 (1890). See also § 913, *infra.* A grant by a city, under authority of a statute to a water-works company to lay pipes in the streets is perpetual, where no limit of time is expressly stated, and is irrevocable when acted upon. National Water-works Co. *v.* Kansas City, 65 Fed. Rep. 691 (1895).

2 Mobile, etc. R. R. *v.* State, 29 Ala. 573, 586 (1857); Savage *v.* Walshe, 26 Ala. 619 (1855); Attorney-General *v.* Clergy Society, 10 Rich. Eq. (S. C.) 604 (1859); Chesapeake, etc. Canal Co. *v.* Baltimore, etc. R. R., 4 Gill & J. (Md.) 1, 121 (1832); McIntyre Poor School *v.* Zanesville Canal, etc. Co., 9 Ohio, 203 (1839); La Grange, etc. R. R. *v.* Rainey, 7 Coldw. (Tenn.) 420 (1870); Slee *v.* Bloom, 19 Johns. 456 (1822); Webster *v.* Turner, 12 Hun, 264 (1877); Houston *v.* Jefferson College, 63 Pa. St. 428 (1869); Denike *v.* New York, etc. Co., 80 N. Y. 599, 606 (1880). Although a stockholder has sued in the federal court to wind up a Connecticut corporation, nevertheless it seems that such corporation may dissolve voluntarily. Kessler *v.* Continental, etc. Co., 42 Fed. Rep. 258 (1890).

3 Quoted and approved in State *v.* Chilhowee, etc. Mills, 115 Tenn. 266 (1905). Treadwell *v.* Salisbury Mfg. Co., 73 Mass. 393 (1856); Hancock *v.* Holbrook, 9 Fed. Rep. 353 (1881) (reversed on another point, 112 U. S. 229); Wilson *v.* Central Bridge, 9 R. I. 590 (1870). Compare, however, dictum in Denike *v.* New York, etc. Co., 80 N. Y. 599, 606 (1880), citing cases, and in Mobile, etc. Co. *v.* State, 29 Ala. 573, 586 (1857), citing New Orleans, etc. Co. *v.* Harris, 27 Miss. 517 (1854); Ward *v.* Society, etc., 1 Collier, 370 (1844); Angell & Ames, Corp., § 772. See also Berry *v.* Broach, 65 Miss. 450 (1888), where the business was a losing one.

4 The majority have a right to have the business wound up and sold when such business cannot be advantageously carried on. Price *v.* Holcomb, 89 Iowa, 123 (1893). See also § 670, *infra.* A majority may cause the corporation to dissolve before it has purchased any property or incurred any debts or done any corporate business. State *v.* Chilhowee, etc., Mills, 115 Tenn. 266 (1905).

case, and where the term during which the corporation was to exist has not expired;[1] or where the dissolution is desired in order to obtain a new charter for a different object;[2] or where the dissolution is merely a device to effect a consolidation which otherwise would be *ultra vires*,[3]—it has been held that the majority cannot dissolve the corporation in opposition to the wishes of the minority.[4] Stockholders owning only a minority of the stock cannot, at common law, compel a dissolution before the expiration of the time limited

1 Kean *v.* Johnson, 9 N. J. Eq. 401 (1853); Zabriskie *v.* Hackensack, etc. R. R., 18 N. J. Eq. 178 (1867); Mowrey *v.* Indianapolis, etc. R. R., 4 Biss. 78 (1866); s c., 17 Fed. Cas. 930; Lauman *v.* Lebanon, etc. R. R., 30 Pa. St. 42 (1858). See also Von Schmidt *v.* Huntington, 1 Cal. 55 (1850). Dissolution of a solvent corporation before its charter time has elapsed cannot be had except by unanimous consent of the stockholders. Barton *v.* Enterprise, etc. Assoc., 114 Ind. 226 (1887). In Louisiana a majority of the stockholders have the power to wind up the affairs of the corporation even though it is solvent. Pringle *v.* Eltringham, etc. Co., 49 La. Ann. 301 (1897). In Tennessee it is held that where a hotel company cannot raise sufficient capital to build, and it has become impracticable and undesirable to proceed, and the enterprise is clearly a failure, a minority stockholder may force a winding up and distribution. O'Connor *v.* Knoxville Hotel Co., 93 Tenn. 708 (1894). It seems that a company cannot dissolve itself by a vote of a majority of the stockholders without judicial action before the expiration of the charter. Economy, etc. Assoc. *v.* Paris, etc. Co., 113 Ky. 246 (1902).

2 Ward *v.* Society of Attornies, 1 Coll. 370 (1844).

3 Black *v.* Delaware, etc. Canal Co., 22 N. J. Eq. 403 (1871). A minority stockholder may enjoin a public sale of the property of a prosperous corporation, even though the company has been dissolved, under the New York statute, where he shows that the public sale is not being fairly advertised and conducted, and shows also that the dissolution is for the purpose of reorganizing under the laws of another state and freezing out the minority, and that information could not be obtained as to the actual condition of the company. Treadwell *v.* United, etc. Co., 47 N. Y. App. Div. 613 (1900). The voluntary dissolution, under the New York statute, of a prosperous corporation will be enjoined at the instance of minority stockholders where it is alleged that it is a mere scheme to freeze out the latter and to buy in the property for a partnership. Elbogen *v.* Gerbereux, etc. Co., 30 N. Y. Misc. Rep. 264 (1900). In the case of Arents *v.* Blackwell's, etc. Co., 101 Fed. Rep. 338 (1900), where the holders of 159,769 shares out of 160,000 shares of the stock of a tobacco company wished to accept the offer of another company to buy it out for $2,800,000, and a person had purchased one share for the purpose of stopping the sale and having the charter repealed, the court appointed a receiver to sell the property as preliminary to a dissolution and distribution of the assets. A depositor in a savings bank may maintain a bill in equity to prevent dissolution thereof, where the purpose is to turn over the business to a trust company. Barrett *v.* Bloomfield Sav. Inst., 64 N. J. Eq. 425 (1903). See also § 670, *infra*.

4 Polar Star Lodge *v.* Polar Star Lodge, 16 La. Ann. 53 (1861); Curien *v.* Sentini, 16 La. Ann. 27 (1861). See also dictum in Mobile, etc. R. R. *v.* State, 29 Ala. 573 (1857).

in the charter for the existence of the corporation.[1] The directors of a corporation cannot dissolve it.[2]

A court of equity has, in the absence of statutory power, no jurisdiction over corporations for the purpose of decreeing their dissolution and the distribution of their assets among the individual corporators at the suit of one or more of the stockholders.[3]

1 Denike *v.* New York, etc. Co., 80 N. Y. 599 (1880) (citing cases); Folger *v.* Columbian Ins. Co., 99 Mass. 267 (1868); Pratt *v.* Jewett, 75 Mass. 34 (1857), where dissolution was denied, although the business was a losing one and the single person holding a majority of the stock was mismanaging the business; Croft *v.* Lumpkin, etc. Min. Co., 61 Ga. 465 (1878), where the corporation was solvent, but made no effort to transact business or proceed; Waterbury *v.* Merchants' Union Exp. Co., 50 Barb. 177 (1867), holding that misconduct of the corporate officers is no cause for dissolution at the suit of the minority. To same effect, Belmont *v.* Erie Ry., 52 Barb. 637 (1869). A stockholder has no right to bring an action for the dissolution of the corporation. Byrne *v.* New York Brick, etc. Co., 16 Week. Dig. 139 (1882). A stockholder cannot cause a receiver to be appointed merely on the ground that the liabilities exceed the assets and the company has ceased to do business. Murray *v.* Superior Court, 129 Cal. 628 (1900). A minority stockholder of an alien corporation cannot file a bill in equity to have the company wound up and its assets distributed, even though he complains of the management, and even though the main purpose of the corporation is to acquire land in the state, it being shown that the corporation is solvent. Sidway *v.* Missouri, etc. Co., 101 Fed. Rep. 481 (1900). Where the stockholders of a bank have legally ordered the winding up of its business, and for three years thereafter the officers still continue to do business at a great loss, apparently without any effort to wind up its affairs, a stockholder may file a bill for an accounting and the appointment of a receiver, and no request to the corporation to bring the suit need be made. Mathews *v.* Bank of Allendale, 60 S. C. 183 (1901). Even though a corporation has lost most of its assets and has abandoned its business, yet a minority stockholder cannot have a receiver appointed, except for mismanagement, especially where the object of the receivership is to bring suits against the directors, which the stockholder himself may bring. Clark *v.* National, etc. Co., 105 Fed. Rep. 787 (1900). A minority stockholder cannot compel a dissolution and winding up, even though the corporation has lost money. Manufacturers', etc. Co. *v.* Cleary, 89 S. W. Rep. 248 (Ky. 1905).

2 Lake Ontario, etc. Bank *v.* Onondaga Bank, 7 Hun, 549 (1876); Jones *v.* Bank of Leadville, 10 Colo. 464 (1888); Ward *v.* Sea Ins. Co., 7 Paige, 294 (1838); Abbot *v.* American Hard Rubber Co., 33 Barb. 578 (1861). *Cf.* Bank of Switzerland *v.* Bank of Turkey, 5 L. T. (N. S.) 549 (1862), where the directors repaid sums advanced to an abortive company.

3 U. S. Trust Co. *v.* N. Y., etc. R. R., 101 N. Y. 478 (1896); Taylor *v.* Decatur, etc. Co., 112 Fed. Rep. 449 (1901); Oldham *v.* Mt. Sterling Imp. Co., 45 S. W. Rep. 779 (Ky. 1898); Verplanck *v.* Mercantile, etc. Co., 1 Edw. Ch. 84 (1831); Hardon *v.* Newton, 14 Blatchf. 376 (1878); s. c., 11 Fed. Cas. 500; Fountain Ferry, etc. Co. *v.* Jewell, 8 B. Mon. (Ky.) 140 (1848); Ferris *v.* Strong, 3 Edw. Ch. 127 (1837). See also Strong *v.* McCagg, 55 Wis. 624 (1882); Latimer *v.*

But where the directors of a corporation have misappropriated the funds of the company, created fraudulent debts, levied assessments

Eddy, 46 Barb. 61 (1864). But see dictum in Benedict *v.* Columbus, etc. Co., 49 N. J. Eq. 23, 36 (1891); Barton *v.* International, etc. Alliance, 85 Md. 14 (1897); Wallace *v.* Pierce-Wallace, etc. Co., 101 Iowa, 313 (1897); People *v.* Weigley, 155 Ill. 491 (1895); State, etc. Ins. Co. *v.* San Francisco Super. Ct., 101 Cal. 135 (1894). A court of equity has no power at the instance of a stockholder to wind up an insolvent corporation. Commonwealth *v.* Richardson, 94 S. W. Rep. 639 (Ky. 1906). A court of equity has no power to dissolve a corporation. People *v.* District Court, 33 Colo. 293 (1905). Mismanagement is not a good cause for the appointment of a receiver with a view to winding up the business and distributing the assets. A court of equity has no such power. Ulmer *v.* Maine, etc. Co., 93 Me. 324 (1899). A court of equity has no power to wind up a solvent corporation and distribute its assets simply on the ground of dissensions among the stockholders. Sternberg *v.* Wolff, 56 N. J. Eq. 555 (1898). See s. c., 56 N. J. Eq. 389 (1897). A court of equity has no jurisdiction to appoint a receiver of and dissolve a solvent beneficial assessment association on the ground of mismanagement, fraud, and the abuse of corporate powers. Mason *v.* Equitable League, 77 Md. 483 (1893). A stockholder cannot file a bill for the dissolution of an insolvent corporation. Heap *v.* Heap Mfg. Co., 97 Mich. 147 (1893). But the court will appoint a receiver to preserve the corporate assets where the majority do not elect officers. Lawrence *v.* Greenwich Fire Ins. Co., 1 Paige, 587 (1829). In Tennessee, where a corporation has abandoned business for many years, and has no known board of directors, a stockholder may file a bill to wind up its affairs, but he should not join the corporation as a complainant with himself. In such a case no request to the directors is necessary. Tennessee, etc. Co. *v.* Ayers, 43 S. W. Rep. 744 (Tenn. 1897). Where for twenty-five years incorporation has been abandoned and its property has been held by a trustee a stockholder may file a bill in equity to have the property sold and the assets distributed, even though there has been no dissolution. Greenleaf *v.* Land, etc. Co., 60 S. E. Rep. 424 (N. C. 1908).

Where, upon voluntary dissolution, the stockholders appoint two of their number to administer the assets, the court will not displace them and appoint a receiver. Follett *v.* Field, 30 La. Ann. 161 (1878). A single stockholder in an insolvent corporation cannot have it dissolved in a court of equity. Merryman *v.* Carroll, etc. Co., 4 Ry. & Corp. L. J. 12 (1888). A corporation cannot be dissolved except by judicial sentence or sovereign power. A court of equity has no inherent power to decree dissolution. A member cannot sue for his part of the assets until a dissolution is had. Magee *v.* Geneseo Academy, 17 N. Y. St. Rep. 221 (1888). A stockholder cannot have the corporation wound up in equity. Hinckley *v.* Pfister, 83 Wis. 64 (1892). Where for seven years a stockholder who owned a majority of the stock elected himself and two of his dummies as directors of the company, and caused the board to vote a large salary to himself as president and manager, and had leased to the company his property at a large rental, the salary and rental were declared illegal and void. Where the same company had failed to pay its dividends by reason of such acts, a court of equity, upon the suit of another stockholder, ordered the president to account, and appointed a receiver of the company and directed

upon the stock, caused the stock to be forfeited for non-payment, and judgment to be entered on said debts and the property to be sold out, a stockholder may file a bill to set aside all the transactions and to compel the directors to account and to wind up the company.[1] A court of equity has no power to sequestrate the property of a corporation by means of a receiver.[2] Sequestration is the

that its affairs be wound up. Miner *v.* Belle Isle Ice Co., 93 Mich. 97 (1892). The appellate court, in Florida Const. Co. *v.* Young, 59 Fed. Rep. 721 (1892), refused to reverse an order in an action brought by stockholders in a construction company for an accounting between the company and a railroad company, and a distribution of the assets of the former. The order appointed a receiver of the former and granted an injunction. "The power to declare a forfeiture of corporate franchises was originally in England vested in the courts of law, and was exercised in a proceeding brought by the attorney-general in the name of the sovereign. The court of chancery never assumed jurisdiction in such cases until it was conferred by act of parliament. It declined, until the power was conferred by statute, to sequestrate corporate property through the medium of a receiver or to dissolve corporate bodies, or to restrain the usurpation of corporate powers." Decker *v.* Gardner, 124 N. Y. 334 (1890). In the absence of statutory authority, a court of equity has no jurisdiction to dissolve a corporation. Wheeler *v.* Pullman Iron, etc. Co., 143 Ill. 197 (1892).

1 Jellenik *v.* Huron, etc. Co., 177 U. S. 1 (1899). A suit for the appointment of a receiver and an accounting and the liquidation of the affairs of a corporation, lies at the instance of a stockholder where it appears that the board of directors and a majority of the stockholders are guilty of mismangement and gross negligence. Klugh *v.* Coronaca, etc. Co., 66 S. C. 100 (1903). Where a corporation organized to build a town and sell lots finds that its plans are impossible, and it owes no debts and has been practically abandoned by its stockholders, and the officers each year sell a little of the land to pay taxes, some of the stockholders, even though they are a minority, may file a bill to have the court wind up the affairs of the company and distribute the proceeds, it being shown that there are a great number of stockholders scattered throughout the country, and that it is impossible to get a majority of them together. Noble *v.* Gadsden, etc. Co., 133 Ala. 250 (1902). Where a corporation has abandoned business for many years and its property has deteriorated, and the officers are not serving, a stockholder may file a bill to liquidate its affairs and to obtain an adjudication as to the validity of certain stock in order that the distribution may be made to those stockholders who are entitled to the assets. Central Land Co. *v.* Sullivan, 44 S. Rep. 644 (Ala. 1907). In a suit by a stockholder to dissolve a corporation, where it has failed in its purposes and objects, all the stockholders are necessary parties defendant. Ross *v.* American Banana Co., 43 S. Rep. 817 (Ala. 1907).

2 Matter of Coleman, 174 N. Y. 373 (1903). *Re* Binghamton Gen. Elec. Co., 143 N. Y. 261 (1894). A receiver will not be appointed for a benevolent society in a suit by a member charging that illegal expulsions have been made and illegal election held, even though the illegal officers are running the business; nor will a receiver be appointed, although the purpose of the company is impracticable, the member bringing the suit having been

taking of property from the owner for a time till the rents, issues, and profits satisfy a demand. The judgment in such case does not dissolve the corporation.[1] In proving dissolution of a foreign corporation it is not sufficient to prove the decree of a court to that effect. The statutory power of the court to dissolve must also be proved.[2] Sometimes the corporation, after paying its debts, distributes its assets among its stockholders without any dissolution.[3]

In many of the states and in England there are statutes regulating the dissolution of a corporation. These statutes generally specify what parties may bring suit for dissolution, on what grounds dissolution will be decreed, and what proceedings must be taken to obtain the decree. Such a statutory dissolution is hardly a voluntary dissolution, and yet it approaches that kind of dissolution more nearly than any other.[4] A bill filed by a stockholder under the terms of a

a party thereto. Equity will not interfere, although the company is wholly illegal and unauthorized. The remedy is at law. Crombie *v.* Order of Solon, 157 Pa. St. 588 (1893). *Cf.* 116 N. W. Rep. 893.

1 Proctor *v.* Sidney, etc. Co., 8 N. Y. App. Div. 42 (1896). A collusive suit by officers for dissolution and the appointment of a receiver does not prevent a creditor filing an independent bill. Taber *v.* Royal, etc. Co., 124 Ala. 681 (1899). Under a prayer for general relief in a judgment creditor's suit the court may wind up the affairs of the corporation. Barber *v.* International Co., 73 Conn. 587 (1901).

2 Olds *v.* City, etc. Co., 185 Mass. 500 (1904).

3 See §§ 670–672, *infra*, and § 548, *supra*.

4 Thus, in New York, elaborate provision is made. The majority of the directors may apply for dissolution. See Code Civ. Pro., §§ 2419, etc. As also may a creditor or stockholder. Code Civ. Pro., §§ 1784, etc. Under the New York statute the court will order the dissolution of a corporation where a majority of the directors and stockholders wish it, where the interests are discordant, and a dissolution will be beneficial. *Re* Importers', etc. Exchange, 132 N. Y. 212 (1892). Where a reduction of the number of directors is attempted, but not made in compliance with the statute, an attempt at voluntary dissolution by a majority of the directors as reduced is not legal, they not being a majority of the original number of directors. Matter of Dolgeville, etc. Co., 160 N. Y. 500 (1899). Under the old statute, part of the stockholders might compel a dissolution where there had been a failure to elect officers. Ward *v.* Sea Ins. Co., 7 Paige, 294 (1838). Where a majority of the directors and stockholders apply for dissolution the court will presume that it should be granted. *Re* Niagara Ins. Co., 1 Paige, 258 (1828). In general, see also *Re* Pyrolusite, etc. Co., 29 Hun, 429 (1883); *Re* Boynton, etc. Co., 34 Hun, 369 (1884). Corporate creditors cannot, before judgment, apply for a dissolution of the corporation. Cole *v.* Knickerbocker, etc. Ins. Co., 23 Hun, 255 (1880); aff'd, 91 N. Y. 641. In a stockholders' suit to dissolve and wind up a corporation the books of the company are not admissible as against them, being mere declarations in its favor. Matter of Ditman, 65 N. Y. App. Div. 343 (1901). It is legal for a person to contract with the directors of an insurance company to purchase at least sixty-five per cent. of the stock of the company, the same offer being made to all the

statute to bring about a dissolution and winding up of the corporation will be dismissed where it is shown that the suit is brought in

stockholders, even though it is proposed to thereupon wind up the company. Garrett Co. *v.* Morton, 65 N. Y. App. Div. 366 (1901). In this case the lower court has held (35 N. Y. Misc. Rep. 10—1901) that under the New York statute it is illegal for an insurance company to transfer its business and liquidate its affairs without dissolution proceedings in accordance with the statute, and hence the purchaser of the business cannot maintain a suit for false representations as to the condition of the company. Under a statute authorizing the court to dissolve any corporation on good cause shown, a minority stockholder may file a bill to have the corporation dissolved for purchasing unnecessary real estate. Bixler *v.* Summerfield, 195 Ill. 147 (1902). Where the minority stockholders file a bill for the dissolution of a corporation the court may refuse to proceed unless the stockholders at large are brought in. McKleroy *v.* Gadsen, etc. Co., 126 Ala. 184 (1900). Where the statute provides that two-thirds of the stockholders may cause the corporation to be wound up, their right to do so is absolute and cannot be controlled by the court. Watkins *v.* Lawrence Nat. Bank, 51 Kan. 254 (1893). Under a statute authorizing dissolution for good cause shown, the court will not order dissolution at the instance of the minority merely because the business is not conducted satisfactorily to them and successfully. Platner *v.* Kirby, 115 N. W. Rep. 1032 (Iowa, 1908). The voluntary dissolution of a company under the statute, but without ten days' notice required by the statute, is not such a dissolution as to prevent creditors from attaching the property of the company as though no dissolution had been had. Cleveland, etc. Co. *v.* Taylor, etc. Co., 54 Fed. Rep. 82 (1893). But the dissolution cannot be enjoined by creditors in the absence of fraud. Cleveland, etc. Co. *v.* Taylor, etc. Co., 54 Fed. Rep. 85 (1893). Under statutes in some of the states, an information in the nature of *quo warranto* may be filed at the relation of a shareholder against an illegally-existing corporation to compel a dissolution. Albert *v.* State, 65 Ind. 413 (1879). Under the National Banking Act, see Kennedy *v.* Gibson, 8 Wall. 498 (1869); Bank of Bethel *v.* Pahquioque Bank, 14 Wall. 383 (1871); Bank *v.* Kennedy, 17 Wall. 19 (1872); *Re* Platt, 1 Ben. 534 (1867); s. c., 19 Fed. Cas. 815. A resolution of two-thirds of the stockholders in a national bank to go into liquidation does not dissolve the corporation. Merchants' Nat. Bank *v.* Gaslin, 41 Minn. 552 (1889). Where a statute provides that on a certain vote a corporation may be dissolved and a liquidator appointed by the stockholders and such action is taken, the liquidator may file a bill in a court of equity to take charge of such liquidation and enjoin creditors' suits and supervise the acts of the liquidators. *In re* Grant, etc. Co., 51 La. Ann. 1254 (1899). Under a statute a court may decree dissolution where the stockholders are evenly divided and cannot agree and no elections are being held. State *v.* Oudin, etc. Co., 93 Pac. Rep. 219 (Wash. 1908). Under the statutes of Louisiana a state may file a bill in equity to enjoin a corporation from acting as a corporation, its organization being defective, and may also ask that the charter be forfeited for violation of law, even though it had been legally organized. The incorporators and officers need not be made parties defendant. New Orleans, etc. Co. *v.* Louisiana, 180 U. S. 320 (1901). Proceedings for the dissolution of a corporation are not an act of bankruptcy. *In re* Empire, etc. Co., 95 Fed. Rep.

the interest of rival corporations. The reason for dismissal is that

957 (1899). Where the bill does not specify any act which is illegal, fraudulent, or *ultra vires*, nor show any effort on the part of the minority stockholder to change the management, the court will not appoint a receiver and will not decree dissolution of the corporation. Worth, etc. Co. *v.* Bingham, 116 Fed. Rep. 785 (1902). In West Virginia one-third in interest of the stockholders may apply to the court for a dissolution. See Hurst *v.* Coe, 30 W. Va. 158 (1887).

Under the English act it has been held that the majority cannot insist upon dissolution, though the business is a losing one. *Re* Suburban Hotel Co., L. R. 2 Ch. 737 (1867). But the court may grant it under such circumstances even to a few stockholders. *Re* Factage Parisien, 34 L. J. (Ch.) 140 (1865). In determining whether to order a winding up the court will not consider possible future profits. *Re* European, etc. Soc., L. R. 9 Eq. 122 (1869). For an application to have a winding up because business had not been commenced within a year, see *Re* Tumacacori, L. R. 17 Eq. 534 (1874). If the corporation has sold its property and ceased business the court will order a distribution of the assets. Cramer *v.* Bird, L. R. 6 Eq. 143 (1868). The mere fact that the company is losing money is not sufficient to have a winding up. *Re* Joint-stock Coal Co., L. R. 8 Eq. 146 (1869). The court has a judicial discretion, and will not ordinarily order a winding up at the instance of one stockholder in opposition to all the others. *Re* London Suburban Bank, L. R. 6 Ch. 641 (1871). But if the company is insolvent or is doing a ruinous business, with no prospect of a change, the court will order a winding up on the petition of a minority. *Re* Great Northern, etc. Min. Co., 17 W. R. 462 (1869). Where the main purpose of a corporation is the furnishing of lodgings and refreshments at the queen's jubilee, a stockholder has the right to have the company dissolved after the jubilee, even though, under general clauses, the objects of the company are to furnish lodgings and refreshments generally, and even though the directors intend to continue the business. *Re* Amalgamated Syndicates, Ltd., [1897] 2 Ch. 600. Where a company is organized to work gold mines in a specified place as well as elsewhere, and the company actually works mines elsewhere, but not in the specified place, the main purpose of the company is not carried out and a dissolution may be had. *Re* Coolgardie, etc. Mines, Ltd., 76 L. T. Rep. 269 (1897). Where a corporation has been enjoined from using its name, this is cause for a dissolution. *Re* Thomas, etc. Sons, Ltd., [1897] 1 Ch. 406. A court has no jurisdiction to wind up a corporation where a company was never incorporated, one of the requisite incorporators not having signed the articles of incorporation. *Re* National, etc. Corp., [1891] 2 Ch. 505. See also, in general, under this winding-up act, *Re* Factage Parisien, 34 L. J. (Ch.) 140 (1865); *Re* Exmouth Docks Co., L. R. 17 Eq. 181 (1873); *Re* Sanderson's Patents Assoc., L. R. 12 Eq. 188 (1871); *Re* Bradford Navigation Co., L. R. 10 Eq. 331 (1870); Princess of Reuss *v.* Bos, L. R. 5 H. L. 176 (1871); *Re* Commercial Bank, L. R. 6 Eq. 517 (1868); *Re* London India Rubber Co., L. R. 1 Ch. 329 (1866); *Re* Pen-y-Van Colliery Co., L. R. 6 Ch. D. 477 (1877); *Re* United Service Co., L. R. 7 Eq. 76 (1868); *Re* German Date Coffee Co., L. R. 20 Ch. D. 169 (1882), holding that where a company was organized and chartered to engage in manufacture and sale of goods under a certain patent, when in fact there was no patent such as was referred to, and an application for such a patent was refused, *held*, that the substratum

the suit is a fraud upon the court.[1] Where the statutes authorize dissolution on a certain vote of the stockholders, a dissolution so voted is legal, irrespective of the motives of the stockholders in voting it.[2] Hence a stockholder may vote for the dissolution of the corpo-

upon which the company was based or main object for which it was formed not being in existence, the company must be dissolved on petition of a shareholder, notwithstanding it was profitably engaged in the manufacture and sale of the commodity without any patent, and notwithstanding a very large majority of the company desired to have the company continue in business. To same effect, under somewhat similar circumstances, *Re* Haven Gold Min. Co., L. R. 20 Ch. D. 151 (1882). A lender of money to a benefit building society cannot petition to wind it up. *Ex parte* Williamson, L. R. 5 Ch. 309 (1869). Mortgage bondholders cannot institute winding-up proceedings under the English act. *Re* Uruguay, etc. Ry., L. R. 11 Ch. D. 372 (1879). For many cases relative to the question of when a court will order a winding up and when not, under the English statute, see Healey, Companies Law and Practice, pp. 446, etc.

1 Watson *v.* Le Grand, etc. Co., 177 Ill. 203 (1898).

2 The "right to have the business carried on until the natural death of the corporation is subject to the will of the majority of two-thirds provided for in the statute." Beling *v.* American, etc. Co., 65 Atl. Rep. 725 (N. J. 1907). A guarantee of dividends on stocks, so long as the certificates are outstanding, but not to exceed the period for which the company was incorporated, ceases upon the dissolution of the company, even though the guarantor owns a majority of the stock of the company and brings about the disolution, unless the dissolution was for the purpose of escaping this liability. Mason *v.* Standard, etc. Co., 85 N. Y. App. Div. 520 (1903). Where the articles of association of an unincorporated joint-stock association authorize dissolution at any time upon the vote of a majority in interest, such dissolution may be had, although it is for the purpose of transferring all the assets to a foreign corporation for stock of the latter, the privilege, however, being given to each stockholder to receive payment in cash on the basis of a certain valuation of the assets, which valuation is fair and adequate. Francis *v.* Taylor, 31 N. Y. Misc. Rep. 187 (1900). Dissolution by a two-thirds vote of the stockholders under a statute may be enjoined by a dissenting stockholder, where the corporation is a going solvent concern and the purpose of the dissolution is to transfer the property to another corporation. Theis *v.* Spokane, etc. Co., 34 Wash. 23 (1904). A depositor in a savings bank may maintain a bill in equity to prevent dissolution thereof, where the purpose is to turn over the business to a trust company. Barrett *v.* Bloomfield Sav. Inst., 64 N. J. Eq. 425 (1903). Under the statutes of New Jersey a stockholder or a creditor may apply for a receiver of an embarrassed corporation, even though its condition is due to his misconduct. McMullin *v.* McArthur, etc. Co., 68 Atl. Rep. 97 (N. J. 1907). Under the act of congress two-thirds in interest of the stockholders of a national bank may liquidate it at any time, and the minority cannot complain that it is a conspiracy, even though two-thirds of stock is held by the directors and executive officers. Green *v.* Bennett, 110 S. W. Rep. 108 (Tex. 1908). Where, pending an application by a shareholder for a receiver of a corporation which has become insolvent by the misconduct

ration as allowed by the statute, even though his object is to terminate a contract which he has with the corporation.[1]

An American court has no power to dissolve an English corporation and wind up its business. A resolution to that effect by the stockholders may be declared invalid. But the American courts will not enjoin a dissolution and winding up of the company in England in accordance with English laws.[2] The courts of one state cannot dissolve a corporation created by another state,[3] but may appoint a receiver of the corporate assets within the jurisdiction.[4]

Where a dissolution is being obtained or has been obtained by fraud and an inequitable overbearing of the rights of an innocent stockholder,[5] a court of equity will, at the instance of the latter, enjoin or set aside the dissolution.[6] A dissolution may be set aside

of the directors, the directors cause voluntary dissolution proceedings to be commenced, and their representatives to be elected liquidators, the court will remove them and appoint a receiver. Fitzgerald *v.* State, etc. Assoc., 69 Atl. Rep. 564 (N. J. 1908).

1 Windmuller *v.* Standard, etc. Co., 115 Fed. Rep. 748 (1902). In the case of Robotham *v.* Prudential Ins. Co., 64 N. J. Eq. 673 (1903), the court approved the decision in Windmuller *v.* Standard, etc. Co., but said that if the complaint had been framed on a different theory, and "if the complainants had attacked the action of the directors in instituting the proceedings for dissolution as the product of bribery or improper influence of any kind, or of favoritism to the majority stockholder, who had appointed the directors, a very different case would have been presented. If the complainants had also charged that the directors, their trustees, had not only committed a gross and flagrant breach of duty, but that the majority stockholder had instigated them to do it, a strong case, apparently, would have been made out, in which to hold the majority stockholder liable for damages."

2 Republican, etc. Mines *v.* Brown, 58 Fed. Rep. 644 (1893).

3 Baker *v.* Backus, 32 Ill. 79, 110 (1863). A Canadian court has no authority to wind up a West Virginia corporation which has no property, officer or agent in Canada and has not transacted business there. Matter of Great Northern, etc. Co., 50 N. Y. Misc. Rep. 467 (1906).

4 See § 865, *infra*. A non-resident stockholder in a non-resident corporation may institute suit asking that the property in the state be applied to the debts; showing that otherwise it would be lost by attachments and by the extravagant management of the officers. Culver, etc. Co. *v.* Culver, 99 S. W. Rep. 391 (Ark. 1906). A Texan stockholder in an Indiana corporation, owning land in Texas, cannot have a receiver appointed in Texas on the ground that preferred stock had been fraudulently issued and corporate funds diverted, etc., the purpose of the bill being to wind up the affairs of the company and sell its property and pay its debts. American, etc. Co. *v.* Schuler, 34 Tex. Civ. App. 560 (1904). See 116 N. W. Rep. 893.

5 People *v.* Hektograph Co., 10 Abb. N. Cas. 358 (1882). A stockholder, who has been induced by fraud to consent to a dissolution, may hold the guilty parties liable. Vogt *v.* Vogt, 119 N. Y. App. Div. 518 (1907).

6 *Re* Beaujolais Wine Co., L. R. 3 Ch. 15 (1867); *Re* London, etc. Discount Co., L. R. 1 Eq. 277 (1865). In

where the corporation concealed the existence of a large claim against it and such creditor was not aware of the dissolution proceedings.[1] But even though the motive of directors in dissolving a corporation in accordance with the statute are fraudulent, yet this is not cause for setting aside the dissolution at the instance of a minority stockholder.[2] A dissolution cannot be attacked collaterally on the ground that it was obtained by a false statement.[3] Resignations of all the officers and directors in order to have a receiver appointed under the New York statute and wind up the corporate affairs, are illegal.[4]

§ 630. There has been some doubt whether a voluntary dissolution by all or a majority of the stockholders is completed by a mere vote of the stockholders, or whether a decree of a court is needed and is sufficient; or whether a legislative acceptance and confirmation of the dissolution is essential. The better opinion is that the resolution of the stockholders to dissolve will effect a dissolution only after the legislature has accepted it and ordained it, or a court duly authorized by statute to accept a voluntary dissolution has entered a decree to that effect.[5] Where a charter expires

Stupart *v.* Arrowsmith, 3 Sm. & G. 176 (1855), a bill filed by a shareholder on behalf of himself and others to set aside a dissolution, after three years' acquiescence, no fraud or imposition being alleged, was dismissed with costs. *Cf.* Kent. *v.* Jackson, 2 De G., M. & G. 49 (1852); Bailey's Appeal, 96 Pa. St. 253 (1880), where certain stockholders procured the dissolution of a corporation by fraud. They were held to be trustees *ex maleficio* for the *bona fide* stockholders, and as such liable to account to them for the assets of the company. See 96 Pac. Rep. 1062.

1 Sullivan Co. R. R. *v.* Connecticut, etc. Co., 76 Conn. 464 (1904).

2 Knickerbocker *v.* Groton, etc. Co., 111 N. Y. App. Div. 145 (1906). See also § 736, *infra*.

3 Crossman *v.* Vivienda, etc. Co., 150 Cal. 575 (1907).

4 Zeltner *v.* Zeltner, etc. Co., 174 N. Y. 247 (1903).

5 Portland Dry Dock, etc. Co. *v.* Trustees of Portland, 12 B. Mon. (Ky.) 77 (1851); La Grange, etc. R. R. *v.* Rainey, 7 Coldw. (Tenn.) 420 (1870); Harris *v.* Muskingum Mfg. Co., 4 Blackf. (Ind.) 267 (1836); Town *v.* Bank of River Raisin, 2 Doug. (Mich.) 530 (1847); Currien *v.* Santini, 16 La. Ann. 27 (1861); Norris *v.* Smithville, 1 Swan (Tenn.), 164 (1851); Bradt *v.* Benedict, 17 N. Y. 93, 99 (1858); Boston Glass Mfy. *v.* Langdon, 41 Mass. 49 (1841); Wilson *v.* Central Bridge, 9 R. I. 590 (1870); Penobscot Boom Corp. *v.* Lamson, 16 Me. 224 (1839); Enfield Toll Bridge Co. *v.* Connecticut River Co., 7 Conn. 28, 45 (1828); Mumma *v.* Potomac, etc., 8 Pet. 281, 287. A corporation cannot legally dissolve itself except with the consent of the state. *In re* North American, etc. Co., 99 Minn. 475 (1906). An acceptance by the state of a surrender of a charter is necessary in order to complete a dissolution by voluntary surrender. Atty.-Gen. *v.* Superior, etc. Ry., 93 Wis. 604 (1896). A mere resolution of the stockholders is ineffectual. New York, etc. Works *v.* Smith, 4 Duer, 362 (1855); Powell *v.* Oregonian Ry., 38 Fed. Rep. 187 (1889). A notice of the resolution sent to the governor is ineffectual. Mechanics' Bank *v.* Heard, 37 Ga. 401

no adjudication of dissolution is necessary.[1] A federal court may have jurisdiction of a suit by a stockholder to wind up an insolvent corporation, as allowed by a state statute.[2]

§ 631. *Acts which do not constitute dissolution.*—There are certain acts and facts which do not in themselves constitute a dissolution. A dissolution is not effected by a failure to elect officers;[3] nor by

(1867); Revere *v.* Boston, etc. Co., 32 Mass. 351 (1834). By a statute the acceptance may be made by a proclamation. Campbell *v.* Mississippi Union Bank, 7 Miss. 625, 681 (1842). The judgment of a court of law in such a case is ineffectual. Chesapeake, etc. Co. *v.* Baltimore, etc. R. R., 4 Gill & J. (Md.) 1, 107 (1832). In England the surrender at common law was to the king, and had to be accepted by him in order to work a dissolution. Rex *v.* Amery, 2 T. R. 515, 531 (1788); Rex *v.* Gray, 8 Mod. 358 (1825). *Cf.* Bruce *v.* Platt, 80 N. Y. 379 (1880). A voluntary dissolution need not be accepted by the state. Merchants', etc. Line *v.* Waganer, 71 Ala. 581 (1882). The case of Webster *v.* Turner, 12 Hun, 264 (1877), can be upheld only in connection with § 631, *infra.* See also cases in notes *supra*, to effect that a court cannot decree a dissolution at the instance of stockholders. Many states now have statutes expressly giving to courts such authority. The statutes may of course make a voluntary dissolution effectual without legal proceedings.

1 People *v.* James, 5 N. Y. App. Div. 412 (1896), holding also that where the statute provides for the directors winding up the company the attorney-general cannot maintain an action for that purpose in behalf of the state.

2 Briggs *v.* Traders' Co., 145 Fed. Rep. 254 (1906). Where by a state statute a stockholder may apply for dissolution the suit may be in the federal courts. Jacobs *v.* Mexican Sugar Co., 130 Fed. Rep. 589 (1904). Even though by statute a state court of equity is given power to dissolve a corporation, yet the United States court in equity cannot exercise this power. Conklin *v.* United States, etc. Co., 140 Fed. Rep. 219 (1905).

3 Speer *v.* Colbert, 200 U. S. 130 (1906); Rose *v.* Turnpike Co., 3 Watts (Pa.), 46 (1834); Lehigh Bridge Co. *v.* Lehigh Coal, etc. Co., 4 Rawle (Pa.), 8, 23 (1832); Commonwealth *v.* Cullen, 13 Pa. St. 133 (1850); Hoboken Building, etc. Assoc. *v.* Martin, 13 N. J. Eq. 427 (1861); Evarts *v.* Killingworth Mfg. Co., 20 Conn. 447 (1850); Nashville Bank *v.* Petway, 3 Humph. (Tenn.) 522 (1842); Boston Glass Mfy. *v.* Langdon, 41 Mass. 49 (1841); Russell *v.* McLellan, 31 Mass. 63 (1833); Cahill *v.* Kalamazoo, etc. Ins. Co., 2 Doug. (Mich.) 124, 140 (1845); Harris *v.* Mississippi Valley, etc. R. R., 51 Miss. 602 (1875); People *v.* Runkle, 9 Johns. 147 (1812); Philips *v.* Wickham, 1 Paige, 590 (1829); Slee *v.* Bloom, 5 Johns. Ch. 366 (1821); s. c., 19 Johns. 456 (1822); St. Louis, etc. Loan Assoc. *v.* Augustin, 2 Mo. App. 123 (1876); Knowlton *v.* Ackley, 62 Mass. 93 (1851); Mendota *v.* Thompson, 20 Ill. 197 (1858); People *v.* Wren, 5 Ill. 269 (1843). Nor will a resignation of all the officers dissolve the corporation. Muscatine Turn Verein *v.* Funck, 18 Iowa, 469 (1865); Evarts *v.* Killingworth Mfg. Co., 20 Conn. 447 (1850). The corporate rights and franchises are, in such a case, merely dormant until other officers are elected. Philips *v.* Wickham, 1 Paige, 590 (1829). *Cf.* Lea *v.* American Atlantic, etc. Canal Co., 3 Abb. Pr. (N. S.) 1 (1867). Failure to elect officers does not dissolve the corporation nor terminate the term of

a sale or assignment of all the corporate property;[1] nor by the fact that one person owns all the shares of stock;[2] nor by a cessation of all corporate business and acts;[3] nor by the death of its stock-

office of existing officers. Youree *v.* Home, etc. Co., 180 Mo. 153 (1904). Failure to elect directors is not dissolution. Drake *v.* Herndon, 91 S. W. Rep. 674 (Ky. 1906). A corporation which for a long time was abandoned and which is unable to tell who its stockholders are may file a bill in equity to ascertain who its stockholders are and to cancel illegal certificates and determine the rights of conflicting claims to the stock. Geneva, etc. Co. *v.* Steele, 111 N. Y. App. Div. 706 (1906).

1 Quoted and approved in State *v.* Mitchell, 104 Tenn. 336, 343 (1898); Barclay *v.* Talman, 4 Edw. Ch. 123 (1842); De Camp *v.* Alward, 52 Ind. 468 (1876); Reichwald *v.* Commercial Hotel Co., 106 Ill. 439 (1883); Rollins *v.* Clay, 33 Me. 132 (1851); Kansas City Hotel Co. *v.* Sauer, 65 Mo. 279 (1877); Troy, etc. R. R. *v.* Kerr, 17 Barb. 581 (1854), where a railroad corporation had leased the entire property to another corporation; State *v.* Merchant, 37 Ohio St. 251 (1881); Smith *v.* Gower, 2 Duv. (Ky.) 17 (1865). To same effect, State *v.* Rives, 5 Ired. L. (N. C.) 297 (1844); Bruffett *v.* Great Western R. R., 25 Ill. 353 (1861). The fact that the company sells its property and that one person acquires all the stock does not dissolve the corporation. Parker *v.* Bethel Hotel Co., 96 Tenn. 252 (1896). Even though all the property of the corporation has been sold by a foreclosure *in pais*, the corporation continues in existence, but is not liable for the negligence of a lessee of the purchaser at such foreclosure sale. Williard *v.* Spartanburg, etc. R. R., 124 Fed. Rep. 796 (1903). Where a statute provides for dissolution by transferring all the corporate property and such conveyance is made this in itself constitutes dissolution. State *v.* Grant University, 115 Tenn. 238 (1905).

2 See § 709, *infra.* A railroad company which acquires all the stock of another railroad company and then files a certificate with the secretary of state under the New York statute, which prescribes that thereupon the former succeeds to the property of the latter, is practically dissolved. Rochester Railway *v.* Rochester, 205 U. S. 236 (1907), aff'g 182 N. Y. 116.

3 Attorney-General *v.* Bank of Niagara, Hopk. Ch. 403 (1825); Harrington *v.* Connor, 51 Neb. 214 (1897); Baptist Meeting-house *v.* Webb, 66 Me. 398 (1877); Rollins *v.* Clay, 33 Me. 132 (1851); Harris *v.* Nesbit, 24 Ala. 398 (1854); Kansas City Hotel Co. *v.* Sauer, 65 Mo. 279, 288 (1877); Nimmons *v.* Tappan, 2 Sweeney (N. Y.), 652 (1870); Mickles *v.* Rochester City Bank, 11 Paige, 118 (1844); State *v.* Barron, 58 N. H. 370 (1878); *Re* Jackson M. Ins. Co., 4 Sandf. Ch. 559 (1847); West *v.* Carolina, etc. Co., 31 Ark. 476 (1876); Bache *v.* Horticultural Soc., 10 Lea (Tenn.), 436 (1882); Brandon Iron Co. *v.* Gleason, 24 Vt. 228 (1852); Atlanta *v.* Gate, etc. Co., 71 Ga. 106 (1883); Law *v.* Rich, 47 W. Va. 634 (1900). Mere non-user does not dissolve a corporation. A proceeding in behalf of the state is first necessary. Bloch *v.* O'Connor, etc. Co., 129 Ala. 528 (1900). Dissolution may exist by cessation, etc., so far as the reversion of property given to the corporation is concerned. Stone *v.* Framingham, 109 Mass. 303 (1872). A cessation of business with the understanding that the company is dissolved, the property having been transferred to the stockholders, does not work a dissolution. Suits may be instituted against the company. Carnaghan *v.* Exporters', etc. Co., 11 N. Y. Supp. 172 (1890).

holders;[1] nor by insolvency;[2] nor, in all cases, by a consolidation with another corporation under statutory authority.[3] Nor is it dissolved by the appointment of a receiver,[4] or the foreclosure of a mortgage,[5] nor by failure to file reports.[6] The fact that there are less stockholders than the charter requires does not invalidate the acts of the corporation.[7] For certain purposes, however, such as rendering stockholders liable on their statutory liability,[8] or relieving directors from a penal liability,[9] dissolution is held to arise by some of these acts. Failure to pay an incorporation fee to the state

A foreclosure sale of all the property and franchises of a corporation will close out and foreclose the whole interest of the stockholders therein. Vatable *v.* New York, etc. R. R., 96 N. Y. 49 (1884); Thornton *v.* Wabash Ry., 81 N. Y. 462, 467 (1880). See also Sullivan *v.* Portland, etc. R. R., 94 U. S. 806 (1876). As to reorganization, see ch. LII, *infra.*

1 Boston Glass Mfy. *v.* Langdon, 41 Mass. 49, 52 (1841); Russell *v.* McLellan, 31 Mass. 63, 69 (1833).

2 Stolze *v.* Manitowoc, etc. Co., 100 Wis. 208 (1898); Geneva, etc. Co. *v.* Coursey, 45 N. Y. App. Div. 268 (1899); Moseby *v.* Burrow, 52 Tex. 396 (1880); Valley Bank, etc. Inst. *v.* Sewing Soc., 28 Kan. 423 (1882). Such is the case though a receiver has been appointed. State *v.* Merchant, 37 Ohio St. 251 (1881); National Bank *v.* Insurance Co., 104 U. S. 54 (1881); Kincaid *v.* Dwinelle, 59 N. Y. 548 (1875). The insolvency of a corporation and the appointment of a receiver do not constitute dissolution. Chemical Nat. Bank *v.* Hartford Deposit Co., 161 U. S. 1 (1896).

3 See ch. LIII, *infra.*

4 The appointment of a receiver does not dissolve a corporation. Nothing but the expiration of the charter or the judgment of a court can do that. Hasselman *v.* Japanese, etc. Co., 2 Ind. App. 180 (1891).

5 Smith *v.* Gower, 2 Duv. (Ky.) 17 (1865); White, etc. R. R. *v.* White, etc. R. R., 50 N. H. 50 (1870). In Pennsylvania it seems to be held that the foreclosure sale of all the assets of the company extinguishes the company itself. Reynolds *v.* Cridge, 1 Pa. Dist. 693 (1892); New Castle Northern Ry. *v.* New Castle, etc. R. R., 1 Pa. Dist. 768 (1892). Where a railroad company's property has been foreclosed, and for twenty-six years it has owned no property and kept up no existence, it will be presumed to have been dissolved, and service upon it will be set aside. Combes *v.* Keyes, 89 Wis. 297 (1895). A corporation is not dissolved by the fact that it has lost all its property. Weigand *v.* Alliance Supply Co., 44 W. Va. 133 (1897). A corporation is not dissolved by reason of its property being sold out under a mortgage. Bump *v.* Butler County, 93 Fed. Rep. 290 (1899).

6 Failure to file a report does not work a forfeiture of the charter. State *v.* Brownstown, etc. Co., 120 Ind. 337 (1889).

7 Welch *v.* Importers', etc. Bank, 122 N. Y. 177 (1890). The facts that the corporate officers are dead, and the number of stockholders is less than the number required for incorporation, do not dissolve the corporation. *Re* Belton, 47 La. Ann. 1614 (1895).

8 See Slee *v.* Bloom, 19 Johns. 456 (1822), and § 219, *supra.* *Cf.* Bradt *v.* Benedict, 17 N. Y. 93 (1858).

9 Losee *v.* Bullard, 79 N. Y. 404 (1880).

does not forfeit a charter, even though the statute prohibits it from doing business until such fee is paid.[1] A foreign business corporation doing business in Colorado ceases to be a corporation in that state after twenty years, even though by its charter it was to exist fifty years, the Colorado statutes allowing incorporation for twenty years only.[2]

§ 632. *Only the attorney-general can institute a suit to forfeit a corporate charter.*—Such unquestionably is the law. It is for the state alone to withdraw the charter which the state has given. A stockholder cannot institute the suit;[3] nor a corporate creditor;[4] nor can the municipal authorities by reason of a change of route by a railroad;[5] nor can a person who is overcharged on a turnpike bring suit to forfeit the company's charter.[6] In a suit in equity by a toll road company to enjoin the municipality from interfering with the erection of its gates and fence, its franchise cannot be declared forfeited.[7] The secretary of state cannot forfeit a charter, even though the statute prescribes forfeiture for non-payment of taxes;[8] but it is constitutional to provide by statute, as is the case in New

1 Murphy *v.* Wheatley, 102 Md. 501 (1896).

2 Iron, etc. Co. *v.* Cowie, 31 Colo. 450 (1903).

3 North *v.* State, 107 Ind. 356 (1886); Baker *v.* Backus, 32 Ill. 79 (1863); Commonwealth *v.* Union Ins. Co., 5 Mass. 230 (1809); State *v.* Paterson, etc. Turnp. Co., 21 N. J. L. 9 (1847); Murphy *v.* Farmers' Bank, 20 Pa. St. 415 (1853); Rice *v.* National Bank, 126 Mass. 300 (1879); Folger *v.* Columbian, etc. Ins. Co., 99 Mass. 267 (1868), where the court refused to recognize a dissolution decreed by a New York court at the instance of a stockholder; Raisbeck *v.* Oesterricher, 4 Abb. N. Cas. 444 (1878), where the plaintiff claimed that the incorporation was irregular.

4 Gaylord *v.* Fort Wayne, etc. R. R., 6 Biss. 286 (1875); s. c., 10 Fed. Cas. 121. A judgment forfeiting the charter of a private corporation, where the state is not a party to the suit, is a nullity. Pickett *v.* Abney, 84 Tex. 645 (1892).

5 Moore *v.* Brooklyn, etc. R. R., 108 N. Y. 98 (1888).

6 Commonwealth *v.* Allegheny Bridge Co., 20 Pa. St. 185 (1852): State *v.* White's, etc. Co., 3 Tenn. Ch. 164 (1876), where the bill purported to be in the attorney-general's name. A shipper of freight cannot by bill in equity compel a canal company to repair and render its canal navigable. Only the state can complain. Buck, etc. Co. *v.* Lehigh, etc. Co., 50 Pa. St. 91 (1865). The statutes of a state, however, sometimes change these rules of law.

7 Bridge Street, etc. Co. *v.* Hogadone, 114 N. W. Rep. 917 (Mich. 1908).

8 Fox *v.* Robbins, 62 S. W. Rep. 815 (Tex. 1901). The secretary of state has no inherent power to forfeit a charter for non-payment of taxes. Rippstein *v.* Haynes, etc. Ry., 85 S. W. Rep. 314 (Tex. 1905). A statute of West Virginia stating that charters shall be forfeited if corporate taxes are not paid does not authorize the secretary of state to declare corporate charters forfeited. Forfeiture can be made only in a suit by the state brought for that purpose. Greenbrier Lumber Co. *v.* Ward, 30 W. Va. 43 (1887).

Jersey, that the charter and all corporate powers shall be void and cease upon the non-payment of taxes.[1] A stockholder in a corporation cannot sustain a bill to have the charter forfeited and the corporation wound up on the ground that it was formed to purchase and combine various competing linseed-oil mills for the purpose of forming a monopoly. The state alone can ask for such a forfeiture. Moreover, the stockholder, by being a stockholder, is estopped from complaining, and is presumed to have had knowledge of the facts from the time that he became a stockholder.[2] Where a public corporation, vested with state property for public use, makes a lease of it which is *ultra vires,* a private person cannot sustain a suit to contest it; this can be done only by the state or the corporation.[3] The attorney-general has inherent power from his office to institute a *quo warranto* proceeding against a corporation abusing or misusing its franchise.[4]

§ 633. *Forfeiture for misuser—Acts which constitute a misuser—Ultra vires acts and usurpation of franchises.*—The law is clear that, if a corporation misuses its powers, the state may by a suit withdraw the charter which it has given. Great difficulty, however, arises in determining what constitutes a misuser. A clear idea can be obtained only by a study of the cases themselves.[5]

1 See General Corporation Act of New Jersey, L. 1896, p. 319. As to such a provision being self-executing, see § 638, *infra.*

2 Coquard *v.* National L. O. Co., 171 Ill. 480 (1898).

3 Directors, as such, of such corporation, cannot sustain such a suit. Smith *v.* Cornelius, 41 W. Va. 59 (1895).

4 Malone *v.* New York, etc. R. R., 83 N. E. Rep. 408 (Mass. 1908).

5 A corporation organized to manufacture railway cars has no power to lay out a town around its works and build twenty-two hundred homes to lease to its employees, to build and run a hotel and saloon, and also a theatre, a gas plant, a sytem of waterworks and a brick plant, and to own and run a farm for supplies to sell, and for its employees, and to own stock in other corporations manufacturing and selling bar iron and railroad spikes; but may erect an office building containing more space than it requires at the time, and may purchase more real estate than it actually requires at the time, and may supply liquor, etc., to passengers on its cars, and may sell surplus steam power. The state may bring *quo warranto* proceedings to forfeit the charter. It is no defense that the usurpations had continued for many years to the knowledge of the state, or that a legislative committee had reported that the real estate was properly taxed. People *v.* Pullman's Palace Car Co., 175 Ill. 125 (1898). The state will, at the instance of the attorney-general, forfeit the charter of the corporation whose stockholders have entered into a "trust" with the stockholders of competing corporations, for the purpose of forming a monopoly in and raising the price of sugar. The "trust" is not a joint-stock association. It is of the character of a trust estate. People *v.* North River Sugar Ref. Co., 121 N. Y. 582 (1890). *Quo warranto* lies against a corporation formed to purchase substantially all the distilleries in the

In Ohio it has been held that a statute giving to a court the

country. Distilling, etc. Co. *v.* People, 156 Ill. 448 (1895). The state may forfeit a charter for a failure of the officers to file the annual report and of the stockholders to pay in the capital stock as required by statute. It is immaterial that the state's action was induced by parties who were themselves responsible for the failure to comply with the statute. People *v.* Buffalo, etc. Co., 131 N. Y. 140 (1892). It is cause for forfeiture that some of the directors, all of whom were required to be stockholders, held but one share each, the certificates for which shares were transferred back at once to the real parties in interest, thus leaving the directors disqualified; also that required certificates had not been filed; also that annual elections had not been held; also that the corporation had done business *ultra vires*. But unless public interest so requires, the attorney-general should not bring suit at his own instance. Lorillard *v.* Clyde, 142 N. Y. 456 (1894). A water-works charter may be forfeited where it wilfully and persistently charges more for water than its charter specifies. State *v.* New Orleans, etc. Co., 107 La. 1 (1901). See s. c., 185 U. S. 336. A gas charter will not be forfeited because some of the customers use it also for heating. People *v.* Los Angeles, etc. Co., 150 Cal. 557 (1907).

In the case of State *v.* Hogan, 163 Mo. 43 (1901), it was held that an option to buy a mine is not property for which stock may be issued, under the constitution and statutes of the state of Missouri, there being no proof that the person giving the option owned it. Hence where $90,000 of stock was issued for the option and for services in inspecting the mine, and $30,000 of the stock was turned back for treasury stock, the court held that the state might maintain a bill to forfeit the charter. The decision of the Virginia courts forfeiting the charter of a club because it violated the liquor laws is valid, even though the liquor laws were passed after the charter had been granted to the club. Cosmopolitan Club *v.* Virginia, 208 U. S. 378 (1907). See also 210 *Id.* 324.

Under the statutes of Alabama in reference to watered stock, *quo warranto* lies where $1,000,000 of stock is issued for the possibility of patents to be thereafter granted. In such *quo warranto* proceedings stockholders need not be made parties. State *v.* Webb, 97 Ala. 111 (1893). Where a railroad leases its line in violation of a constitutional provision prohibiting the consolidation of parallel lines, it is subject to forfeiture. So also where it issues "watered stock" in violation of the constitution. State *v.* Atchison, etc. R. R., 24 Neb. 143 (1888); s. c., 38 Neb. 437. In the case of State *v.* New Orleans, etc. Co., 51 La. Ann. 1827 (1899), the subscribers to the stock of a debenture company paid ninety-five per cent. of their subscription by borrowing that amount from the company on their notes, and thereupon full-paid stock was issued to them, although the statute prohibited the issue of stock until paid for. The state brought suit to set aside the charter and liquidate the company. The court held that under the constitution of Louisiana the incorporation was illegal. The court held also that the charter was illegal, in that the debentures issued were forfeited if deferred payments were not made, and that they provided for cancellation at fifty per cent. on the amount paid, and that they were redeemable in numerical order in six years and that it would be impossible for the company to pay them. The same conclusion was reached in State *v.* Louisiana, etc. Co., 51 La. Ann. 1795 (1899). Where a corporation is authorized to com-

power to forfeit the franchises of turnpike companies for being

mence business only when $100,000 of stock has been subscribed, and it does commence business prior to such subscription being made, the state may file a bill to forfeit its charter. State *v.* Debenture, etc. Co., 51 La. Ann. 1874 (1899). In the case of State *v.* Portage City, etc. Co., 107 Wis. 441 (1900), the court stated that a contract between a city and a water-works company, giving to the latter the right to use the streets for its water pipes, was a franchise, and that *quo warranto* would lie to forfeit such franchise for failure to supply water in accordance with its terms.

Where an unauthorized lease of competing lines has been made, the state may forfeit the charter of the lessor and cause a receiver of the charter to be appointed, and such proceedings will lie even six years after the lease has been made. Eel River R. R. *v.* State, 155 Ind. 433 (1900). The state cannot oust a foreign railroad corporation from operating a railroad in the state on the ground that the railroad in the state had been leased to the foreign company without the consent of the stockholders, as required by statute, it appearing that such stockholders did not object. Louisville & N. R. R. *v.* State, 45 S. Rep. 296 (Ala. 1907). In *quo warranto* against a turnpike company the burden of proof is on the company to prove its title, and deeds from other companies without seals and not acknowledged as corporate deeds are insufficient. Lyons, etc. Co. *v.* People, 29 Col. 434 (1902). The charter of a plank-road company for failure to keep the road in repair was forfeited in the case of People *v.* Detroit, etc. Co., 131 Mich. 30 (1902). For failure to keep a part of its road in repair, or to rebuild a burned bridge, or for abandoning a part of its road, a plank-road company's charter may be forfeited. People *v.* Plainfield, etc. Co., 105 Mich. 9 (1895). The charter of a water-works company may be forfeited when, in violation of its charter, it does not furnish pure water and does not increase its source of supply. It is no defense that the municipality had elected to take over the property as provided in the original ordinance, or that the municipality had the right to annul the contract between the municipality and the company. Capital City Water Co. *v.* State, 105 Ala. 406 (1894). To a *quo warranto* to forfeit a water-works charter because it failed to supply sufficient water, it is no answer that the company had intended to enlarge, but had not done so because the city had declared its intention to exercise its option to buy the works. State *v.* Capital City Water Co., 102 Ala. 231 (1894). It has been held to be misuser to file a false certificate that the capital stock has been paid up, Eastern, etc. Co. *v.* Regina, 22 Eng. L. & Eq. 328 (1853); or to establish a branch bank where the charter authorizes only a principal banking place, People *v.* Oakland County Bank, 1 Doug. (Mich.) 282 (1843); or for an insurance company to take risks which it cannot pay if required, Ward *v.* Farwell, 97 Ill. 593 (1881); or for taking "graveyard" insurance, State *v.* Central, etc. Assoc., 29 Ohio St. 399 (1876), the person receiving the insurance having no insurable interest in the person insured; or for not keeping tracks in a condition required by the charter, State *v.* Madison Street Ry., 72 Wis. 612 (1888); or for a canal company to allow the canal to become out of repair, State *v.* Pennsylvania, etc. Canal Co., 23 Ohio St. 121 (1872); or for a ferry company to be guilty of the same neglect, State *v.* Council Bluffs, etc. Co., 11 Neb. 354 (1881); or for filing false and fraudulent articles of association; State *v.* Bailey, 16 Ind. 46 (1861), holding also that mere insolvency is no cause for for-

out of repair for the preceding six months, without having a jury

feiture; or for accepting subscriptions by persons who are notoriously insolvent, Holman *v.* State, 105 Ind. 569 (1885); or for a failure of a river-improvement company to make an improvement as commanded by a statute, People *v.* Improvement Co., 103 Ill. 491 (1882); or for a bank to loan to its directors in violation of a statute, Bank Com'rs *v.* Bank of Buffalo, 6 Paige, 497 (1837); or for a charitable corporation to divide with a lobbyist an appropriation obtained from the legislature, People *v.* Dispensary, etc. Soc., 7 Lans. 304 (1873); or for an insurance company to insure in a manner contrary to statute and to delay payments of losses, State *v.* Standard, etc. Assoc., 38 Ohio St. 281 (1882); for a bank to contract debts beyond the charter limits, and to make dividends before resuming specie payments, State Bank *v.* State, 1 Blackf. (Ind.) 267 (1823); or for persistently taking usurious interest, Commonwealth *v.* Commercial Bank, 28 Pa. St. 383 (1857); State *v.* Commercial Bank, 33 Miss. 474 (1857); or for a mutual relief association to be run for the benefit of its officers only, State *v.* People's, etc. Assoc., 42 Ohio St. 579 (1885); or for a bank to suspend specie payments, State *v.* Bank of South Carolina, 1 Spears, L. (S. C.) 433 (1841); Commercial Bank *v.* State, 14 Miss. 599 (1846); but see State *v.* New Orleans, etc. Co., 2 Rob. (La.) 529 (1842); or for a turnpike company to allow its road to be out of repair. Washington, etc. T. Co. *v.* State, 19 Md. 239 (1862); Coon *v.* Plymouth, etc. Co., 32 Mich. 248 (1875); Darnell *v.* State, 48 Ark. 321 (1887); State *v.* Pawtucket, etc. Corp., 8 R. I. 182 (1865), where the company neglected a part of its road which it had sold to a municipality. Not every neglect is fatal. The question is for the jury. People *v.* Royalton, etc. Turnp. Co., 11 Vt. 431 (1839). And it is no defense to forfeiture for neglect that the road has been sold on an execution sale. Commonwealth *v.* Tenth, etc. Turnp. Co., 59 Mass. 509 (1850). Nor is it a defense that the state has authorized a competing line. Turnpike Co. *v.* State, 3 Wall. 210 (1865).

In State *v.* Essex Bank, 8 Vt. 489 (1836), the court refused to decree a forfeiture, since the public were not injured, though the corporation was clearly guilty of misuser. If a gas company is ordered by a municipality under a statutory power to reduce the price of gas, it may defend against forfeiture for non-compliance by asserting that the municipality was fraudulently induced to act. State *v.* Cincinnati, etc. Co., 18 Ohio St. 262 (1868). If a company has incorporated under a general act, but for a purpose not authorized by it, a suit for forfeiture lies. State *v.* Beck, 81 Ind. 501 (1882), where a turnpike company incorporated to *purchase* turnpikes, a purpose not authorized by the statute. The state may create causes for the forfeiture of insurance companies' charters. Chicago, etc. Ins. Co. *v.* Needles, 113 U. S. 574 (1885). Where the state sues to forfeit the charter of a railroad company which has leased its road, the latter cannot institute a suit to test the validity of that lease. Ogdensburgh, etc. R. R. *v.* Vermont, etc. R. R., 4 Hun, 712 (1875); s. c., 63 N. Y. 176. If *quo warranto* is brought for not making reports, the corporation may offer to make the reports. State *v.* Barron, 57 N. H. 498 (1876); s. c., 58 N. H. 370. By statute, forfeiture may be decreed where the court decides that a continuance of business by an insurance company will be hazardous to the community. Ward *v.* Farwell, 97 Ill. 593 (1881). The legislature cannot amend a charter by forfeiting the charter if specie payments are not made within a specified time. State *v.* Tombeckbee Bank, 2

pass upon the question and without appeal, is unconstitutional.[1] A statute prescribing that the charter of a railroad company shall be forfeited if it allows a competing road to use its tracks, unless the freight rates on coal from points in certain other states shall be as low as on the competing railroad, is illegal, as an attempt to regulate interstate commerce.[2]

Stew. (Ala.) 30 (1829). It cannot provide that charters shall be forfeited for non-payment of corporate obligations so far as corporations existing before the statute are concerned. Aurora, etc. Co. *v.* Holthouse, 7 Ind. 59 (1855). But it may prescribe that the charter be repealed unless within a certain time the company do certain things—here make good its capital. Lothrop *v.* Stedman, 42 Conn. 583 (1875). And may force the dissolution of insolvent insurance corporations, or corporations whose continuance of business will be dangerous to the public. Ward *v.* Farwell, 97 Ill. 593 (1881); Chicago Life Ins. Co. *v.* Auditor, 101 Ill. 82 (1881). So also as to banks. The remedy "for a violation of duty may be altered and changed by legislative provisions if the power of accomplishing the same objects by any means is within the legitimate scope of legislative authority." Commonwealth *v.* Farmers', etc. Bank, 38 Mass. 542 (1839). *Quo warranto* does not lie against a corporation for *ultra vires* acts, such as issuing watered stock or purchasing its own stock. "Acts in excess of power may undoubtedly be carried so far as to amount to a misuser of the franchise to be a corporation and a ground for its forfeiture." The courts refuse to define what *ultra vires* acts will and what will not sustain *quo warranto* proceedings. They must be acts which "so derange or destroy the business of the corporation that it no longer fulfills the end for which it was created." State *v.* Minnesota, etc. Co., 40 Minn. 213 (1889). A suit by a state to enjoin the defendant railroad company from being managed by directors elected by the votes of stock of the company owned by a foreign railroad corporation *ultra vires*, and also to declare such votes and elections void, and also for a receiver, or in lieu of all this for a forfeiture of the charter, is not demurrable. State *v.* Port Royal, etc. Ry., 45 S. C. 470 (1895).

The following acts and facts do not constitute a misuser: Where, eight years after the organization of a waterworks company, the attorney-general applies for leave to bring suit to forfeit the charter on account of the issue of watered stock and bonds, and of violations of city ordinances, and for not keeping accurate books of account, the city having the right to buy the works at the end of seven years, the court will not allow the

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1 Salt Creek Val. Turnp. Co. *v.* Parks, 50 Ohio St. 568 (1893). The legislature may authorize county commissioners to institute proceedings to forfeit the charters of plank-road companies which do not keep their plank roads in repair. Davis *v.* Vernon, etc. Co., 103 Ga. 491 (1898). In a proceeding under a statute to forfeit a railroad franchise and charter for not maintaining the property in good repair the railroad is entitled to trial by jury. Louisiana, etc. R. R. *v.* State, 75 Ark. 435 (1905).

2 State *v.* Cumberland, etc. R. R., 66 Atl. Rep. 458 (Md. 1907), holding also that in a suit to forfeit a railroad charter for allowing its tracks to be used by a competing railroad in violation of the statute the answer may be demurred to if insufficient.

A charter will not be forfeited merely because the corporation was incorporated in one state and all its officers and stockholders

suit to be commenced. The court said: "Unless there is a clear, wilful misuse, abuse, or non-use of the franchises sought to be forfeited, or violation of law,—something that strikes at the very groundwork of the contract between the corporation and the sovereign power; something that amounts to a plain, wilful abuse of power or violation of law, within the meaning of the statute on the subject, whereby the corporation fails to fulfill the very design and purpose of its organization,—leave will not be granted by the court to resort to the extraordinary remedy for a forfeiture of its franchises." State *v.* Janesville Water Co., 92 Wis. 496, 501 (1896). A waterworks company's charter will not be forfeited because another company has purchased a majority of its stock and illegally placed a mortgage upon its property. Commonwealth *v.* Punxsutawney, etc. Co., 197 Pa. 569 (1901). The fact that a corporation has levied illegal assessments on its stockholders is no ground for a dissolution at the instance of the state. People *v.* Rosenstein, etc. Co., 131 Cal. 153 (1900). Where a company is granted power by the city to build tracks on the streets on condition that the tracks conform to the street grade, and on condition that the company pay for the paving between its tracks, its failure to comply with such conditions is no ground for declaring a forfeiture of the company's charter. State *v.* Omaha, etc. Co., 91 Iowa, 517 (1894). A state may forfeit the charter of a corporation which is engaged in the lottery business. State *v.* Nebraska, etc. Co., 66 Neb. 349 (1902). An action by the state against a stock exchange in San Francisco, to annul its charter on the ground that it was a gambling institution, failed in People *v.* San Francisco Public Stock Exchange, 33 Pac. Rep. 785 (Cal. 1893), because the complaint did not clearly allege gambling acts. There is no misuser of franchises by a corporation where the objectionable act was by a cashier in direct violation of orders given to him by the directors, State *v.* Commercial Bank, 6 Sm. & M. (Miss.) 218 (1846); or where a railroad or turnpike company has constructed its road over land without obtaining the right of way, State *v.* Kill Buck Turnp. Co., 38 Ind. 71 (1871); People *v.* Hillsdale, etc. Turnp. Co., 2 Johns. 190 (1807); or where the company deviates slightly from its route, fails to file a map of the route, and neglects to elect new directors, Harris *v.* Mississippi, etc. R. R., 51 Miss. 602 (1875); or fails to file a statement of its condition as required by statute, the object of such filing having ceased, People *v.* Improvement Co., 103 Ill. 491 (1882); or where the public are compelled to open a drawbridge for themselves, Commonwealth *v.* Breed, 21 Mass. 460 (1827); or where a bank has assigned its assets to trustees to pay its debts, State *v.* Commercial Bank, 21 Miss. 569 (1850); or for the insolvency of a bank, it having since then become solvent. People *v.* Bank of Niagara, 6 Cow. 196 (1826); People *v.* Washington, etc. Bank, 6 Cow. 212 (1826) (but the contrary has been held as regards a suspension of specie payments and a subsequent resumption, Commercial Bank *v.* State, 14 Miss. 599 (1846); Planters' Bank *v.* State, 15 Miss. 163 —1846); or where a bridge company gives reduced rates to constant patrons, and gives free passage in payment for land and fails to file required statements, Commonwealth *v.* Alleghany, etc. Co., 20 Pa. St. 185 (1852); or on the ground that the corporation has incorporated also in another state, Commonwealth *v.*

reside in another state; nor because it keeps its books out of the state, in violation of a statute.[1]

Pittsburg, etc. R. R., 58 Pa. St. 26 (1868); or that required statements are not filed, State *v.* Barron, 58 N. H. 370 (1878). Though a corporation take more interest than allowed by charter it may recover. The only penalty is such as the usury law prescribes. Grand Gulf Bank *v.* Archer, 16 Miss. 151 (1847). For a vigorous and interesting but futile effort to oust a going railroad company from its franchises for all kinds of misfeasances, malfeasances, and nonfeasances, see International, etc. Ry. *v.* State, 75 Tex. 356 (1889); and for a successful case in the same line, see East Line, etc. Ry. *v.* State, 75 Tex. 434 (1889). It is not for the state to institute an action to dissolve and wind up a mutual benefit and building corporation merely because some of the members are dissatisfied. People *v.* Lowe, 117 N. Y. 175, 190 (1889). No *quo warranto* lies for using an abbreviated corporate name. People *v.* Bogart, 45 Cal. 73 (1872). The averments of misuser must be definite and certain. Danville, etc. Pr. Co. *v.* State, 16 Ind. 456 (1861). And the misuser must be wilful. State *v.* Columbia, etc. Co., 2 Sneed (Tenn.), 254 (1854); Baltimore *v.* Connellsville, etc. Ry., 6 Phila. 190 (1866). In charging misuser the word "wilful" is not necessary. State *v.* Equitable L. etc. Co., 142 Mo. 325 (1897). Concerning the pleadings in *quo warranto*, see People *v.* Stanford, 77 Cal. 360 (1888). An information in the nature of *quo warranto* to for-

1 North, etc. Stock Co. *v.* People, 147 Ill. 234 (1893). The court may exercise its discretion as to forfeiting a charter for misfeasance or nonfeasance, which is not expressly made a ground of forfeiture by the charter, and the court will not decree a forfeiture where the violation is doubtful and no public necessity requires forfeiture. Hence the court will not forfeit a charter for failure to keep the corporate books at the principal office, as required by its charter, nor for the failure to make the first annual report, the omissions not having been wilful. State *v.* United States, etc. Co., 140 Ala. 610 (1904). In Kansas the charter of a corporation may be forfeited at the instance of the state if the corporation fails to keep its general office and the office of its treasurer within the state in accordance with the terms of the statutes. State *v.* Topeka Water Co., 59 Kan. 151 (1898). Where a corporation removes all its offices from the state, a stockholder may apply, under a statute, for a dissolution on the ground of an abuse of powers. Simmons *v.* Norfolk, etc. Steamboat Co., 113 N. C. 147 (1893). In State *v.* Park, etc. Lumber Co., 58 Minn. 330 (1894), the court forfeited the charter of a company that had been incorporated in Minnesota for the purpose evidently of doing all its business in Wisconsin. The charter was forfeited on the ground that the company had not complied with the statute in having its place of business and keeping its books within the state. The court also approved of a decision in Wisconsin to the effect that at common law a charter may be forfeited where the corporation keeps its principal office, books, and records out of the state to such an extent that it is impossible for the state and its courts to have full jurisdiction and visitorial power over the corporation. To same effect where the company kept its books and place of business out of the state. State *v.* Milwaukee, etc. Ry., 45 Wis. 590 (1878).

A charter will be forfeited where it authorizes a medical school but is actually used to sell medical diplomas.[1] The attorney-general may, by information in the nature of *quo warranto,* cause to be forfeited the charter of a corporation which was organized for fair-ground and race-track purposes, but which is actually engaged in gambling.[2]

Frequently a corporation does acts which its charter does not authorize it to do, or which its charter or a statute expressly prohibits it from doing. The question then arises, What is the remedy of the state? The right of a stockholder, or the corporation itself, or a person contracting with the corporation, to object to such acts is discussed elsewhere.[3] But may the state object? Undoubtedly it may. It seems that the state has four remedies. Its legislature may repeal the charter of the corporation under the reserved

feit the charter of a temperance enterprise is not definite enough in its charges when it charges a perversion of funds. People *v.* Dashaway Assoc., 84 Cal. 114 (1890), containing also a discussion on the pleadings and practice. Where the state has brought suit to forfeit the charter of a railroad company on the ground that a majority of its stock is held, contrary to the statutes and constitution of the state, by another railroad company, the case may be removed to the federal court if the latter company is an instrument of interstate commerce and purchased the stock for interstate commerce purposes. It is also removable where the latter company claims that its charter existed before such constitution and statutes, and give it a right to own such stock. South Carolina *v.* Port Royal, etc. Ry., 56 Fed. Rep. 333 (1893).

1 Illinois, etc. University *v.* People, 166 Ill. 171 (1897). The charter of a medical college will be forfeited at the instance of a state where it is shown that the college is carried on chiefly to sell medical diplomas. Independent, etc. College *v.* People, 182 Ill. 274 (1899). Where an athletic corporation is but a scheme for running a saloon, the charter will be forfeited. State *v.* Rose Hill, etc. Club, 121 Mo. App. 81 (1906). Where a corporation organized as a social club is used to violate the liquor laws, the state may have its charter annulled. Hanger *v.* Commonwealth, 60 S. E. Rep. 67 (Va. 1908). Where several persons organized a corporation with a capital stock of $100, to buy and sell oil lands, etc., and it incurred debts to the amount of nearly $20,000, the highest court in Kentucky held that it was not a complete corporation but a mere preliminary step and the promoters were liable as partners for the debts. Sanders, etc. *v.* Herndon, 108 S. W. Rep. 908 (Ky. 1908).

2 State *v.* Delmar Jockey Club, 200 Mo. 34 (1906); aff'd, 210 U. S. 324. In the case Attorney-General *v.* Preferred Mercantile Co., 187 Mass. 516 (1905), the charter of a corporation was forfeited because its sole business was to sell for cash its contracts to deliver diamonds to the oldest holders of such contracts, the sole source of revenue being the price received for the contracts. The court held that this was not a lottery, but was in violation of the statute prohibiting obligations redeemable in numerical order or in any arbitrary order.

3 See Part IV, *infra.*

right of the state to repeal;[1] or the state may institute a proceeding to forfeit the charter for misuse of powers; or such proceeding may be only to oust the corporation from the exercise of the usurped powers; or, according to some authorities, a suit may be commenced in equity for an injunction restraining the corporation from committing the *ultra vires* acts.[2] Taking up first the subject of *quo warranto,* it seems that the judgment in an ordinary *quo warranto* proceeding may be either a forfeiture of all the corporate franchises and of the charter, or may be a forfeiture only of the right to continue to do the illegal acts, and that it is within the discretion of the court to say which judgment shall be rendered.[3]

1 See § 639, *infra.*

2 See § 635, *infra.*

3 State *v.* People's, etc. Assoc., 42 Ohio St. 579 (1885), where only a discontinuance of the acts complained of was ordered; People *v.* Improvement Co., 103 Ill. 491 (1882), where a complete forfeiture of charter, etc., was decreed. See also People *v.* Utica Ins. Co., 15 Johns. 357 (1818), where an insurance company had engaged in banking contrary to statute. A partial ouster does not seem to differ much from an injunction at the instance of the state. See § 635, *infra.* Where a telephone company charges more than its original grant from a city authorized, its franchises cannot be forfeited, but it may be ousted from the enjoyment of the grant. People *v.* Chicago, etc. Co., 220 Ill. 238 (1906). In State *v.* Building Assoc., 35 Ohio St. 258 (1879), the court said that where the corporation is guilty of an offense which by statute is cause for forfeiture of its franchise as a corporation, the court will decree that forfeiture; but where the cause of forfeiture is outside of those prescribed in the statutes, then the court may decree either a forfeiture of the franchise to be a corporation or an ouster from the powers and acts illegally assumed or done. There may be a judgment of ouster of a particular franchise, and not of the whole charter. State *v.* Old Town Bridge Corp., 85 Me. 17 (1892). Where two competing gas companies agree on rates to be charged the public and agree not to interfere with each other's patrons, the state may forfeit their charters, or the court may in its discretion declare a forfeiture or ouster of the right of the defendants to carry out the illegal acts. State *v.* Portland, etc. Co., 153 Ind. 483 (1899). Where the criminal law has penalties for abuse of franchises by a turnpike company, the court will not forfeit its charter for such abuses, if it is in position to correct them. Commonwealth *v.* Newport, etc. Co., 97 S. W. Rep. 375 (Ky. 1906). Forfeiture of a water-works grant from the city will not be decreed except in a clear case, and where no other punishment will adequately remedy the mischief. City of Ashland *v.* Ashland, etc. Co., 110 Wis. 94 (1901). The court may forfeit the charter of a railroad corporation for illegally leasing its road, and need not merely enjoin the continuation of the lease. East Line, etc. R. R. *v.* State, 75 Tex. 434 (1889). "Corporate charters are not forfeited in fragments, or annulled as damages for the violation of private contracts." In condemnation proceedings the defendant cannot set up that the charter has been violated. *Re* Long Island R. R., 143 N. Y. 67 (1894). In Pennsylvania, where the state filed an information to declare *ultra vires* a contract between a canal company and a coal company, whereby one-half of the canal facilities were mo-

Quo warranto lies to forfeit the exclusive feature of a franchise without forfeiting the remainder of the franchise.[1] *Quo warranto* does not lie at the instance of the state to prevent a railroad company from making an additional charge for the use of switch tracks.[2] It has been held in a recent well considered case, that where a corporation is exercising a power which it has no charter right to exercise, a judgment may oust it from exercising that particular power, but where the corporation has been guilty of acts which by statute are made the cause of forfeiture, the whole charter may be forfeited.[3] The nature of *scire facias, quo warranto,* and information in the nature of a *quo warranto,* is explained in the notes below.[4]

nopolized by the latter, the court held that an information was a proper remedy, and that the court, in its judgment in favor of the state, might order the corporation to discontinue the unauthorized act, and that the judgment need not oust the corporation from its charter and franchises. Commonwealth *v.* Delaware, etc. Canal Co., 43 Pa. St. 295 (1862). Although the state proves the case, yet the court will not adjudge a forfeiture unless justice requires it. State *v.* Essex Bank, 8 Vt. 489 (1836). State *v.* United States, etc. Co., 140 Ala. 610 (1904).

1 Commonwealth *v.* Sturtevant, 182 Pa. St. 323 (1897).

2 State *v.* Atchison, 176 Mo. 687 (1903).

3 Marion Bond Co. *v.* Mexican, etc. Co., 160 Ind. 558 (1902). In *quo warranto* proceedings the court has discretion to render a general judgment of ouster or an ouster from exercising the particular act complained of, or may give a suspensive judgment of ouster with a fine accompaniment or simply a fine, especially where the act complained of has been abandoned. State *v.* Armour Packing Co., 173 Mo. 356 (1903). Where a railroad company has been adjudicated to have no power to own warehouses it may lease them. State *v.* New Orleans, etc. Co., 109 La. 64 (1902).

4 Professor Dwight explained these as follows:

"*Scire facias* is resorted to where there is original defect in the charter. as if, *e. g.*, a grant obtained by fraud. It may be used also in the case where the charter was valid but the powers of a corporation have been abused. The distinction taken in England is this: that a *scire facias* may be resorted to where a legal corporation in full possession of its powers abuses them, while a *quo warranto* is applicable where a corporation, from a defect in its constitution, such as a loss of part of its members which are integral to its existence, becomes an imperfect body, but nevertheless continues to act as a corporation. See Grant on Corporations, 296.

"*Writ of quo warranto.* This is an ancient writ, employed by the king against any one who claims or usurps an office or franchise, or who, having had a right to the franchise, neglects to exercise it, to inquire by what warrant he still claims to exercise it. The theory of the writ is, there is an unlawful encroachment upon the royal prerogative, and, being a dilatory proceeding and technical, it is not now so much employed as the succeeding remedy.

"*Information in the nature of a quo warranto.* This is in form of a criminal proceeding. There were two proceedings in the criminal law for the conviction of criminals. One is termed an information and the other an indictment. They differ in this respect: that while an indictment is found by

Quo warranto at the instance of the state does not lie merely because a street railway company has been given street rights in

a grand jury, an information is simply the allegation of an officer who files it. In this case the attorney-general proceeds on twofold ground, both to punish the usurper and to prevent the unlawful exercise of its franchises. In the case of a corporation the main object is to interfere with the exercise of the franchise. The inquiry is the same as in the writ of *quo warranto;* that is, by what warrant the franchise is exercised. The reason why it is more resorted to is that it is easy and simple of application.

"Under the New York code the proceeding is simply an action brought by the attorney-general, governed by the same general rules as an action at common law. If judgment goes against the corporation it is liable to be dissolved. This proceeding in England was instituted in the great criminal court, the king's or queen's bench, and in New York in the supreme court only, which represents the queen's bench."

Pleadings in an information in the nature of a *quo warranto* should conform to pleadings at common law. People *v.* Central, etc. Tel. Co., 83 N. E. Rep. 829 (Ill. 1908). An information in the nature of a *quo warranto* simply calls on the defendant to show under what authority it exercises privileges. People *v.* Central, etc. Tel. Co., 83 N. E. Rep. 829 (Ill. 1908). A *quo warranto* is not such a criminal proceeding as to require the degree of certainty as is required in criminal proceedings. Independent, etc. College *v.* People, 182 Ill. 274 (1899). In the case of State *v.* Merchants', etc. Trust Co., 8 Humph. (Tenn.) 235 (1847), the court said: "By the common law the forfeiture of a charter can be enforced in a court of law only; and the proceeding to repeal it is by a *scire facias* or an information in the nature of a writ of *quo warranto.* A *scire facias* is the proper remedy where there is a legal existing body capable of acting, but which had been guilty of an abuse of the power intrusted to it; a *quo warranto* where there is a body corporate *de facto,* which takes upon itself to act as a body corporate, but from some defect in its constitution it cannot legally exercise the power it affects to use." Citing 8 Wheat. 483, 484. For the ancient learning as to *scire facias* in forfeiting charters, see State *v.* Moore, 19 Ala. 514 (1851). When the information has for its object to oust the defendants from acting as a corporation, and to test the fact of their incorporation, it must be filed against individuals. When the object is to effect a dissolution of a corporation which has had an actual existence, or to oust such corporation of some franchise which it has unlawfully exercised, the information must be filed against the corporation. People *v.* Rensselaer, etc. R. R., 15 Wend. 113 (1836). *Quo warranto* against a corporation in its corporate name admits that it was legally incorporated. North, etc. Stock Co. *v.* People, 147 Ill. 234 (1893). As to the pleadings in *quo warranto,* see Distilling, etc. Co. *v.* People, 156 Ill. 448 (1895); People *v.* Stanford, 77 Cal. 360 (1888). As to the pleadings in *quo warranto* against a street railway company assuming to be a corporation, see Smith *v.* State, 140 Ind. 343 (1895). For pleadings in *quo warranto* proceedings by the state to oust a corporation from usurped franchises and to forfeit a railroad charter, see People *v.* Stanford, 77 Cal. 360 (1888), holding also that the statute of limitations is no bar. The state cannot file a *quo warranto* proceeding to forfeit a charter, where a receiver is already in charge,

perpetuity by a municipality, while the statute limits its corporate existence to thirty years.[1] In an action by the state to forfeit a railroad charter the state must prove not only that a cause of forfeiture did exist, but that it still continues to exist. Moreover some public interest must be involved in obtaining the forfeiture.[2] *Quo warranto* lies against a railroad corporation to recover back to the state canal lands which the railroad is using.[3] *Quo warranto* or an information in the nature thereof is the proper remedy where the corporation has not been legally incorporated.[4] The attorney-general

unless the consent of the court is first obtained. Wayne Pike Co. *v.* State, 134 Ind. 672 (1893).

1 Attorney-General *v.* Detroit Suburban Ry., 96 Mich. 65 (1893).

2 People *v.* Ulster, etc. R. R., 128 N. Y. 240 (1891). See also § 634, *infra.* A corporation will not be dissolved at the instance of a stockholder because it purchased a half acre of land *ultra vires*, where it sold the same immediately upon complaint being made. Bixler *v.* Summerfield, 210 Ill. 66 (1904).

3 Ohio *v.* Railway Co., 53 Ohio St. 189 (1895).

4 The state may forfeit a charter where the statute required five persons to sign and acknowledge the articles, but only four of the five actually did acknowledge them. People *v.* Montecito Water Co., 97 Cal. 276 (1893). In *quo warranto* proceedings on the ground that the company was not properly incorporated, the corporation itself is a necessary party defendant. People *v.* Montecito Water Co., 97 Cal. 276 (1893). A charter of the company will be forfeited at the instance of the state where some of the parties who are alleged to join in the corporation did not so join, but their names were inserted without their sanction or authority. Such parties are not liable as stockholders. La Banque d'Hochelaga *v.* Murray, L. R. 15 App. Cas. 414 (1890). See also §§ 236, 237, *supra.* In a *quo warranto* proceedings to declare void an alleged charter the corporation is a necessary party defendant. People *v.* Flint, 64 Cal. 49 (1883). After the attorney-general institutes *quo warranto* proceedings and much testimony is taken, and then the proceeding is discontinued, and the company proceeds to expend money and make contracts, the attorney-general will not be allowed to institute new proceedings. *Re* Equity Gas-Light Co., 10 N. Y. Supp. 801 (1890). See 141 N. Y. 232 (1894). In *quo warranto* charging defendants with usurping a public franchise to operate a ferry, where they attempted to defend on the ground that they had a legal right to use the ferry, the burden was on them to show a valid title. Gunterman *v.* People, 138 Ill. 518 (1891). Where an incorporation is for several objects, one of which is illegal, the charter will be forfeited, the objects not being clearly separable. People *v.* Chicago Gas. T. Co., 130 Ill. 268 (1889). The issuing of transferable certificates of stock is not assuming the functions of a corporation. Rice *v.* Rockefeller, 56 Hun, 516 (1890); reversed on other points in 134 N. Y. 174. A suit instituted by the state to forfeit a charter cannot be removed to the federal court on the ground that a contract exists between the corporation and the state, and that such contract will be violated. Commonwealth *v.* Louisville Bridge Co., 42 Fed. Rep. 241 (1890). A corporation incorporated for an illegal purpose, such as buying a majority or all of the stock in each of four competing gas corporations, and thereby creating a monopoly, is subject to having

may file an information in *quo warranto* without leave of the court.[1] *Quo warranto* for claiming to be a corporation should be against the officers of the corporation as individuals.[2] Under the Massachusetts statutes any person who is injured by a corporation may file an information in the nature of *quo warranto* against the corporation.[3] But at common law an information to forfeit a charter does not lie for wrongs to creditors and stockholders. It lies only for *ultra vires* acts, wilful and continued, and relating to some franchise granted.[4] Where a steam railroad is buying the stocks and bonds of street railroads, the attorney general under the Massachusetts statute may file an information in equity to prevent the exercise of that particular power, instead of applying for a mandamus or an information at law in the nature of *quo warranto*.[5] *Quo warranto* lies against foreign corporations doing business illegally in the state.[6] The state by *quo*

its charter forfeited at the instance of the attorney-general. People *v.* Chicago Gas Trust Co., 130 Ill. 268 (1889). In *quo warranto* proceedings against a turnpike company, the latter has the burden of proof to show by what authority it is exercising its privileges. People *v.* Volcano, etc. Co., 100 Cal. 87 (1893).

1 State *v.* Equitable Loan, etc. Co., 142 Mo. 325 (1897).

2 State *v.* Fleming, 147 Mo. 1 (1898). *Quo warranto* proceedings by the state against a corporation to declare that it was fraudulently incorporated may be against the corporation without joining the officers. State *v.* Inner Belt Ry., 74 Kan. 413 (1906). The information should not be against the corporation in its own name because that admits its existence. State *v.* City of South Park, 34 Wash. 162 (1904).

3 Hartnett *v.* Plumbers' Supply Assoc., 169 Mass. 229 (1897).

4 State *v.* Southern, etc. Assoc., 132 Ala. 50 (1902).

5 Malone *v.* New York, etc. R. R., 83 N. E. Rep. 408 (Mass. 1908).

6 State *v.* Western, etc. Ins. Co., 47 Ohio St., 167 (1890); State *v.* Fidelity, etc. Co, 39 Minn. 538 (1888). *Quo warranto* against a foreign corporation illegally doing business in the state must be against the corporation as such and not merely against its officers and agents. State *v.* Somerby, 42 Minn. 55 (1899). Where a foreign corporation has not complied with reasonable regulations by the state as a condition of its doing business in the state, *quo warranto* lies to oust it of its claim of right to do business in the state. State *v.* American, etc. Co., 65 Kan. 847 (1902). Where a foreign telephone company by inadvertence does not file an abstract of its charter in each of the counties in which it does business, as required by statute, it will not be ousted from doing business at the instance of the state, inasmuch as the statutes do not make such omission a cause of forfeiture. State *v.* Cumberland, etc. Co., 114 Tenn. 194 (1905). *Quo warranto* lies on the relation of a private individual to compel a foreign corporation to show its existence as a corporation and its authority for doing business in the state, and may attack its corporate existence as being an illegal trust. Attorney General *v.* Booth & Co., 143 Mich. 89 (1906). A state by a proceeding in the nature of *quo warranto* may oust a foreign corporation from doing business in the state, no license for that purpose having been issued by the state. State *v.* Kansas, etc. Co., 71 Kan. 785 (1905). See § 635, *infra*. An

warranto may oust a railroad from discriminations in favor of oil shipped in tank cars.[1] An exemption from taxation is not a franchise. Hence, *quo warranto* does not lie to oust the corporation from such exemption.[2] Although *quo warranto* can be only for acts committed within five years in Ohio, yet it serves to oust a company from exercising a power which it has not exercised continuously for twenty years.[3] The court has no power to appoint a receiver in *quo warranto* proceedings. A receiver can be appointed only in a suit in equity unless a statute provides otherwise.[4]

§ 634. *Non-user as a cause for forfeiture — Forfeiture for failure to complete a railroad or enterprise.*—Non-user of its franchise is a cause for forfeiture where a corporation is possessed not only of its franchise to be a corporation, but also other franchises, such as a right of way, which the public are interested in having kept in active use. Thus, where a charter required a street railway company to lay its track on certain streets, and the company did so on a part of such streets and then removed them, and for many years operated no cars thereon at all, the court held that the charter might be forfeited at the instance of the state.[5] Where a street railway

injunction lies at the instance of the state against foreign corporations. See § 635, *infra*.

1 State *v.* Cincinnati, etc. R. R., 47 Ohio St. 130 (1890).

2 International, etc. Ry. *v.* State, 75 Tex. 356 (1889).

3 State *v.* Standard Oil Co., 49 Ohio St. 137 (1892).

4 Commonwealth *v.* Order of Vesta, 156 Pa. St. 531 (1893).

5 People *v.* Broadway R. R., 126 N. Y. 29 (1891). A suit for forfeiture lies where a railroad company takes up part of its track. State *v.* West, etc. Ry., 34 Wis. 197 (1874); s. c., 36 Wis. 466 (1874). Or where a railroad company constructs but part of its road, has no station or freight-houses and no passenger coaches, but engages only in getting out coal from beds owned by those interested in the company. State *v.* Railway Co., 40 Ohio St. 504 (1884). But the suit does not lie on the ground that the company does not *intend* to complete its road. State *v.* Kingan, 51 Ind. 142 (1875); State *v.* Beck, 81 Ind. 501 (1882). No forfeiture is decreed because a railroad company discontinues passenger trains over a branch line which is run at a loss by reason of horse-car competition. Commonwealth *v.* Fitchburg R. R., 78 Mass 180 (1858). The lessee of a railroad is a proper party defendant to a suit to forfeit franchises for non-user. People *v.* Albany, etc. R. R., 77 N. Y. 232 (1879); State *v.* Minnesota, Cent. Ry., 36 Minn. 246 (1886). An assignment of all corporate assets to others, thereby rendering the corporation incapable of continuing business, is cause for forfeiture. State *v.* Real Estate Bank, 5 Ark. 595 (1843). A bank which ceases to do business and to file statements, and which makes improper loans to its directors, is liable to forfeiture of charter. State *v.* Seneca County Bank, 5 Ohio St. 171 (1856). It is not a non-user for a county-fair corporation to rent its grounds. Kent County Agr. Soc. *v.* Houseman, 81 Mich. 609 (1890). Where the statute prescribes that non-user for a year shall be cause for forfeiture, a non-

does not run its cars as required by the ordinance, the state, at the instance of the city, may by *quo warranto* proceedings oust the company from its rights in said ordinance. The remedy in such a case is not in equity.[1] A street railway grant from the city may be forfeited at the instance of the state where the company runs but one car a day in order to hold the franchise. It may also be forfeited for failure to construct the entire line within the time specified by statute.[2]

It is good cause for forfeiture of a charter by judicial decree that a railroad company does not complete its road, or does not complete it within a prescribed time.[3] And such a forfeiture at the instance of the state, by reason of the failure of the corporation to complete its enterprise as required by charter, has often been decreed.[4]

user for a few days is insufficient. People *v.* Atlantic, etc. R. R., 125 N. Y. 513 (1891). A railroad which is leased to another company without statutory provisions to do so is subject to forfeiture at the instance of the state. State *v.* Atchison, etc. R. R., 24 Neb. 143 (1888); s. c., 38 Neb. 437. As to a failure of a railroad corporation to complete its road, see § 638, *infra.* The abandonment of the right of way by the railroad is no ground for an action of trespass by the former owner to recover it. Logan *v.* Vernon, etc. R. R., 90 Ind. 552 (1883). See, on this subject, § 906, *infra.*

1 In this case the company had not run its cars for three years. State *v.* East Fifth St. Ry., 140 Mo. 539 (1897).

2 People *v.* Sutter St. Ry., 117 Cal. 604 (1897), holding also that the court may impose a fine instead of forfeiting the rights.

3 The failure of a railroad corporation to complete its line as laid down in the charter is ordinarily good cause for forfeiture of its charter, but the state may waive it. People *v.* Ulster, etc. R. R., 128 N. Y. 240 (1891). See also New York, etc. R. R. *v.* New York, N. H. etc. R. R., 52 Conn. 274, 284 (1884). A railroad may construct its line long subsequently to the date of its charter, there being no limit in its charter as to time of construction. Western, etc. R. R.'s Appeal, 104 Pa. St. 399 (1883); Union Canal Co., *v.* Young, 1 Whart. (Pa.) 410 (1836). If the time limited for the completion of the road has expired, this is a defense to eminent domain proceedings. Morris, etc. R. R. *v.* Central, etc. R. R., 31 N. J. L. 205 (1865). *Cf.* § 637, *infra.* The state may forfeit the charter where the road is not constructed within the time fixed by the charter and amendments; also where it abandons a part of its lines. State *v.* Nonconnah Turnp. Co., 17 S. W. Rep. 128 (Tenn. 1875). Where a railroad company mortgages such part of its road as is completed, and the mortgage is foreclosed, the purchasers are not bound to go on and complete the road. Failure on their part to complete it is no defense to an action on a subscription. Chartiers Ry. *v.* Hodgens, 85 Pa. St. 501 (1877). The court will not forfeit the municipal grant to a waterworks company, even though the latter does not extend its mains as required by the charter. *Mandamus* is the proper remedy. City of Topeka *v.* Topeka Water Co., 58 Kan. 349 (1897). *Cf.* § 931, *infra.*

4 People *v.* Kingston, etc. Turnp. Co., 23 Wend. 193 (1840), where the

A water-works charter will be forfeited where the company has abandoned business and attempted to sell out.[1] It is not the duty

road was not constructed as required; Thompson *v.* People, 23 Wend. 537 (1840), reversing 21 Wend. 235, holding that an immaterial omission is not fatal; People *v.* National Sav. Bank, 11 N. E. Rep. 170 (Ill. 1887); aff'd, 129 Ill. 618 (1889), forfeiting for failure to complete subscriptions as required by charter; Eastern, etc. Co. *v.* Regina, 22 Eng. L. & Eq. 328 (1853), for failure to pay in capital stock as required by charter; People *v.* City Bank, 7 Colo. 226 (1883), to same effect. See People *v.* Jackson, etc. P. R. Co., 9 Mich. 285 (1861), for a case of the construction of a road in sections. And where the charter prescribes that a certain number of miles shall be completed within a certain time, but does not prescribe that the effect of non-compliance shall be a forfeiture, then the only way of forfeiting the charter is by a suit and a decree of a court. Hughes *v.* Northern Pac Ry., 18 Fed. Rep. 106 (1883); Arthur *v.* Commercial Bank, 17 Miss. 394, 430 (1848). The fact that a corporation commences business in another state within a year suffices for a charter provision that it must commence business within a year. *Re* Capital F. Ins. Co., L. R. 21 Ch. L 209 (1882); People *v.* Kankakee Improvement Co., 103 Ill. 491 (1882). In this case the charter required the proposed improvements to be completed within eight years as far east as the state line. The company completed as far east as Kankakee City, and claimed the right to exercise the option of making or not making further improvements between that point and the state line. The court said: "The non-compliance with the requirements was *per se* a misuser, and a cause of forfeiture of the franchise as for condition broken;" and "we can see here but one entire franchise for the improvement of these streams, and that this obligation to make the improvements above Kankakee City was a condition annexed to this entire franchise. . . . We think the non-compliance with the requirement in question was a cause of forfeiture of the entire franchise." The bondholders of the company take the risk of this forfeiture of the charter for non-compliance with conditions. Silliman *v.* Fredericksburg, etc. R. R., 27 Gratt. (Va.) 119 (1876), where, however, the corporate officers were endeavoring to enforce fraudulent bonds. Some of the English railway acts are plainly not obligatory, but only enabling; and it is held that the evident intention of parliament was to permit the companies to complete their lines as far as possible or desirable before the limit of time set, and to abandon the remaining portion. York, etc. Ry. *v.* The Queen, 1 El. & Bl. 858 (1853), reversing same case, 1 El. & Bl. 178; Great Western Ry. *v.* The Queen, 1 El. & Bl. 874 (1853), reversing same case, 1 El. & Bl. 253; Edinburgh, etc. Ry. *v.* Philip, 2 Macq. H. L. Cas. 514, 526 (1857); Scottish N. E. Ry. *v.* Stewart, 3 Macq. H. L. Cas. 382, 414 (1859). See also Rex *v.* Birmingham Canal, 2 W. Bl. 708 (1780), by Lord Mansfield; Blakemore *v.* Glamorganshire Canal, 1 Myl. & K. 162 (1832), by Lord Eldon; The Queen *v.* Eastern Counties Ry., 10 Ad. & El. 531 (1839); The Queen *v.* Lancashire, etc. Ry., 1 El. & Bl. 228 (1852).

1 City Water Co. *v.* State, 33 S. W. Rep. 259 (Tex. 1895). A state cannot have a bridge company's franchise forfeited on the ground that the city owns the entire stock and charges no tolls and manages the property as its own. Commonwealth *v.* Monongahela, etc. Co., 216 Pa. St. 108 (1906). A citizen of a city cannot maintain a suit to have a water-works company

of the attorney-general, however, to lie in wait for all corporations, which have not fully or technically complied with all the requisites of their charters.[1]

Turning now to purely private corporations which do not exercise any great public franchises, it is the rule here too that for non-user *quo warranto* will lie.[2] Thus where a river-improvement company that has received a land grant from the state for the purpose of improving the river has long ceased operations, and the parties interested in it departed, an injunction and dissolution at the instance of the state may be obtained.[3]

A bill filed by the attorney-general to enjoin the construction of an electric street railroad will be dismissed where it was filed really at the instance of rival companies.[4] A corporation is not bound to

put in the hands of a receiver on the ground that all of its stock is owned by the city and the city has not elected directors having the necessary qualification. Kirch *v.* City of Louisville, 101 S. W. Rep. 373 (Ky. 1907).

1 People *v.* De Grauw, 133 N. Y. 254 (1892); People *v.* Equity G. L. Co., 141 N. Y. 232 (1894); Lorillard *v.* Clyde, 142 N. Y. 456, 465, 466 (1894); People *v.* Ulster, etc. R. R., 128 N. Y. 240 (1891); United States *v.* San Jacinto Tin Co., 125 U. S. 273 (1888).

2 The state may forfeit a charter for wilful non-user, although the corporation is a private one. People *v.* Milk Exchange, 133 N. Y. 565 (1892); Edgar Coll. Inst. *v.* People, 142 Ill. 363 (1892). See Attorney-General *v.* Simonton, 78 N. C. 57 (1878), holding that the suit will not lie, although only five shares of stock were subscribed for and no other act done by the corporation; State *v.* Société Républicaine, etc., 9 Mo. App. 114 (1880), holding the same, though the company was dormant. But the case of State *v.* Pipher, 28 Kan. 128 (1882), forfeited the charter of an agricultural college for non-user for nineteen years. And see dicta in Terrett *v.* Taylor, 9 Cranch, 43, 51 (1815); State *v.* Commercial Bank, 21 Miss. 569 (1850). In New York by statute such a suit will lie. Code Civ. Pro., § 1798. See also *Re* Jackson, etc. Ins. Co., 4 Sandf. Ch. 559 (1847). Where a corporation has abandoned its authorized business and engaged in another it will be wound up. This is different from a case where the directors have merely and incidentally committed *ultra vires* acts. *Re* Crown, etc. Bank, L. R. 44 Ch. D. 634 (1890). An abandonment by a corporation of part of the purposes of its incorporation is no cause for dissolution. Norwegian Titanic Iron Co., 35 Beav. 223 (1865), where, its purpose being to purchase English and Norway mines, it sold the English mines. By the terms of a new constitution, all corporations which have failed to organize before its adoption may be deemed to have forfeited their franchises thereby. Chincleclamanch, etc. Co. *v.* Commonwealth, 100 Pa. St. 438 (1882). Even though a land corporation does no business for many years except to hold the title to a tract of land which it has purchased, yet this is not cause for dissolution at the instance of a stockholder under the Virginia statute. Radford, etc. Co. *v.* Cowan, 101 Va. 632 (1903).

3 State *v.* Cannon, etc. Assoc., 67 Minn. 14 (1896).

4 People *v.* General Electric Ry., 172 Ill. 129 (1898). A bill filed by a stockholder under the terms of a statute to bring about a dissolution and winding up of the corporation

exercise all the powers contained in its charter.[1] Even though the property of a private corporation is sold out on execution and it does no business for eight years, yet it may resume business.[2] Where a bridge was originally incorporated for ordinary public travel as well as railroad tracks, but for nearly thirty years has been used exclusively for railroad tracks, the state cannot by *mandamus* compel such an alteration in the bridge as to make a toll bridge for general travel.[3]

§ 635. *Injunction at the instance of the state.*—Turning now to the subject of injunction as a remedy, it is very doubtful whether the state may file a bill in equity to enjoin a corporation from committing an *ultra vires* act. The remedy of the state is *quo warranto.*[4] In England, however, a bill has been sustained to restrain a railroad corporation from engaging in the coal business.[5] And an injunction

will be dismissed where it is shown that the suit is brought in the interest of rival corporations. The reason for dismissal is that the suit is a fraud upon the court. Watson *v.* Le Grand, etc. Co., 177 Ill. 203 (1898). The state cannot bring *quo warranto* to prevent a street railway company from carrying freight where the proceedings are instituted at the instance of a competitor for the purpose of preventing competition. State *v.* Dayton, etc. Co., 64 Ohio St. 272 (1901).

1 Illinois, etc. Bank *v.* Doud, 105 Fed. Rep. 123 (1900). A corporation organized to furnish power as well as electric light, and which does furnish the electric light within the time fixed by its charter, need not complete its plant to furnish power unless there is a demand for the power. Proceedings by the state to forfeit its right to furnish power will fail. State *v.* Twin, etc. Co., 98 Me. 214 (1903). The charter of a corporation formed to conduct agricultural fairs and operate a race-track, may be forfeited if it confines itself to the race-track business. State *v.* Delmar, etc. Club, 200 Mo. 34 (1906).

2 Geneva, etc. Co. *v.* Coursey, 45 N. Y. App. Div. 268 (1899). See also § 631, *supra.*

3 State *v.* Boonville, etc. Co., 103 S. W. Rep. 1052 (Mo. 1907).

4 In *quo warranto* proceedings it is not necessary to forfeit the whole charter or none. There may be judgment of ouster from particular powers. See § 633, *supra.*

5 Attorney-General *v.* Great Northern Ry., 1 Dr. & Sm. 154 (1860). But the attorney-general cannot enjoin a corporate act merely because it is *ultra vires.* Some injury to the public must be involved. The attorney-general's suit, at the instance of a manufacturer, to enjoin one railroad from leasing its rolling-stock to another failed. Attorney-General *v.* Great Eastern Ry., L. R. 11 Ch. D. 449 (1879). A court of equity cannot compel a corporation to cease collecting tolls, although it has not improved a stream as required by its charter. Pixley *v.* Roanoke, etc. Co., 75 Va. 320 (1881). In Attorney-General *v.* Mid-Kent Ry., L. R. 3 Ch. App. 100 (1867), a mandatory injunction requiring the defendant to construct a bridge was granted. The case of Attorney-General *v.* North, etc. Tramways Co., 72 L. T. Rep. 340 (1895), was an action brought by the attorney-general at the relation of several car manufacturers to restrain a street-railway company from manu-

lies to enjoin a corporation, the same as an individual, from creating a public nuisance.[1] The state may enjoin a railroad corporation from purchasing a competing line in violation of the constitution.[2] Where a steam railroad is buying the stocks and bonds of street railroads, the attorney-general under the Massachusetts statute may file an information in equity to prevent the exercise of that particular power, instead of applying for a *mandamus* or an information at law in the nature of *quo warranto*.[3] In Wisconsin it is held that the attorney-general may enjoin railroad companies from taking greater rates than are prescribed by statute;[4] and in some of the states such a bill will lie by statute.[5] The attorney-general may file a bill to restrain a railroad company from laying its tracks on the

facturing and selling rolling-stock to other companies on the ground that such acts were *ultra vires*.

1 Attorney-General *v.* Jamaica Pond, etc. Corp., 133 Mass. 361 (1882). A corporation may be enjoined from doing criminal acts—in this case prize-fighting—and a receiver may be put in. Columbian Athletic Club *v.* State, 143 Ind. 98 (1895).

2 Louisville, etc. R. R. *v.* Commonwealth, 97 Ky. 675 (1895); aff'd in 161 U. S. 677 (1896), *sub nom.* Louisville, etc. Ry. *v.* Kentucky. In Massachusetts by statute the attorney-general may enjoin a railroad from committing an *ultra vires* act, *i. e.*, the illegal holding of street railway stocks. Attorney-General *v.* New York, etc. R. R., 84 N. E. Rep. 737 (Mass. 1908). A court of equity has no jurisdiction to forfeit the franchises of a corporation, but it may, at the instance of the attorney-general, enjoin the abuse or misuse of corporate franchises. State *v.* American, etc. Assoc., 64 Minn. 349 (1896). In the case of Trust Co. etc. *v.* State, 109 Ga. 736 (1900), there is a dictum that the state may enjoin a corporation from illegally purchasing shares of stock in other corporations where it is shown that an injury to the public is involved. The court said that while injunction was not the proer remedy for an act which was merely *ultra vires*, yet where some public interest intervened, such an injunction would lie. See § 633, *supra*.

3 Malone *v.* New York, etc. R. R., 83 N. E. Rep. 408 (Mass. 1908).

4 Attorney-General *v.* Railroad Cos., 35 Wis. 523, 553 (1874), reviewing many cases; but *cf.* Strong *v.* McCagg, 55 Wis. 624 (1882). A lease by a domestic railroad company of its railroad to a foreign railroad corporation is illegal, especially where it is expressly prohibited by statute. The court will enjoin the lease upon the application of the attorney-general where the effect of the lease would be to create a combination in the transportation of coal and to destroy competition in production and sale. Stockton *v.* Central R. R. of N. J., 50 N. J. Eq. 52 (1892). That a bill in equity will lie, at the instance of the United States government, to declare invalid a violation of a federal charter, see U. S. *v.* Western U. Tel. Co., 50 Fed. Rep. 28 (1892); aff'd, 160 U. S. 1 (1895). The attorney-general may maintain a suit in equity to enjoin express companies from charging higher rates than are fixed by statute. State *v.* Pacific, etc. Co., 115 N. W. Rep. 619 (Neb. 1908).

5 State *v.* Merchants', etc. Co., 8 Humph. (Tenn.) 254 (1874), where an insurance company was restrained from banking. So also in New York Bank Com'rs *v.* Bank of Buffalo, 6 Paige, 496 (1837); Brinckerhoff *v.*

street, and it is not necessary for him to prove any injury to the public.[1] A state may maintain a suit for an injunction against an elevator company using all its capacity for the benefit of its stockholders, where the objection is not raised that there is an adequate remedy at law.[2]

The weight of authority, however, is that the remedy of the state is by *quo warranto* and not by a bill in equity for an injunction.[3] As, for instance, the attorney-general cannot enjoin a gas company from laying its pipes, even though he claims that the charter was void by reason of the company not having commenced work within the prescribed time.[4] *Quo warranto* may be the

Bostwick, 88 N. Y. 52 (1882), explaining the difference between this class of cases and cases where other parties are complainants. Concerning the power of the state to object to an *ultra vires* act of a private corporation by any proceeding other than *quo warranto*, see People *v.* Ballard, 134 N. Y. 269 (1892), a carefully considered case.

1 Grey *v.* Greenville, etc. Co., 60 N. J. Eq. 153 (1900). And although a private owner of land who is not injured in any way different from the rest of the public cannot file such a bill, yet such private owner may be relator in an information filed by the attorney-general. Morris, etc. Co. *v.* Greenville, etc. Ry., 46 Atl. Rep. 638 (N. J. 1900).

2 Central Elevator Co. *v.* People, 174 Ill. 203 (1898). A state has no right to enjoin a railroad from discontinuing the operation of its elevators as public warehouses where it has no power to act as a public warehouseman. People *v.* Illinois, etc. Co., 84 N. E. Rep. 368 (Ill. 1908).

3 Attorney-General *v.* Utica Ins. Co., 2 Johns. Ch. 371 (1817); Attorney-General *v.* Bank of Niagara, Hopk. Ch. 354 (1825). But see People *v.* Ballard, 134 N. Y. 269 (1892). In Attorney-General *v.* Tudor Ice Co., 104 Mass. 239 (1870), an injunction restraining an ice company from importing teas was denied. A state creating a corporation has no visitorial power over it—*i. e.*, power to correct corporate abuses—except "(1) where municipal, charitable, religious, or eleemosynary corporations, public in their nature, had abused their franchises, perverted the purpose of their organization, or misappropriated their funds; and as they, from the nature of their corporate functions, were more or less under government supervision, the attorney-general proceeded against them to obtain correction of the abuse; or (2) where private corporations chartered for private and limited purposes had exceeded their powers, and were restrained or enjoined in the same manner from the further violation of the imitation to which their powers were subject." Hence the United States, as the creator of the Union Pacific Railroad, cannot exercise visitorial power over it in respect to frauds in its management. U. S. *v.* Union Pacific R. R., 98 U. S. 569, 617 (1878). *Cf.* Attorney-General *v.* Wilson, 1 Cr. & Ph. 1 (1840), holding that the court had jurisdiction over charitable corporations, and that when the trustees of them abuse their trust the court would take notice of such abuse by reason of its visitorial powers. Also, on this point, Attorney-General *v.* Foundling Hospital, 2 Ves. Jr. 42 (1793). See the Pennsylvania cases in § 314, *supra*, where the state enjoined an illegal purchase of stock by a corporation.

4 People *v.* Equity Gas Light Co., 141 N. Y. 232 (1894). The attorney-

remedy of the state where "watered" stock has been illegally issued.[1]

An injunction does not lie at the instance of the state against a corporation doing business, on the ground that its stock was not properly issued and that there was no intent to do any business within the state or to have an office therein; nor does an injunction lie at the instance of the state to restrain a corporation from transacting business, even though it was formed to bring about, by conditions imposed upon selling agents, a monopoly in the cigarette business, and had largely succeeded in doing so.[2] But the United States government may enjoin corporations from combining in violation of the anti-trust act of congress of July 2, 1890.[3] The state may enjoin foreign corporations from doing business illegally in the state.[4] A highway commissioner cannot be authorized by statute to stop a toll road company from collecting tolls until it repairs its

general cannot maintain an injunction against a combination of insurance companies to fix rates and commissions, inasmuch as insurance business is not a public or quasi-public business, nor does it concern a staple of life. Queen Ins. Co. *v.* State, 86 Tex. 250 (1893).

1 See § 37, *supra.* Even though a person who has a contract with a street railway company that the latter will lease its street railway on certain terms, turns over such contract to a new corporation for $900,000 of stock of the latter, and the latter then assumes the lease, and even though such stock is illegal under the constitution and statutes of Pennsylvania, yet where the state delays three years in filing a bill to declare it void, and meanwhile the stock has passed into *bona fide* hands, and not until five years thereafter are the real owners of the stock made parties defendant, the bill will be dismissed. Commonwealth *v.* Reading, etc. Co., 204 Pa. St. 151 (1902).

2 The remedy, if any, is by *quo warranto.* The court reviewed the cases wherein injunction would lie. Stockton *v.* American, etc. Co., 55 N. J. Eq. 352 (1897).

3 See § 503*a*, *supra.*

4 Where a New Jersey corporation has brought about an illegal combination and trust of fertilizer corporations and has obtained permission to do business in South Carolina, a suit lies against it at the instance of the state to cancel the conveyances of property to it in the state and to have receivers appointed of the South Carolina corporations that entered into the combination, and to set aside all illegal contracts and to revoke the license to the New Jersey corporation to do business in the state. State *v.* Virginia-Carolina, etc. Co., 71 S. C. 544 (1905). The state may enjoin a foreign railroad company from carrying on the warehouse business, except so far as the same is incidental to the railroad business, the charter of such company not including warehouse business as a business in itself. State *v.* Southern, etc. Co., 52 La. Ann. 1822 (1900). The Tennessee statute, prohibiting foreign corporations from doing business in the state where they have combined to lessen competition and influence prices, is legal, and the state may file a bill to restrain foreign corporations from doing business in the state where they have violated such statute. State *v.* Schlitz, etc. Co., 104 Tenn. 715 (1900). As to *quo warranto* against foreign corporations, see § 633, *supra.*

road, because that is a judicial function.[1] A corporation may be compelled to produce its books and papers for examination by a grand jury, even though it is charged with a criminal violation of a statute, but where there is no act of congress authorizing such examination, a *subpoena duces tecum* requiring it to produce all its books and papers before a grand jury is unreasonable and as indefensible as a search warrant would be if couched in similar terms.[2] A receiver will not be appointed even though the promoters have elected directors in violation of promises made, and purchased stock for the company, it appearing that they endeavored to correct these acts when objected to by the attorney-general.[3]

§ 636. *The state may waive its right to forfeit a charter.*—Various acts have been held to constitute such a waiver. "When a legislature has full power to create corporations, its act recognizing as valid a *de facto* corporation, whether private or municipal, operates to cure all defects in steps leading up to the organization, and makes a *de jure* out of what before was only a *de facto* corporation." There must, however, be a *de facto* organization upon which this recognition may act.[4] Numerous instances of acts of the legislature which constitute a waiver are set forth in detail in the notes below.[5]

1 Bridge Street, etc. Co. *v.* Hogadone, 114 N. W. Rep. 917 (Mich. 1908).

2 Hale *v.* Henkel, 201 U. S. 43 (1906). Officers of a corporation cannot excuse their failure to produce books and papers called for by a *subpœna duces tecum* in a proceeding before the grand jury on the ground that such books and papers are not in their possession or under their control, and they cannot object on the ground that the books and papers are immaterial. Nelson *v.* United States, 201 U. S. 92 (1906). A *subpœna duces tecum* commanding the secretary and treasurer of a corporation, which is charged with violating an anti-trust act, to appear and produce practically all the correspondence and documents of the corporation since its organization, in order to enable the district attorney to prove a violation of the statute, is an unreasonable search and seizure of papers, which is prohibited by the fourth amendment of the Constitution of the United States. *In re* Hale, 139 Fed. Rep. 496 (1905); aff'd, 201 U. S. 43. For other decisions to the effect that there is a very decided limit to the powers of the legislature or executive branches of the government to compel the production of the private books and papers of a corporation for inspection, and that there is also a limit, even in judiciary proceedings, see Matter of Application of Pacific Railway Commission, 32 Fed. Rep. 241 (1887); Kilbourn *v.* Thompson, 103 U. S. 168 (1880). *Cf.* Interstate Commerce Commission *v.* Brimson, 154 U. S. 447 (1894); *In re* Chapman, 166 U. S. 661 (1897).

3 State *v.* People's, etc. Bank, 197 Mo. 574 (1906).

4 Comanche County *v.* Lewis, 133 U. S. 198 (1890).

5 A legislative recognition of a charter may cure any unconstitutionality in the statute creating it. Snell *v.* Chicago, 133 Ill. 413 (1890). The

§ 637. *Who may allege that forfeiture or non-incorporation or dissolution exists — De facto corporations.*—It has already been shown that no one but the state can institute a suit to declare a for-

extension of time to complete railroads applies so as to prevent forfeiture for non-completion within the original time. State *v.* Bergen Neck Ry., 53 N. J. L. 108 (1890). Although suit is brought to forfeit a street-railway franchise for using electric power without authority, the legislature may cure the defect of power. To forfeit for not commencing work within a year the pleading must allege when the work was commenced. People *v.* Los Angeles, etc. Ry., 91 Cal. 338 (1891). An amendment to a charter is a waiver of any forfeiture thereof due to not commencing business within the prescribed time. Farnsworth *v.* Lime Rock, etc. R. R., 83 Me. 440 (1891). Although the act requires the certificate of incorporation to specify the termini, and the certificate merely says the termini are in a certain city, yet if the legislature subsequently, by special act, recognizes the company, the legality of its existence cannot be questioned. Koch *v.* North Ave. Ry., 75 Md. 222 (1892). In this case the organization was under the general railroad law. Under such a charter the route and its termini are to be determined by the mayor and city council "under their general power of control and regulation of the streets." A statute authorizing a corporation to reduce its capital stock waives informalities in its incorporation, and such waiver may extend to an illegal issue of watered stock. State *v.* Webb, 110 Ala. 214 (1896). A waiver may be express or by statutes recognizing its continued existence. *Re* New York El. R. R., 70 N. Y. 327, 338 (1877); People *v.* Manhattan Co., 9 Wend. 352, 380 (1832); or requiring it to make alterations on its road. Atty. Gen. *v.* Petersburg, etc. R. R., 6 Ired. L. (N. C.) 470 (1846); or authorizing a transfer of its property and franchises to another corporation. Chesapeake, etc. Canal Co. *v.* Baltimore, etc. R. R., 4 G. & J. (Md.) 1, 127 (1832); or requiring a bank to resume specific payments by a certain date. Commercial Bank *v.* State, 6 Sm. & M. (Miss.) 599, 622 (1846). But waiver as to terminus is not a waiver of an abandonment of part of the road, nor of a defect as to the width of the turnpike. People *v.* Fishkill, etc. Co., 27 Barb. 445 (1857). Waiver may arise by a statute extending the corporate powers. People *v.* Ottawa, etc. Co., 115 Ill. 281 (1885); Central, etc. R. R. *v.* Twenty-third, etc. R. R., 54 How. Pr. 168, 186 (1877); or by authorizing a change of route. State *v.* Fourth, etc. Co., 15 N. H. 162 (1844); or by expressly waiving the cause for forfeiture. Lumpkin *v.* Jones, 1 Ga. 27 (1846). The legislature may expressly waive a cause for forfeiture arising from suspension of specie payments. Atchafalaya Bank *v.* Dawson, 13 La. 497 (1839). May waive by extending the time for completion. La Grange, etc. R. R. *v.* Rainey, 7 Coldw. (Tenn.) 420 (1870). Amending charter, etc., is a waiver. White's, etc. Co. *v.* Davidson County, 3 Tenn. Ch. 396 (1877). An act reviving a corporation is a waiver, even though the act was fraudulently passed. *Re* Mechanics' Soc., 31 La. Ann. 627 (1879). The waiver protects a turnpike corporation from an indictment for obstructing the road. State *v.* Godwinsville, etc. Co., 44 N. J. L. 496 (1882). But the waiver must have been clearly intended. People *v.* Kingston, etc. Co., 23 Wend. 193 (1840). The appointment of a corporate officer by the governor and senate is not a waiver. People *v.* Phœnix Bank, 24 Wend. 431 (1840). Long delay in bringing the

feiture.[1] Also, that no one can institute a suit in equity to dissolve a corporation.[2] The question now arises whether the state or any person, either as plaintiff or defendant, may allege forfeiture or dissolution or non-incorporation where there have been no *quo warranto* proceedings instituted and prosecuted by the state to judgment. With a few exceptions such an allegation is not allowed.

A creditor of a supposed corporation cannot ordinarily hold the stockholders liable as partners although they did not legally incorporate.[3] It is true that in certain cases, where a stockholder is made liable to corporate creditors upon the dissolution of the corporation, a dissolution is held to exist where the corporation is hopelessly insolvent.[4] But as a rule no one is allowed to assert that the corporation is dissolved, or its franchise forfeited, or its incorporation illegal, until after such a result has been decreed by a court in a proceeding instituted for that purpose by the state. Thus, a stockholder sued on his subscription cannot, unless his subscription was made previous to the incorporation, set up that the company was not legally incorporated.[5]

The corporation is called a *de facto* corporation, and only the state is allowed to question its existence.

quo warranto may be a waiver. People *v.* Williamsburgh, etc. Co., 47 N. Y. 586 (1872); People *v.* Oakland, etc. Bank, 1 Doug. (Mich.) 282 (1843). *Cf.* § 633, notes, *supra*. *Dictum*, that the state may waive forfeiture. Briggs *v.* Cape Cod, etc. Co., 137 Mass. 71 (1884), citing cases. A special act amending the charter waives defects in the articles of association as filed. Basshor *v.* Dressel, 34 Md. 503 (1871). An amendment to a charter waives the right of forfeiture for fraud, non-user, and misuser. People *v.* Ottawa, etc. Co., 115 Ill. 281 (1886). An amendment of the charter is a waiver. Attorney-General *v.* Petersburg, etc. R. R., 6 Ired. L. (N. C.) 456 (1846); Charles River Bridge Co. *v.* Warren Bridge, 24 Mass. 344 (1829). The waiver may be express. State *v.* Bank of Charleston, 2 McMull. (S. C.) 439 (1843); Enfield Bridge Co. *v.* Connecticut, etc. Co., 7 Conn. 28 (1828); Kanawha Coal Co. *v.* Kanawha, etc. Co., 7 Blatchf. 391 (1870); s. c., 14 Fed. Cas. 108. Where the incorporation had been irregular, the recognition of a corporation by the legislature is equivalent to a charter. McAuley *v.* Columbus, etc. Ry., 83 Ill. 348 (1876); Cowell *v.* Colorado Springs Co., 3 Colo. 82 (1876); Mead *v.* New York, etc. R. R., 45 Conn. 199 (1877); Kanawha Coal Co. *v.* Kanawha, etc. Co., 7 Blatchf. 391 (1870); s. c., 14 Fed. Cas. 108; St. Louis R. R. *v.* Northwestern, etc. Ry., 2 Mo. App. 69 (1876); Atlantic, etc. R. R. *v.* St. Louis, 66 Mo. 228 (1877); State *v.* Morris, 73 Tex. 435 (1889). *Contra*, where charters must be granted by general laws. Oroville, etc. R. R. *v.* Supervisors, 37 Cal. 354 (1869). But see Brent *v.* State, 43 Ala. 297 (1869).

1 § 632, *supra*.

2 § 629, *supra*.

3 See ch. XIII, *supra*.

4 See § 631, *supra*.

5 §§ 183–186, *supra*. Concerning the question of who can complain of mistakes, irregularities, and illegalities in the corporation, see also ch. I, § 5, *supra*.

If there is a law authorizing incorporation, and a company has attempted to organize under it and has acted as a corporation, it is a *de facto* corporation, and its *de jure* existence can be questioned only by the state.[1] In condemnation proceedings, instituted by a corporation, the property owner may set up the defense that the corporation is neither a *de facto* nor a *de jure* corporation,[2] but if its *de facto* existence is clear, no question can be raised in that proceeding as to its *de jure* existence.[3]

1 Quoted and approved in Central, etc. Ry. *v.* Union, etc. Ry. 144 Ala. 639 (1905). Independent Order *v.* United Order, 94 Wis. 234 (1896). "The test of a *de facto* corporation is this: Was there a law under which there might have been a *de jure* corporation of the kind, character, and class to which the organization in question apparently belongs?" Toledo, etc. R. R. *v.* Continental Trust Co., 95 Fed. Rep. 497, 508 (1899). A corporation is a *de facto* one where the law authorizes such a corporation and where the company has made an effort to organize under that law and is transacting business in the corporate name. Marshall *v.* Keach, 81 N. E. Rep. 29 (Ill. 1907). In proving a *de facto* corporation the meetings and the issue of stock and the transaction of business may be proved by parol without producing the books. Johnson *v.* Okerstrom, 70 Minn. 303 (1897). A *de facto* corporation exists where the company might have incorporated under the statutes and has acted as a corporation. Methodist, etc. Church *v.* Pickett, 19 N. Y. 482 (1859). Estoppel as to corporate existence seems to mean that the corporation is obliged to prove only a *de facto* existence, and need not prove the details of incorporation. Leonardsville Bank *v.* Willard, 25 N. Y. 574 (1862).

2 *Re* Brooklyn, etc. Ry., 72 N. Y. 245 (1878); *Re* New York Cable Co. *v.* Mayor, etc., 104 N. Y. 1 (1887). In condemnation proceedings the defense may be set up that the charter illegally combined public and private purposes. Bayou, etc. Co. *v.* Doullut, 111 La. 517 (1904). It is a defense to condemnation proceedings that the corporation has no resources to carry out the purposes of its charter. New Orleans Terminal Co. *v.* Teller, 113 La. 733 (1904). In a condemnation proceeding by a foreign telephone company against a railroad the telephone company must prove that it was legally organized, and it is a good defense that it was not legally organized. Cumberland, etc. Co. *v.* St. Louis, etc. Ry., 117 La. 199 (1906). In condemnation proceedings the defendant may show that the articles of incorporation of a railroad did not comply with the statute. Kinston, etc. R. R. *v.* Stroud, 132 N. C., 413 (1903).

3 Central, etc. Ry. *v.* Union, etc. Ry., 144 Ala. 639 (1905). *Re* Brooklyn, etc. R. R., 125 N. Y. 434 (1891). It is no defense to condemnation proceedings that the company had not commenced work within the time fixed by statute nor expended the capital required by statute. Thomas *v.* South Side, etc. R. R., 218 Ill. 571 (1905). In condemnation proceedings the defense that the corporation has ceased to exist for failure to complete its road within ten years is not good, inasmuch as the corporate existence can be attacked only in a direct proceeding for that purpose. Morrison *v.* Forman, 177 Ill. 427 (1898). Where land has been condemned by a railroad corporation, the grantee of the party whose land has been so condemned, the grant having been made prior to the condemnation,

A person who gives a bond or note to a corporation is not allowed to defeat the same by alleging that the corporation was not

but the grantee being represented in the proceedings, cannot maintain ejectment therefor on the ground that the railroad charter provided "that the rights, privileges, and powers of said corporation shall be null and void," unless certain work was done within a certain time, even if the work had not been done within the prescribed time. Only the state can question the corporate existence on this ground. New York & N. E. R. R. *v.* New York, N. H. etc. R. R., 52 Conn. 274, 284 (1884). See also Briggs *v.* Cape Cod Land Co., 137 Mass. 71 (1884). In this case the charter of a corporation required it to deposit with the state treasurer within four months from its date the sum of $200,000 as security for certain purposes, among others for the payment of damages for taking land, and the corporation did not deposit the $200,000 in cash, but in bonds of the United States of the par value of $200,000, and of the market value of $230,000. *Held*, a sufficient compliance, as the object of the provision was to provide security to various interests. Also held that the question whether a corporation has ceased to exist for non-compliance with charter provisions could only be judicially determined in a suit to which the commonwealth was a party. In condemnation proceedings the legality of the corporate existence cannot be attacked. Eddleman *v.* Union, etc. Co., 217 Ill. 409 (1905). A property owner cannot maintain a bill in equity for a decree that a railroad corporation is not a *bona fide* railroad corporation, and is not operating a public road, but only a private road for its use in manufacturing, even under the statutes of Pennsylvania, and even though the railroad company claims the right to take the property of the complainant under the power of eminent domain. Windsor Glass Co. *v.* Carnegie Co., 204 Pa. St. 459 (1903). It is no defense to a condemnation proceeding that the amended certificate of incorporation was not acknowledged before the proper officer. Philadelphia, etc. Co. *v.* Intercity, etc. R. R., 73 N. J. L. 86 (1905). A railroad may acquire, by condemnation or otherwise, a right of way as allowed by statute, even though no money has been paid in on its capital stock. Fayetteville St. Ry. *v.* Aberdeen & R. R., 142 N. C. 423 (1906). In condemnation proceedings the incorporation may be attacked as not being *de facto*. Its *de jure* existence cannot be so attacked. Brown *v.* Calumet River Ry., 125 Ill. 600 (1888). A railroad company regularly organized is entitled to condemn a right of way, even though it was organized in the interest of a coal company which furnished the capital for such railroad. The claim that the railroad company is merely a dummy for the coal company is no defense to the condemnation proceedings. Kansas, etc. Ry. *v.* Northwestern, etc. Co., 161 Mo. 288 (1901). An adjacent owner cannot enjoin a street-railway company on the ground that its charter is invalid, unless his property rights are affected. Nichols *v.* Ann Arbor, etc. Ry., 87 Mich. 361 (1891). A person whose land a corporation seeks to take under power of eminent domain cannot set up that the articles of incorporation had not been filed with the secretary of state, as required by the incorporating statute. Portland, etc. Co. *v.* Bobb, 88 Ky. 226 (1889). A railroad charter is not good so far as the right to condemn land is concerned, where the terminus is stated to be on the state line in a certain county. Atlantic, etc. R. R. *v.* Sullivant, 5 Ohio St. 276 (1855). In condemnation proceedings the defendant cannot set up that

duly incorporated;[1] nor can the corporation defeat its bonds or

the charter has been violated. *Re* Long Island R. R., 143 N. Y. 67 (1894). The existence of a railroad corporation cannot be questioned in an action brought by it to condemn land. Wellington, etc. R. R. *v.* Cashie, etc. Co., 114 N. C. 690 (1894). Where a gas company opens the streets under a statute and pays damages, and partly lays its pipes, it cannot subsequently be enjoined by a property owner on the ground that the statute has subsequently been adjudged to be unconstitutional. King *v.* Philadelphia Co., 154 Pa. St. 160 (1893). See also § 934, *infra*. In a condemnation proceeding by a street railway to obtain a right over a turnpike, the turnpike company may set up that the street railway charter has lapsed by reason of the company not having organized and commenced business within a certain time and that thereby the charter became void by reason of a constitutional provision. *In re* Philadelphia & M. Ry., 187 Pa. St. 123 (1898). The legality of a consolidation which has complied substantially with the statute cannot be attacked in condemnation proceedings. Smith *v.* Cleveland, etc. Ry., 81 N. E. Rep. 501 (Ind. 1907). In condemnation proceedings it is no defense that the corporation is not *de jure*, it being shown that it is *de facto*. Gillette *v.* Aurora Ry., 81 N. E. Rep. 1005 (Ill. 1907). Condemnation proceedings by a railroad cannot be defeated on the ground that it was fraudulently organized and does not intend to serve the public. Connolly *v.* Woods, 92 Pac. Rep. 573 (Idaho, 1907). A property owner may enjoin condemnation proceedings by a railroad company on the ground that it was not intended to be for public use, but was merely a dummy for a coal company. State *v.* Caretta Ry., 56 S. E. Rep. 520 (W. Va. 1907). Legal incorporation of a railroad may be questioned in condemnation proceedings. Warden *v.* Madisonville, etc. R. R., 101 S. W. Rep. 914 (Ky. 1907). It is no defense to condemnation proceedings that the principal part of the stock was subscribed for by an irresponsible person. State *v.* Superior Court, etc., 95 Pac. Rep. 490 (Wash. 1908). Corporate existence may be proved in condemnation proceedings by a certified copy of the certificate of incorporation and a showing of compliance with the statutory requirements. Calor, etc. Co. *v.* Franzell, 109 S. W. Rep. 328 (Ky. 1908). A land owner cannot enjoin condemnation proceedings on the ground that the railroad was an illegal merger of competing lines. Tibby Bros. Glass Co. *v.* Pennsylvania R. R., 68 Atl. Rep. 975 (Penn. 1908).

1 The validity of the incorporation of an insurance company cannot be questioned by a person who has given to it a capital-stock note. Raegener *v.* Hubbard, 167 N. Y. 301 (1901). A person who has sold a bond and mortgage to a corporation and seeks to recover it back from one who purchased it in good faith from the corporation, cannot set up that the corporation was irregularly organized. Green *v.* Grigg, 98 N. Y. App. Div. 445 (1904). A member of a building and loan association who borrows money from it cannot defend against the loan on the ground that it was illegally organized. Manship *v.* New, etc. Assoc., 110 Fed. Rep. 845 (1901). The maker of a note in payment for goods sold by a corporation cannot question the corporate existence. First, etc. Church *v.* Grand Rapids, etc. Co., 15 Colo. App. 46 (1900). Where a bond has been given to a corporation for the performance by the treasurer of his duties, and the corporation sues on such bond, due incorporation cannot be denied. Wood *v.* Friendship, etc., 106 Ky. 424 (1899). A railroad suing on a note

debt by alleging its want of lawful incorporation.[1] A tenant cannot, in an ejectment suit, set up that his landlord was not duly in-

cannot be defeated by the defense that it has forfeited its charter, there being no adjudication to that effect. Toledo, etc. R. R. *v.* Johnson, 49 Mich. 148 (1882). A suit by the corporation on a bond is not to be met by a plea of forfeiture for non-user. West *v.* Carolina, etc. Ins. Co., 31 Ark. 476 (1876). Nor its suit on a note by the plea that it has abandoned its franchises. John *v.* Farmers', etc. Bank, 2 Blackf. 367 (1830); East Tennessee, etc. Co. *v.* Gaskell, 2 Lea (Tenn.), 742 (1879); Hartsville University *v.* Hamilton, 34 Ind. 506 (1870). An indorser sued by the corporation cannot claim that it has rendered its charter liable to forfeiture by suspension of specie payments. Atchafalaya Bank *v.* Dawson, 13 La. 497 (1839). See also McFarlan *v.* Triton Ins. Co., 4 Denio, 392 (1847); St. Louis *v.* Shields, 62 Mo. 247 (1876); Loaners' Bank *v.* Jacoby, 10 Hun, 143 (1877); Commissioners, etc. *v.* Bolles, 94 U. S. 104 (1876); Henriques *v.* Dutch West India Co., 2 Ld. Raym. 1532 (1729), where a foreign corporation sued and the general issue was not pleaded. Proof of organization in fact and user meets a plea of *nul tiel corporation* by the maker of a note to the corporation. Mitchell *v.* Deeds, 49 Ill. 416 (1867); Smelser *v.* Wayne, etc. T. Co., 82 Ind. 417 (1882). But see Williams *v.* Bank of Michigan, 7 Wend. 540 (1831). In a suit by a corporation on a note, the execution of the note to the corporation is *prima facie* proof of its incorporation. A *de facto* corporation may enforce a note given to it. Hudson *v.* Green Hill Seminary, 113 Ill. 618 (1885); Booske *v.* Gulf Ice Co., 24 Fla. 550 (1888); Winget *v.* Quincy Bldg. etc. Assoc., 128 Ill. 67 (1889). In a suit by a *bona fide* indorsee of a note from a corporation as indorser, the maker cannot set up that the company was not properly incorporated. Brickley *v.* Edwards, 131 Ind. 3 (1892). The maker of a note to a bank cannot question its incorporation. Exchange Nat. Bank *v.* Capps, 32 Neb. 242 (1891); Columbia Electric Co. *v.* Dixon, 46 Minn. 463 (1891); Butchers', etc. Bank *v.* McDonald, 130 Mass. 264 (1881); Jones *v.* Bank of Tennessee, 8 B. Mon. (Ky.) 122 (1847); Leonardsville Bank *v.* Willard, 25 N. Y. 574 (1862); Nutting *v.* Hill, 71 Ga. 557 (1883); Irvine *v.* Lumberman's Bank, 2 Watts & S. (Pa.) 204 (1841); Congregational Soc. *v.* Perry, 6 N. H. 164 (1833); Pape *v.* Capital Bank, 20 Kan. 440 (1878); Massey *v.* Building Assoc., 22 Kan. 624 (1879); Vater *v.* Lewis, 36 Ind. 288 (1871); Smith *v.* Miss. etc. R. R., 14 Miss. 179 (1846), where the maker of the note claimed that the corporation was fraudulently and illegally organized; Studebaker, etc. Co. *v.* Montgomery, 74 Mo. 101 (1881); Stoutimore *v.* Clark, 70 Mo. 471 (1875); Blake *v.* Holley, 14 Ind. 383 (1860); Jones *v.* Cincinnati, etc. Co., 14 Ind. 89 (1860), holding also that the corporation need not prove even a *de facto* existence. To same effect, Montgomery R. R. *v.* Hurst, 9 Ala. 513 (1846). *Cf.* White *v.* Campbell, 5 Humph. (Tenn.) 38 (1844), where the remarkable decision was made that, if the corporation had been dissolved at the time the note was given, the maker was not liable and could have a mortgage which he gave as security set aside. A *de facto* corporation, as indorsee of a note, may enforce it. Wilcox *v.* Toledo, etc. R. R., 43 Mich. 584 (1880); Haas *v.* Bank of Commerce, 41 Neb. 754 (1894); Bank of Shasta *v.* Boyd, 99 Cal. 604 (1893).

1 Independent Order, etc. *v.* Paine, 122 Ill. 625 (1887); Blackburn *v.*

corporated.[1] But where a proposed national bank is never authorized by the comptroller of the currency to commence business and never does commence business, a lease made in its name cannot be enforced against it.[2] A person who mortgages land to a supposed corporation cannot defeat a foreclosure of the mortgage by alleging that the mortgagee is not a corporation;[3] nor can the corporation

Selma, etc. R. R., 2 Flip. 525 (1879); s. c., 3 Fed. Cas. 526; Racine, etc. R. R. *v.* Farmers', etc. Co., 49 Ill. 331, 346 (1868); Liter *v.* Ozokerite Min. Co., 7 Utah, 487 (1891); Aller *v.* Cameron, 3 Dill. 198 (1874); s. c., 1 Fed. Cas. 522, where a municipality set up this defense; Empire, etc. Mfg. Co. *v.* Stuart, 46 Mich. 482 (1882), a promissory note case. A corporation cannot defend against a debt on the ground that by a mistake one of the duplicate originals of its certificate of incorporation was filed in the state recorder's office instead of the county recorder's office. Huntington, etc. Co. *v.* Schofield, 28 Ind. App. 95 (1901). Where the suit is on a bond, a stockholder cannot sue to have the corporation declared a copartnership by reason of irregular incorporation. Baker *v.* Backus, 32 Ill. 79 (1863). Even though the statute requires the articles of incorporation to be filed in each county where the company does business, yet failure to file in one county is no defense to a note given to the company. Farmers', etc. Co. *v.* Borders, 26 Ind. App. 491 (1901). The corporation itself, when sued upon notes which it has made, cannot set up any informality in its incorporation. Kelley *v.* Newburyport, etc. R. R., 141 Mass. 496 (1886); Empire Mfg. Co. *v.* Stuart, 46 Mich. 482 (1881), where the corporation reincorporated in order to cure the irregularity.

1 Ricketson *v.* Galligan, 89 Wis. 394 (1895). Or where the corporation sues for rent due on a lease made by it. Oregonian Ry. *v.* Oregon, etc. Nav. Co., 22 Fed. Rep. 245 (1884); s. c., 23 Fed. Rep. 232 (1885); rev'd on another point in 130 U. S. 1. A lessee of corporate property cannot refuse to vacate on the ground that the company was not properly incorporated and officered, and that it did not own the property. Fayetteville Waterworks Co. *v.* Tillinghast, 119 N. C. 343 (1896).

2 McCormick *v.* Market Nat. Bank, 162 Ill. 100 (1896).

3 People's Sav. Bank *v.* Collins, 27 Conn. 142 (1858); West, etc. Sav. Bank *v.* Ford, 27 Conn. 282 (1858); and Hasenritter *v.* Kirchhoffer, 79 Mo. 239 (1883), where the mortgagor's grantee was held to be estopped; Franklin *v.* Twogood, 18 Iowa, 515 (1865); Hackensack Water Co. *v.* De Kay, 36 N. J. Eq. 548 (1883); Hubbard *v.* Chappel, 14 Ind. 601 (1860), where it was held that the mortgagee need not even prove itself to be a *de facto* corporation; Jones *v.* Kokomo, etc. Assoc., 77 Ind. 340 (1881). A mortgagor cannot attack the corporate existence of a mortgagee. Equitable, etc. Assoc. *v.* Bidwell, 60 Neb. 169 (1900). The regularity of the incorporation cannot be questioned in a suit by a corporation to foreclose a mortgage. Washington, etc. Assoc. *v.* Stanley, 38 Oreg. 319 (1901). But the mortgagor may deny the corporate existence of the assignee of the mortgagee. Dundee, etc. Co. *v.* Cooper, 26 Fed. Rep. 665 (1886). A second mortgagee cannot question the incorporation of the first mortgagee. Williamson *v.* Kokomo, etc. Assoc., 89 Ind. 389 (1883). In a mortgage foreclosure case brought by a corporation, the mortgagee cannot claim that the corporation took the mortgage before stock was subscribed to the amount required by its charter. Johnston *v.* Elizabeth,

itself, having given a mortgage, defeat a foreclosure by such a plea.[1] It has been held that where a consolidation of two railroad companies without statutory authority is void, and the consolidated company is not even a *de facto* company, a mortgage deed of trust and the bonds given by such a consolidated company cannot be

etc. Assoc., 104 Pa. St. 394 (1883). Parties contracting with a corporation as such cannot attack a mortgage given by the corporation on the ground that the corporation was never legally organized. Andrews *v.* National, etc. Works, 77 Fed. Rep. 774 (1897). A mortgagor to a foreign insurance company cannot demur to a bill for foreclosure on the ground that the taking of the mortgage was *ultra vires* and no certificate was filed. Boulware *v.* Davis, 90 Ala. 207 (1890). A stockholder who has given a mortgage to the corporation cannot defeat the same on the ground that the charter was unconstitutional. Building & Loan Assoc. *v.* Chamberlain, 4 S. D. 271 (1893). As against its mortgage the corporation cannot set up the defense that it was not legally organized, in that no stock was ever subscribed for. Jones *v.* Hale, 32 Oreg. 465 (1898). As against the purchaser of a note and mortgage executed to a corporation, it is no defense that the charter of the corporation had expired when the note and mortgage were executed. Citizens' Bank *v.* Jones, 117 Wis. 446 (1903). It is no defense to a mortgage given to a corporation that the statute under which it was organized was unconstitutional. Crete, etc. Ass'n *v.* Patz, 95 N. W. Rep. 793 (Neb. 1901). It is no defense to foreclosure that the company was fraudulently organized. Gunderson *v.* Illinois Trust & Savings Bank, 100 Ill. App. Rep. 461 (1902); aff'd, 199 Ill. 422.

1 Quoted and approved in Phinizy *v.* Augusta, etc. R. R., 62 Fed. Rep. 678 (1894); Wallace *v.* Loomis, 97 U. S. 146 (1877); Racine, etc. R. R. *v.* Farmers', etc. Co., 49 Ill. 331, 346 (1868). Where the mortgagor was a consolidated company, the grantee of the corporation cannot deny the validity of its mortgage to another person by alleging its want of legal incorporation. Hasselman *v.* U. S. etc. Co., 97 Ind. 365 (1884). The lessee of the road of a railroad corporation cannot defeat the foreclosure of a mortgage given by the latter by alleging that the latter was never duly incorporated. Beekman *v.* Hudson, etc. Ry., 35 Fed. Rep. 3 (1888). A mortgagee of a *de facto* corporation is not defeated by an attachment against the company. Defects in incorporation are immaterial herein. Duggan *v.* Colorado, etc. Co., 11 Colo. 113 (1888). In a mortgage foreclosure the defense that the mortgagor was not legally incorporated or organized cannot be set up. Hackensack Water Co. *v.* De Kay, 36 N. J. Eq. 548 (1883). A mortgagor corporation cannot defend against the mortgage on the ground that the special charter of the mortgagor was unconstitutional and void. McTighe *v.* Macon Const. Co., 94 Ga. 306 (1894). A junior mortgagee cannot question the incorporation of a senior mortgagee, the latter being a *de facto* corporation. Williamson *v.* Kokomo, etc. Assoc., 89 Ind. 389 (1883). It is no defense to a foreclosure that the mortgagor was not legally organized, and a stockholder will not be allowed to intervene to set up that defense. Gunderson *v.* Illinois, etc. Bank, 100 Ill. App. 461 (1902). It is no defense to a mortgage that in the incorporation of the company most of its subscriptions were made by irresponsible parties. Gunderson *v.* Illinois, etc. Bank, 199 Ill. 422 (1902).

enforced and do not bind even the constituent companies.[1] But where there is a statute authorizing such a consolidation, the rule is different.[2] In a creditor's suit to hold a reorganized company liable for his debt of the old company, the legality of the organization of the new company cannot be inquired into.[3]

A grantor of land to a *de facto* corporation cannot deny the legality of his grant on the ground that the corporation was not duly incorporated.[4] Theoretically, however, a deed to a supposed cor-

1 American L. & T. Co. *v.* Minnesota, etc. R. R., 157 Ill. 641 (1895). *Cf.* Coe *v.* New Jersey, etc. Ry., 31 N. J. Eq. 105 (1879).

2 Thus no one but the state can attack the legality of a consolidation of a line of railroad running through Ohio, Indiana, and Illinois, where the statutes of those three states provided for such consolidation under certain circumstances, even though a judgment creditor who endeavors to attack such consolidation offers to prove that this consolidated company did not come within the terms of the statutes. Such a consolidated company is a *de facto* corporation, and no one but the state can attack its *de jure* existence, there being a statute under which such corporations apparently might exist. Toledo, etc. R. R. *v.* Continental Trust Co., 95 Fed. Rep. 497 (1899). A general creditor of a consolidated corporation cannot attack the validity of the bonds of the corporation on the ground that the consolidation was not legal. Louisville T. Co. *v.* Louisville, etc. Co., 84 Fed. Rep. 539 (1898); rev'd on other grounds, 174 U. S. 674. A steam railroad cannot enjoin a street railway from crossing its lines on the ground that the latter was a consolidation made before one of the constituent street railway companies was completed as required by statute. Cleveland, etc. Co. *v.* Freight, 84 N. E. Rep. 15 (Ind. 1908). Even though two corporations are neither of them legally incorporated, yet if they are consolidated a stockholder in the consolidated company cannot claim that the stockholders are partners, although the consolidated company is not a legal corporation; neither are the officers of the consolidated company merely agents for the stockholders, no partnership being intended. Hence any question of fraud on the part of the majority stockholders will be determined by the principles of corporation law. Cannon *v.* Brush, etc. Co., 96 Md. 446 (1903).

3 Armour *v.* E. Bement's Sons, 123 Fed. Rep. 56 (1903).

4 Smith *v.* Sheeley, 12 Wall. 358 (1870); Frost *v.* Frostburg Coal Co., 24 How. 278 (1860). See also Cahall *v.* Citizens', etc. Assoc., 61 Ala. 232 (1878), where the corporation brought ejectment; Thompson *v.* Candor, 60 Ill. 244 (1871), where the grantor sued to recover possession; Sword *v.* Wickersham, 29 Kan. 746 (1883), where the grantee was a municipality; Cowell *v.* Colorado Springs Co., 3 Colo. 82 (1876); affirmed, 100 U. S. 55 (1879), where the corporation sued for breach of covenant; Alexander *v.* Tolleston Club, 110 Ill. 65 (1884), where the grantor claimed the right of way; Bakersfield, etc. Assoc. *v.* Chester, 55 Cal. 98 (1880); Keene *v.* Van Reuth, 48 Md. 184 (1877); Baker *v.* Neff, 73 Ind. 68 (1880); Snyder *v.* Studebaker, 19 Ind. 462 (1862),—cases where a grantee of the grantor was held estopped; Fay *v.* Noble, 61 Mass. 188 (1851), where a third person was not allowed to impeach a transfer of property by a corporation to another person, setting up that the

poration, which is not even a *de facto* corporation, has been held to be absolutely void.[1]

transfer was invalid owing to informalities in the corporation. A grantor of land to a corporation cannot claim title on the ground that the corporation was not properly organized. Rannels *v.* Rowe, 145 Fed. Rep. 296 (1906). Whether a corporation was properly organized cannot be questioned where it is merely a link in a chain of title to real estate. Thomas *v.* Wilcox, 18 S. Dak. 625 (1904). A conveyance of property to a corporation cannot be attacked on the ground that it was not legally organized. Leavengood *v.* McGee, 91 Pac. Rep. 453 (Ore. 1907).

The grantee of the corporation cannot defeat an attachment against it and levied on the land by setting up this defense. Dooley *v.* Walcott, 86 Mass. 406 (1862). But Carey *v.* Cincinnati, etc. R. R., 5 Iowa, 357 (1857), allowed a grantor to a foreign corporation to allege this defense to its suit for possession. A grantor to a corporation who aids the corporation in conveying to others is certainly not allowed this defense. Close *v.* Glenwood Cemetery, 107 U. S. 466 (1882). A corporation may hold and sell land, though in its incorporation the incorporators did not attach a seal to their signatures as required by statute. Stoker *v.* Schwab, 1 N. Y. Supp. 425 (1888). A conveyance to or by a *de facto* corporation cannot be avoided on the ground of any defect in its organization. Doyle *v.* San Diego, etc. Co., 46 Fed. Rep. 709 (1891). The grantor who has been paid cannot rescind on the ground that the grantee corporation could not take. Long *v.* Georgia Pac. Ry., 91 Ala. 519 (1891). In ejectment the incorporation of a prior grantor need not be shown. Finch *v.* Ullmann, 105 Mo. 255 (1891). A creditor of a supposed corporation cannot attack a mortgage given by it to another creditor on the ground that the company was irregularly organized. Briar Hill Coal, etc. Co. *v.* Atlas Works, 146 Pa. St. 290 (1892). A transfer of land by a *de facto* corporation is

1 Where a statute extending the existence of a corporation was unconstitutional the corporation cannot maintain a suit to enjoin its grantee of land from violating a restriction in the deed. Clark *v.* American, etc. Co., 165 Ind. 213 (1905). A deed to a corporation not in existence is void. Provost *v.* Morgan's, etc. Co., 42 La. Ann. 809 (1890). A purchaser of land from a corporation may object to the title on the ground that the corporation took title before a certain amount of its capital stock had been obtained, as required by statute. Globe Realty Co. *v.* Whitney, 106 La. 257 (1901). Where no organization meetings are held and no officers elected, and no by-laws adopted, and no certificates of stock issued, and no seal adopted, and no records kept, the incorporation does not exist, even though a certificate of incorporation was issued by the state officers. Hence a deed delivered to such corporation does not give title. Wall *v.* Mines, 130 Cal. 27 (1900). A deed to certain persons "as incorporators" of a company not yet incorporated does not vest title in the company when incorporated. McCandless *v.* Inland, etc. Co., 112 Ga. 291 (1900); s. c., 115 Ga. 968. Where the articles must be filed with the secretary of state and a fee paid in order to form a corporation, a transfer of property before this is done does not convey title to the corporation. The transferrer's creditors may attach the property. Jones *v.* Aspen Hardware Co., 21 Colo. 263 (1895).

The question of whether a deed to an unincorporated association is valid is considered elsewhere,[1] as is also the effect of a deed to a corporation to be thereafter organized.[2] A court in passing upon the legality of a bequest to a foreign corporation will not pass upon the legality of its corporate existence.[3]

In general it may be said that the uniform current of authority is to the effect that only the state may question the legality of the organization of a *de facto* corporation. Hence, if it is a *de facto* corporation, persons sued by a corporation in an action *ex contractu*, as well as persons sued by the corporation in an action *ex delicto*, are equally debarred from setting up the defense that the corporation was not legally organized.[4]

valid as against all parties except the state. Crenshaw *v.* Ullman, 113 Mo. 633 (1893). In ejectment the corporate existence cannot be questioned, its deed being in the chain of title. Finch *v.* Ullmann, 105 Mo. 255 (1891). In a suit by a corporation to protect real estate held for it by trustees, the defendants cannot attack the incorporation of the company. First Baptist Church *v.* Branham, 90 Cal. 22 (1891). The grantor of land cannot claim that the grantee was unincorporated and not qualified to hold land, the incorporation being only partially completed. Reinhard *v.* Virginia, etc. Co., 107 Mo. 616 (1891). Under the Montana statutes, even though no organization meetings of the stockholders and directors are held, yet a deed of property to the corporation may be valid. Morrison *v.* Clark, 24 Mont. 515 (1900). Where the owner of real estate deeds it to a supposed corporation, and many years afterwards makes another deed to another corporation, the latter cannot claim that the first corporation was illegally organized. It is for the state alone to make such claim. Los Angeles, etc. *v.* Spires, 126 Cal. 541 (1899). A statute validating deeds made to supposed corporations, which afterwards become incorporated, applies to deeds made after such statute. Cumberland, etc. Co. *v.* Daniel, 52 S. W. Rep. 446 (Tenn. 1899). A grantor of land to a corporation cannot reclaim it on the ground of a disolution, there having been no decree of dissolution. Bohannan *v.* Binns, 31 Miss. 355 (1856). The title to land owned by a corporation is not affected by the fact that the articles of incorporation were filed with the county recorder instead of the county clerk, as required by statute. San Diego, etc. Co. *v.* Frame, 137 Cal. 441 (1902).

1 See § 504, *supra*.

2 See § 694, *infra*.

3 St. John *v.* Andrews Institute, 117 N. Y. App. Div. 698 (1907).

4 Keokuk Commercial Bank *v.* Pfeiffer, 108 N. Y. 242 (1888). A city contracting with a water-works company for water cannot defeat the rent on the ground that the company was not legally organized. City of Greenville *v.* Greenville, etc. Co., 125 Ala. 625 (1900). Even though an electric light company is incorporated under the general manufacturing act, yet if a city grants the company the right to use the streets and the company exercises the right for nine years, the city will not then be allowed to repudiate its grant. The state alone can raise the question. Wyandotte, etc. Co. *v.* City of Wyandotte, 124 Mich. 43 (1900). A city, after granting a franchise to a gas company, cannot afterwards question the regularity of its incorporation. City of Kalamazoo *v.* Kalamazoo, etc. Co., 124 Mich. 74 (1900). Even

The same rule applies when the corporation is defendant instead

though a charter has been taken out for water-works and also electric light purposes, although the statutes do not authorize the combining of those two businesses in one corporation, yet a contract made by the city with such corporation to pay certain hydrant and electric light rentals may be enforced, inasmuch as the contract is valid, even if the corporation be considered but a partnership. Cunningham *v.* City of Cleveland, 98 Fed. Rep. 657 (1899). A purchaser of goods from a corporation cannot allege that the company commenced business before a certain part of the capital stock had been paid in as required by its charter. Wells Co. *v.* Avon Mills, 118 Fed. Rep. 190 (1902). See same case, 198 U. S. 177 and 148 Fed. Rep. 1018. The legality of the existence of a gas company cannot be tested by a bill in equity filed by a municipality to prevent its officers and agents from laying pipes in the streets, especially where the corporation itself is not made a party defendant. Mayor, etc. *v.* Addicks, 7 Del. Ch. 56 (1899). A member of a mutual insurance company cannot, when sued for an assessment, set up that the articles of incorporation did not comply with the statute. Gilman *v.* Druse, 111 Wis. 400 (1901). It is no objection to the validity of the issue of stock for patents that the corporation selling the patents was not legally incorporated. Way *v.* American, etc. Co., 60 N. J. Eq. 263 (1900). A city which has made a grant to a telephone company cannot thereafter question the validity of its incorporation. Old Colony Trust Co. *v.* City of Wichita, 123 Fed. Rep. 762 (1903); aff'd, 132 Fed. Rep. 641. A person sued for goods sold to him by a corporation cannot attack its incorporation. Raphael, etc. Co. *v.* Crittenden, 139 Cal. 488 (1903). A vendor of a crop to a corporation cannot defend against the contract on the ground that the corporation was not regularly organized. California, etc. Ass'n *v.* Stelling, 141 Cal. 713 (1904). The regularity of the extension of a charter of a bank cannot be questioned by a borrower from the bank. Campbell *v.* Perth Amboy, etc. Co., 70 N. J. Eq. 40 (1905). Even though an amendment to the charter whereby the number of directors is increased is not for several months recorded in a public office, as required by statute, yet if the increased number of directors is elected their acts bind the corporation. Werle *v.* Northwestern, etc. Co., 125 Wis. 534 (1905). A person who sues a corporation as such and levies an attachment cannot when sued for damages for levying the attachment set up the defense that the corporation was not legally organized. Lincoln Butter Co. *v.* Edwards, etc. Co., 107 N. W. Rep. 797 (Neb. 1906). In a suit by a corporation to recover from the retiring treasurer the books and corporate funds he cannot set up that it was not duly incorporated. Seven, etc. *v.* Ferguson, 98 Me. 176 (1903). A stockholder who by proxy takes part in a meeting extending the corporate existence cannot deny the validity of such extension. Callahan *v.* Chilcott, etc. Co., 37 Col. 331 (1906). A person suing a corporation cannot set up that it was illegally incorporated. Compton *v.* People's, etc. Co., 89 Pac. Rep. 1039 (Kan. 1907). A suit to declare void a tax sale by a municipality cannot be maintained on the ground that the incorporators of the municipality were not as required by the statute, the municipality having existed and acted as such for many years. Whipple *v.* Tuxworth, 99 S. W. Rep. 86 (Ark. 1907). A pledgee of property from a corporation cannot defend against a suit by the receiver thereof to recover the property by denying the corporate capacity of the company. Blanc *v.*

of plaintiff. The corporation itself is no more entitled to set up

Germania Nat. Bank, 114 La. 739 (1905). An insurance company sued on a policy which it issued to a corporation cannot defend on the ground that the latter was not a corporation. Palatine Ins. Co. *v.* Santa Fé, etc. Co., 82 Pac. Rep. 363 (N. Mex. 1905). A party contracting with a corporation cannot claim that it was not legally incorporated. Shawnee, etc., Co. *v.* Miller, Ohio Circuits (1903), p. 198. Where a corporation sues to prevent a loss of its property, the defendant cannot set up the defense that the articles of incorporation were not acknowledged as required by statute. Franke *v.* Mann, 106 Wis. 118 (1900). A person who has contracted to purchase land from a supposed corporation cannot avoid the contract by the defense that the charter of the company had expired. West Missouri, etc. Co. *v.* Kansas City, etc. Ry., 161 Mo. 595 (1901).

The validity of the charter of a school incorporated as a joint-stock incorporation cannot be tested in *quo warranto* proceedings brought to determine the rights of parties claiming to be trustees. Commonwealth *v.* Yetter, 190 Pa. St. 488 (1899). The legality of the existence of the corporation cannot be questioned in a creditor's suit to wind up and administer the assets. Hooven, etc. Co. *v.* Evans, etc. Co., 193 Pa. St. 28 (1899). A person injured by a railroad cannot sue the lessor of such railroad on the ground that the lessee was not a legal corporation. Pinkerton *v.* Pennsylvania, etc. Co., 193 Pa. St. 229 (1899). Even though a corporation was incorporated by a special act in violation of the constitution, yet its existence cannot be attacked collaterally. Commonwealth, etc. *v.* Philadelphia County, 193 Pa. St. 236 (1899).

An officer cannot defend against an action to make him account, by setting up that the company was fraudulently organized. Haacke *v.* Knights, etc. Club, 76 Md. 429 (1892). A person taking water from an irrigation company under contract cannot defend against an action thereon by alleging that the company was not incorporated. Fresno, etc. Co. *v.* Warner, 72 Cal. 379 (1887). A debtor sued by a corporation on an account cannot deny the corporate existence which he has recognized. Plummer *v.* Struby, etc. Co., 23 Colo. 190 (1896). A debtor or creditor of a corporation cannot attack the incorporation on the ground that the certificate of the payment of the capital stock has not been filed as required by the New York statutes. Port Jefferson Bank *v.* Darling, 91 Hun, 236 (1895). That the corporation may ratify and enforce contracts entered into in its behalf by its promoters before incorporation, see § 705, etc., *infra*. A corporation cannot defend against its contracts by alleging that it never published its articles of association as required by statute. Wood *v.* Wiley, etc. Co., 56 Conn. 87 (1888). A corporation is liable for a tax even though it failed to file its articles of association with the secretary of state as required by statute. Walton *v.* Riley, 85 Ky. 413 (1887). The defendant cannot allege that the corporation was for an illegal purpose—that of running blockades—the charter not showing that fact. Importing, etc. Co. *v.* Lock, 50 Ala. 332 (1873). A corporation cannot be defeated in an action on a contract by the fact that twenty-four instead of twenty-five persons signed the articles of incorporation. Buffalo, etc. Ry. *v.* New York, etc. R. R., 22 Alb. L. J. 134 (N. Y. 1886). Where a corporation sues for the price of articles sold, the defendant cannot set up that the plaintiff sold the articles before its capital stock was fully paid up, as required by statute. Chase's, etc. Co. *v.* Boston, etc. Co., 152 Mass.

the defense of irregular, incomplete, or defective incorporation of itself than are the persons who are suing it.[1]

428 (1891); McCord, etc. Co. *v.* Glenn, 6 Utah, 139 (1889). A stockholder cannot enjoin the sale of his stock for non-payment of an assessment on the ground that an amendment to the charter increasing the number from seven to nine had not been filed with the secretary of state, as required by statute, it being shown that at corporate meetings he had voted for nine directors and had accepted certificates of stock signed by the president and secretary elected by nine directors. Jackson *v.* Crown Point, etc. Co., 21 Utah, 1 (1899). A person sued for tolls cannot set up that the corporation has not rendered required statements, and hence its charter is forfeitable. Kellogg *v.* Union Co., 12 Conn. 7 (1837). Nor that the charter was never legally vested or has been violated. In a

1 Dooley *v.* Cheshire Glass Co., 81 Mass. 494 (1860); Callender *v.* Painesville, etc. R. R., 11 Ohio St. 516 (1860); Holbrook *v.* St. Paul, etc. Ins. Co., 25 Minn. 229 (1878). See also Bommer *v.* American, etc. Co., 81 N. Y. 468 (1880), where the corporation sought to escape royalties by alleging that it incorporated after the contract by it to pay them was made. A corporation sued for work done cannot set up that it was not regularly incorporated. Merrick *v.* Reynolds, etc. Co., 101 Mass. 381 (1869). A corporation cannot defeat its taxes by alleging failure to comply with conditions subsequent in its charter. Baltimore, etc. R. R. *v.* Marshall Co., 3 W. Va. 319 (1869). The corporation cannot avoid a tax on the ground that it has ceased business. Bank of U. S. *v.* Commonwealth, 17 Pa. St. 400 (1851). A corporation receiving the stock of another corporation in consideration of certain agreements as to renting machines belonging to said latter company cannot, when enjoined from violating that agreement, set up that the latter company was not properly organized. Automatic, etc. Co. *v.* North American, etc. Co., 45 Fed. Rep. 1 (1891). Although there are less stockholders and less directors than the statute or charter require, yet the acts of these are sufficient to sustain obligations incurred by the corporation with third persons. Welch *v.* Importers', etc. Bank, 122 N. Y. 177 (1890). It is no defense to a proceeding by a religious corporation to collect a legacy to allege that there were irregularities in its incorporation, and that there has been a non-user of its franchises. *Re* Cutchogue Congregational Church, 131 N. Y. 1 (1892). The California code provides that the existence of a *de facto* corporation shall not be called in question in private suits. Lakeside, etc. Co. *v.* Crane, 80 Cal. 181 (1889); Golden, etc. Co. *v.* Joshua, etc. Works, 82 Cal. 184 (1890). An insurance company when sued on a policy cannot deny its incorporation on the ground that its charter required that it be published in a certain way within a specified time after the charter itself was granted and that this was not done. Brady *v.* Delaware, etc. Co., 2 Pennewill (Del.), 237 (1899). In the case of Perine *v.* Grand Lodge, 48 Minn. 82 (1892), where an insurance policy was sued upon, the court held that it was immaterial that the defendant was not incorporated, inasmuch as it had held itself out as a corporation. Bon Aqua Imp. Co. *v.* Standard F. Ins. Co., 34 W. Va. 764 (1891). Even though the certificate of incorporation recites several purposes, where the statute allows but one purpose, yet a corporation exists and may be held liable as such. Marion Bond Co. *v.* Mexican, etc. Co., 160 Ind. 558 (1902).

Where, however, a corporation is not even a *de facto* corporation,

suit by a toll road to recover a penalty for refusal to pay toll, the validity of the company's organization and the condition of the road cannot be brought into the controversy by way of defense. Canal St., etc. Co. *v.* Paas, 95 Mich. 372 (1893). But a turnpike company cannot recover fares for the part of its road which is constructed beyond its chartered limits. Pontiac, etc. Co. *v.* Hilton, 69 Mich. 115 (1888); Dyer *v.* Walker, 40 Pa. St. 157 (1861). Under the California Code, § 358, the regular incorporation of a *de facto* corporation cannot be questioned in an action by it for damages for an injury to property. Golden Gate, etc. Co. *v.* Joshua, etc. Works, 82 Cal. 184 (1890). In a suit by a water company to enjoin another company from diverting water, the legality of the incorporation of the plaintiff cannot be questioned where it is a *de facto* corporation. People's, etc. Co. *v.* '76 Land, etc. Co., 44 Pac. Rep. 176 (Cal. 1896). In a trial for embezzlement from a corporation, proof of a *de facto* corporation is sufficient. People *v.* Leonard, 106 Cal. 302 (1895). In a trial for receiving stolen goods belonging to a corporation, a corporate officer's testimony of its existence is sufficient if not contradicted. State *v.* Hahib, 18 R. I. 558 (1894). In Irvine Co. *v.* Bond, 74 Fed. Rep. 849 (1896), an owner of land in California incorporated a company under the laws of West Virginia, and transferred to it in payment for stock certain portions of his land. He owned all the stock and caused one share each to be issued to his lawyer, his wife, and three employees. The court held that the corporation was legal so far as the jurisdiction of the United States court was concerned. A director is not personally liable in damages to a property owner over whose premises the company's road runs without warrant. Lamming *v.* Galusha, 81 Hun, 247 (1894); aff'd, 151 N. Y. 648, where it was also claimed that the incorporation had been insufficient. Where two railroad companies claim a right of way, one cannot allege that the other's charter is forfeitable. Central, etc. R. R. *v.* Twenty-third, etc. R. R., 54 How. Pr. 168, 185 (1877). A religious corporation suing for its real estate cannot be met by a plea of dissolution, there having been no decree. Baptist House *v.* Webb, 66 Me. 398 (1877). A corporation suing for personal property is not defeated by a plea that it was not legally organized or is dissolved by non-user. Penobscot, etc. Corp. *v.* Lamson, 16 Me. 224 (1839). A grantee of a corporation's right to overflow land is not deprived of his right by dormancy and non-user of its franchises by the corporation. Heard *v.* Talbot, 73 Mass. 113 (1856). Attachment lies against the land of a foreign corporation though a receiver of it exists in the state creating it. Moseby *v.* Burrow, 52 Tex. 396 (1880). One corporation cannot enjoin a competing corporation from proceeding on the ground that the latter has subjected its charter to forfeiture by misuser or non-user. Elizabethtown Gaslight Co. *v.* Green, 46 N. J. Eq. 118 (1889). A county cannot seize a turnpike, although the company is guilty of misuser or non-user. A judgment of forfeiture is first necessary. Moore *v.* Schoppert, 22 W. Va. 282 (1883). A city seeking to lay out a road on a right of way cannot claim that the railroad company's right is forfeited by non-user. New Jersey R. R. *v.* Long Branch Com'rs, 39 N. J. L. 28 (1876). Service on a corporation cannot be made by service on a stockholder on the ground that it has forfeited its charter by non-user. Bache *v.* Nashville, etc. Soc., 10 Lea (Tenn.), 436 (1882). The forfeiture can exist only after a decree to that effect.

then, of course, it falls back into the category of copartnerships and cannot bring suit as a corporation.[1]

Chesapeake, etc. Co. *v.* Baltimore, etc. R. R., 4 G. & J. (Md.) 1 (1832). An agent sued for conversion of funds cannot allege that the corporation is guilty of a non-user of its franchises. Elizabeth, etc. Acad. *v.* Lindsey, 6 Ired. L. (N. C.) 476 (1846). A squatter on corporate land cannot dispute the corporate title by alleging that it was not legally incorporated or organized. Only the state can object. East, etc. Church *v.* Froislie, 37 Minn. 447 (1887). Statutory provisions as to notice of the first meeting are directory. They need not be observed if the stockholders acquiesce. Braintree, etc. Co. *v.* Braintree, 146 Mass. 482 (1881). See § 590, *supra.* Though the provision in the Kentucky statutes requiring publication of the charter is not complied with, yet the corporation is valid and complete, except that the state may proceed to annul the charter. No other party can raise the objection. Stutz *v.* Handley, 41 Fed. 531 (1890); rev'd on other grounds, 139 U. S. 417; Walton *v.* Riley, 85 Ky. 413, 421 (1887), overruling Heinig *v.* Adams, etc. Mfg. Co., 81 Ky. 300 (1883). A *de facto* corporation suffices where it seeks to enjoin a city from disturbing its property. Denver *v.* Mullen, 7 Colo. 345 (1884). Or where an assignment by the corporation was illegal and the assignee is sued by creditors. Rafferty *v.* Bank of Jersey City, 33 N. J. L. 368 (1869). Or where the president is sued by the company to recover its assets from him. Bank of Circleville *v.* Renick, 15 Ohio, 322 (1846). Or where an execution purchaser of the corporate property sues the mortgagee of the corporation. Morgan *v.* Donovan, 58 Ala. 241 (1877). Or where the corporation sues the sheriff for an illegal levy on its property. Dannebroge Min. Co. *v.* Allment, 26 Cal. 286 (1864). Or where the suit grows out of contracts with the corporation. Imboden *v.* Etowah, etc. Min. Co., 70 Ga. 86 (1883); Platte Valley Bank *v.* Harding, 1 Neb. 461 (1870). Or where a bank sues its correspondent bank. Bank of Toledo *v.* International Bank, 21 N. Y. 542 (1860). Or where a foreign corporation sues for a stipulated part of the oil taken from its land, and the defendant alleges that it is doing all its business outside of the state incorporating it. Newburg, etc. Co. *v.* Weare, 27 Ohio St. 343 (1875). See also §§ 237–239, *supra.* Or where a foreign corporation sues the sheriff for trespass. Persse, etc. Works *v.* Willett, 1 Rob. (N. Y.) 131 (1863). Or where the company sues for tolls. Smelser *v.* Wayne, etc. Turnp. Co., 82 Ind. 417 (1882). The case of Welland Canal Co. *v.* Hathaway, 8 Wend. 480 (1832), allowed a contractor to deny the existence of a corporation which sued to recover back money which had been overpaid to him.

[1] See §§ 233, 236, 508, *supra.* A corporation to deal in bonds cannot be organized under a statute authorizing the formation of corporations to deal in merchandise and conduct mercantile operations. Such a corporation is not even a *de facto* corporation, inasmuch as such a *de jure* corporation is impossible under such a statute. Hence such a corporation cannot bring suit as a corporation. Indiana, etc. Co. *v.* Ogle, 22 Ind. App. 593 (1899). Where a proposed national bank is never authorized by the comptroller of the currency to commence business, and never does commence business, a lease made in its name cannot be enforced against it. McCormick *v.* Market Nat. Bank, 162 Ill. 100 (1896). Under the Georgia railroad act a company is not a corporation until directors have

Thus a corporation which files its certificate of incorporation with the secretary of state, but not with the county clerk, as required by statute, and transacts no business except to authorize the issue of stock for property, which issue is never made, is not even a *de facto* corporation, and hence the directors are not liable for failing to file a report as required by statute.[1] And where the statute author-

been elected, even though the certificate was issued by the secretary of state some time prior thereto. Watson *v.* Albany, etc. Ry., 111 Ga. 10 (1900). In a suit brought by a street railway to enjoin another street railway from interfering with an alleged exclusive right of the former, the corporate existence of the former may be questioned. Wilmington City Ry. *v.* Wilmington, etc. Ry., 46 Atl. Rep. 12 (Del. 1900). A purchaser of stock in a company which both the vendor and the vendee believe to be incorporated, but which has not been incorporated, may rescind, where the vendor stated that the company was incorporated, and it is no defense that the property of the company has since depreciated in value. In this case the attorney was instructed to procure a charter, but made no attempt to do so. Bolton *v.* Prather, 35 Tex. Civ. App. 295 (1904). Where a copartnership in Connecticut proceeds to incorporate in that state, but fails to file the certificate with the secretary of state, as required by charter, and it appears that the intent to incorporate was abandoned, one partner, upon the death of the other, may claim possession of the assets as against the corporation. Card *v.* Moore, 68 N. Y. App. Div. 327 (1902); aff'd, 173 N. Y. 598. A corporation whose articles are not filed in the right county, and which has never had an organization meeting, is not *de jure* nor *de facto*. It cannot sue a director for preventing organization. Martin *v.* Deetz, 102 Cal. 55 (1894). In order to constitute a *de facto* corporation "there must at least be an organization under some existing charter or law. And such organization must be in good faith." Hence, where an attorney sues for his services, the supposed corporation may set up that it is not a *de facto* nor *de jure* corporation. Welch *v.* Old Dominion, etc. Ry., 10 N. Y. Supp. 174 (1890). A person who agreed to and did convey property to a company to be incorporated may subsequently repudiate the corporation and his conveyance as against his associates who shared in the stock received therefor. Doyle *v.* Mizner, 42 Mich. 332 (1879). The case of Boyce *v.* Trustees, etc., 46 Md. 359 (1876), allowed a corporation to deny its existence as against a director who sued it for moneys advanced to it. The failure of a railroad to cause to be paid in a certain amount of its capital stock before incorporation may defeat municipal bonds which are given to it. Farnham *v.* Benedict, 107 N. Y. 159 (1887).

1 Emery *v.* De Peyster, 77 N. Y. App. Div. 65 (1902). An older New York case held that a director cannot escape his statutory liability by reason of the failure of the company to file its certificate of incorporation with the secretary of state. Meriden Tool Co. *v.* Morgan, 1 Abb. N. Cas. 125, n. (N. Y. Super. Ct. 1875). Where incorporators under the Illinois statute have not recorded the certificate of incorporation in the county where the principal office is, as required by statute, a suit against the incorporators to enjoin unfair competition will lie, inasmuch as the alleged corporation never had a legal existence. Elgin, etc. Co. *v.* Loveland, 132 Fed. Rep. 41 (1904). Where the certificate of incorporation is filed in the County Clerk's office but not in

izes incorporation for producing and selling electricity, and the certificate of incorporation includes this as well as manufacturing and selling electrical appliances, apparatus, and supplies, the corporation is not a *de jure* corporation, and hence is insufficient to support an action by one promoter against another, on a contract of the latter to convey land to a corporation to be formed and to take stock in payment, especially where the full capital stock of such corporation had not been subscribed for.[1] The mere fact that a person contracts with a party and designates the latter as a "company" will not estop the former from denying the incorporation of the latter. This is the law, and is reasonable, since many copartnerships do business and make contracts under the name of "company."[2] But where the party contracted with is a *de facto* corporation, then the rules given above apply. It is to be borne in mind, also, that a company which is supposed to be incorporated, but is not, may after incorporation ratify and enforce contracts made in its behalf.[3] The execution and delivery of an instrument to a corporation as a corporation raises a presumption that the company was regularly incorporated.[4] A purchaser of stock in a *de facto* corporation cannot repudiate the sale on the ground that the company was not properly organized.[5]

the office of the secretary of state, as required by statute, the corporation does not legally exist, and a conveyance to it is not good. Lusk *v.* Riggs, 70 Neb. 713 (1904). Where a creamery company's certificate of incorporation is not properly recorded and contains no provision for the payment of the capital stock, a person who subscribed to it, but who refuses to deliver cream in accordance with his contract, can defeat a suit for breach of such contract. Byronville, etc. Ass'n *v.* Ivers, 93 Minn. 8 (1904).

1 Burk *v.* Mead, 159 Ind. 252 (1902). A New Jersey corporation organized under the general act to manufacture and sell gas cannot do so in New Jersey, inasmuch as such charters must be taken out under the gas company act, and hence such a company cannot exercise such powers in another state and cannot prevent its plant in the streets being treated as a nuisance by a party suffering special injury thereby. Seattle, etc. Co. *v.* Citizens', etc. Co., 123 Fed. Rep. 588 (1903). See also Carey *v.* Cincinnati, etc. R. R., 5 Iowa, 357 (1857), and § 638, *infra.*

2 See § 243, *supra.* Where several lines of railroad use for convenience the name "Kanawha Dispatch" in handling freight, such Kanawha Dispatch cannot maintain a suit. Kanawha Dispatch *v.* Fish, 219 Ill. 236 (1905).

3 See § 707, *infra.*

4 West Side, etc. Co. *v.* Connecticut, etc. Co., 186 Ill. 156 (1900).

5 Burwash *v.* Ballou, 82 N. E. Rep. 355 (Ill. 1907). In a suit by the vendor of stock for the price, it is no defense that the corporation had not recorded its certificate of incorporation with the recorder of deeds as required by statute, it being shown that the certificate had been filed with the secretary of state and the corporation organized and is doing business. Marshall *v.* Keach, 81 N. E. Rep. 29 (Ill. 1907). See § 350, *supra.*

Irregularities in the organization of a corporation created by a state will not be inquired into in the courts of another state, a charter having been issued to the company in the state where it was organized.[1] The public policy of the state, however, may refuse to recognize such a foreign corporation.[2] As regards the jurisdiction of the federal courts the incorporation of a company cannot be questioned on the ground that the charter required a certain amount of money to be paid in before business was commenced, and that business had been commenced without that amount being paid.[3]

§ 638. *Lapse of charter by failure to comply with conditions.*— Frequently a charter of a railroad corporation requires it to complete its road or a certain number of miles of road within a certain time, and the charter expressly declares that for failure to comply with this requisite the corporate powers and existence shall cease. There is a strong line of decisions to the effect that such a provision as this forfeits the charter absolutely upon non-compliance, and that no decree of a court is necessary to effectuate that forfeiture.[4]

1 Lancaster *v.* Amsterdam Imp. Co., 140 N. Y. 576 (1894).

2 See §§ 237–240, *supra.* A corporation organized in Kansas to buy and sell land in Oklahoma exclusively will not be recognized as a corporation in Oklahoma and cannot enforce a purchase money mortgage which it has received in payment for land. Lafferty *v.* Evans, 17 Okl. 247 (1906).

3 Wells Co. *v.* Gastonia Co., 198 U. S. 177 (1905).

4 See Brooklyn, etc. Co. *v.* City, 78 N. Y. 524 (1879); *Re* Brooklyn, etc. R. R., 72 N. Y. 245 (1878); *Re* Brooklyn, etc. R. R., 75 N. Y. 335 (1878); Commonwealth *v.* Lykens, etc. Co., 110 Pa. St. 391 (1885); Farnham *v.* Benedict, 107 N. Y. 159 (1887). *Cf. Re* Kings County El. Ry., 105 N. Y. 97 (1887), rev'g 41 Hun, 425; People *v* National Sav. Bank, 11 N. E. Rep. 170 (Ill. 1887); aff'd, 129 Ill. 618 (1889). The New York doctrine that a statute to the effect that the existence and powers of a corporation "shall cease" if its business is not commenced within five years, etc., is self-executing and does not require a decree of the court, was applied in Matter of Brooklyn, etc. R. R., 185 N. Y. 171 (1906). The New York statute that if a railroad company shall not within five years begin construction of its road and expend a certain amount, and finish the road within ten years "its corporate existence and powers shall cease," is self-executing without any judicial decree, and applies to a street railway, which obtained the consent of local authorities, but not the abutting property owners, within five years. Matter of Brooklyn, etc. R. R. 106 N. Y. App. Div. 240 (1905); aff'd, 185 N. Y. 171. A condition in a grant from a municipality to a street railway that if the road was not built within a specified time "then this franchise and all the rights thereunder to be null and void," is self-executing. Mill Creek *v.* Erie, etc. Ry., 209 Pa. St. 300 (1904). A statutory provision that the failure of a street railway to complete its line within a time to be specified by the municipality "works a forfeiture" is self-executing as to the part not completed. Los Angeles Ry. *v.* City of Los Angeles, 92 Pac. Rep. 490 (Cal. (1907). A new state constitution may

But this drastic and dangerous construction of charters does not commend itself to law and justice. It adds one more to the perils

forfeit all charters previously existing, but not previously used by the incorporators. Chincleclamanche Lumber, etc. Co. *v.* Commonwealth, 100 Pa. St. 438 (1882), holding also that a constitutional provision that charters under which no organization has been made and business has been commenced shall lapse forthwith is constitutional and self-enforcing. In a condemnation proceeding by a street railway to obtain a right over a turnpike, the turnpike company may set up that the street railway charter has lapsed by reason of the company not having organized and commenced business within a certain time and that thereby the charter became void by reason of a constitutional provision. *In re* Philadelphia & M. Ry., 187 Pa. St. 123 (1898). A provision in a charter that it should become void unless a certain amount of railroad is constructed by a certain date is self-executory, and the company ceases to exist if construction is not so made within that time, and hence the company cannot maintain a suit after that time. Maine, etc. R. R. *v.* Maine, etc. R. R., 92 Me. 476 (1899). The defense may be set up that the company's time to complete its road had expired. Atlantic, etc. R. R. *v.* St. Louis, 66 Mo. 228 (1877). The provision in a street railway charter that the right should become void unless the line was completed within two years and the franchises were thereupon to wholly cease is self-executing. Williamson *v.* Gordon, etc. Ry., 40 Atl. Rep. 933 (Del. 1898). Where a charter, by its terms, is to be void unless the capital stock is subscribed within two years and business commenced, a failure to secure the whole subscription within that time renders the charter void, though business was commenced. *Quo warranto* lies. People *v.* National Sav. Bank, 11 N. E. Rep. 170 (Ill. 1887). The provision in the Railroad Act of New York of 1850 relative to forfeiture of the charter for failure to proceed with the enterprise was self-executing. Underground R. R. *v.* City of New York, 116 Fed. Rep. 952 (1902); aff'd on other grounds in 193 U. S. 416. In Putnam *v.* Ruch, 54 Fed. Rep. 216 (1893), the court, in a dictum, said that the repeal of a charter by a constitutional enactment may be self-executing, but that in the case before the court the judgment of the court was necessary. Where by its charter a street railroad is to be commenced within three years and completed within ten, but it does not even open books for subscriptions until nearly twenty years have elapsed, the corporation never came into existence, and an abutting property owner may enjoin the laying of tracks. Bonaparte *v.* Baltimore, etc. R. R., 75 Md. 340 (1892). *Contra*, New York, etc. R. R. *v.* New York, N. H. etc. R. R., 52 Conn. 274, 284 (1884). *Cf.* State *v.* Bull, 16 Conn. 179 (1844). In Texas the statute is self-executing, the words used being the same as in the New York statute. But the property rights survive for the benefit of creditors and stockholders. Sulphur Springs, etc. Ry. *v.* St. Louis, etc. Ry., 2 Tex. Civ. App. 650 (1893). A provision that, unless certain roads should be completed within a certain time, "its corporate existence and its powers shall cease, so far as it relates to that portion of said road then unfinished," is self-executing. Houston *v.* Houston, etc. Ry., 84 Tex. 581 (1892). A subscriber, sued on his subscription for stock, may defeat the suit by showing that by statute the charter was to be void if no work was commenced within two years, and that such two years have elapsed and no work has been done. Bywaters *v.*

which are attached to all great corporate enterprises. Even in New York, where the above doctrine seems to have had its origin, the courts are inclined to limit its application. The New York courts have held that a provision in a charter, that unless certain things are done within a certain time the company shall "forfeit the rights acquired," does not work a forfeiture *ipso facto*,[1] and that a provision in a charter, that unless work shall be commenced within two years "all rights and privileges granted hereby shall be null and void," is not self-executing, and a judgment of the court is necessary before forfeiture takes place,[2] and the weight of authority, as well as logic and public policy, favor such a rule.[3] It

Paris, etc. Ry., 73 Tex. 624 (1889). Under the Virginia law requiring organization within two years or else the charter is void, the charter becomes void, "without legal proceedings of any kind, from mere operation of law." Welch *v.* Old Dominion, etc. Co., 10 N. Y. Supp. 174 (1890); Silliman *v.* Fredericksburg, etc. R. R., 27 Gratt. (Va.) 119 (1876). A provision in the general statutes to the effect that the powers of a corporation shall cease if it does not organize within one year does not apply to a special charter the terms of which indicate that organization might be after one year. People *v.* Bowen, 30 Barb. 24 (1859); affirmed on other grounds, 21 N. Y. 517. In Bybee *v.* Oregon, etc. R. R., 139 U. S. 663 (1891), the court reviewed the conflicting decisions on the question whether a corporate charter could be made by the legislature to lapse and cease *ipso facto* and without judicial action. As to the effect on corporate mortgages, see § 792, *infra*.

1 Consequently this is no defense to condemnation proceedings. *Re* Brooklyn, etc. R. R., 125 N. Y. 434 (1891).

2 *Re* New York, etc. Bridge Co., 148 N. Y. 540 (1896): The attorney-general cannot enjoin a gas company from laying its pipes on the ground that the charter was void by reason of the company not having commenced work within the prescribed time. The local authorities are fully competent to raise the question if they wish. People *v.* Equity Gas Light Co., 141 N. Y. 232 (1894). Failure to commence work within a time specified in the charter, and a penalty that therefor the company should be dissolved, does not effect dissolution. A judgment is necessary. Day *v.* Ogdensburg, etc. R. R., 107 N. Y. 129 (1887).

3 A statute that a failure to make reports is *prima facie* evidence that the corporation is out of business and shall work a forfeiture of the charter is not self-executing and is legal, but a judicial proceeding is necessary. People *v.* Rose, 207 Ill. 352 (1904). The failure of a railroad to organize within the time specified by the charter does not prevent organization thereafter unless the charter has been forfeited by court proceedings. Seaboard, etc. R. R. *v.* Olive, 142 N. C. 257 (1906). In condemnation proceedings the defense that the corporation has ceased to exist for failure to complete its road within ten years is not good, inasmuch as the corporate existence can be attacked only in a direct proceeding for that purpose. Morrison *v.* Forman, 177 Ill. 427 (1898). The question of whether or not a charter has been forfeited by a provision that its rights should revert to the state, in case certain work was not done within two years, cannot be raised by a party litigating with such company, but can be raised only by a

is no defense to condemnation proceedings that the company had not commenced work within the time fixed by statute nor expended the

proceeding instituted by the state. Olyphant, etc. Co. *v.* Borough of Olyphant, 196 Pa. St. 553 (1900). A statutory provision that a corporation, for purposes of enforcing the stockholder's statutory liability, shall be deemed dissolved one year after it ceases to do business does not cause such dissolution as to prevent the corporation being sued thereafter. Whitman *v.* Citizens' Bank, 110 Fed. Rep. 503 (1901). A provision that a railroad charter shall be null and void unless certain things are done within two years is not self-executing. Brown *v.* Wyandotte, etc. Ry., 68 Ark. 134 (1900). Even though a city has reserved the power to forfeit the right of a street railway company to construct its road on certain streets, if such construction is not completed within five years, this in itself does not work a forfeiture, but a forfeiture must first be declared. Louisville, etc. R. R. *v.* Bowling Green Ry., 110 Ky. 788 (1900). Although a municipal grant to construct a street railway provides that it shall be forfeited and the rights shall cease without any action at law or otherwise unless the road is completed within a specified time, yet the court will not enforce the provision if there was a legal excuse for the delay or a waiver of the provision. Dusenberry *v.* New York, etc. Co., 46 N. Y. App. Div. 267 (1899). A provision in a street railway charter that, if certain things are not done within a certain time, the "act of incorporation shall be void" as to streets not then covered, is not self-executing, and delay in insisting thereon will constitute a waiver. Dern *v.* Salt Lake, etc. R. R., 19 Utah, 46 (1899). The act of congress granting lands to railroad companies, and providing that if any section of the road is not completed within five years after its location the land grant shall be forfeited is not self-executing, and no forfeiture takes place except by judicial proceedings or an act of congress assuming title. Utah, etc. R. R. *v.* Utah, etc. Ry., 110 Fed. Rep. 879 (1901). Although the charter states that it shall be forfeited unless the corporation is organized within two years, yet a stockholder cannot set up such a forfeiture in a suit involving a lien of the corporation on his stock. Boyd *v.* Redd, 120 N. C. 335 (1897). Where land has been condemned by a railroad corporation, the grantee of the party whose land has been so condemned, the grant having been made prior to the condemnation, but the grantee being represented in the proceedings, cannot maintain ejectment therefor on the ground that the railroad charter provides "that the rights, privileges, and powers of said corporation shall be null and void," unless certain work was done within a certain time, even if the work had not been done within the prescribed time. Only the state can question the corporate existence on this ground. New York & N. E. R. R. *v.* New York, N. H. etc. R. R., 52 Conn. 274, 284 (1884). See also Briggs *v.* Cape Cod Land Co., 137 Mass. 71 (1884). In this case the charter of a corporation required it to deposit with the state treasurer within four months from its date the sum of $200,000 as security for certain purposes, among others for the payment of damages for taking land, and the corporation did not deposit the $200,000 in cash, but in bonds of the United States of the par value of $200,000, and of the market value of $230,000. *Held*, a sufficient compliance, as the object of the provision was to provide security to various interests. Also held that the question whether a corporation has ceased to exist for non-compliance with charter provisions could only be

capital required by statute.[1] A statute that after a year's suspension of business the franchises shall be deemed surrendered and the corporation be adjudged dissolved is not self-executory, but requires the judgment of the court.[2]

Where by a charter a bridge is to revert to the state after forty years, the state, upon the expiration of the forty years, may, by an information, enforce the reversion of the bridge to the public.[3] Proof of a charter and user is sufficient without proving organization within the time allowed by law.[4] Where a bank charter provided that it should be void unless the company should organize and proceed to business within two years, and the company organized, but failed to transact any business for fifteen years, a judgment of ouster against it will not be disturbed.[5] The failure of a street railway company to perform a condition of its charter may enable a city to make a new grant to another company.[6]

§§ 639, 640. *Repeals of charters — Right of stockholders to object.* —The repeal by the state of a charter before the expiration of the time it was to exist, or the repeal at any time where the charter is perpetual, is an unconstitutional breach of the contract between the state and the corporation and the stockholders.[7] Where, how-

judicially determined in a suit to which the commonwealth was a party. The corporation itself, when sued for taxes, cannot set up this defense. Baltimore, etc. R. R. *v.* Marshall Co., 3 W. Va. 319 (1869). An owner of land which a railroad has taken cannot reclaim possession by reason of the failure of the company to complete its road within the time limited by charter. Cincinnati, etc. R. R. *v.* Clifford, 113 Ind. 460 (1888); Bravard *v.* Cincinnati, etc. R. R., 115 Ind. 1 (1888). A provision that if the road is not completed within a certain time "the charter shall be forfeited" is not self-executing. Galveston, etc. Ry. *v.* State, 81 Tex. 572 (1891). Such also is the rule where the statute merely limits the term of existence of the corporation. Elizabethtown Gaslight Co. *v.* Green, 46 N. J. Eq. 118 (1889). A provision in the charter that the corporate powers should cease and become void unless certain things were done within a certain time does not work a forfeiture *ipso facto*. A judicial proceeding is necessary. State *v.* Spartanburg, C. etc. R. R., 51 S. C. 129 (1897). See also Hardy Lumber Co. *v.* Pickerel Co., 29 Can. S. C. Rep. 211 (1898).

1 Thomas *v.* South Side, etc. R. R., 218 Ill. 571 (1905). See also § 637, *supra*.

2 Atty.-Gen. *v.* Superior, etc. Ry., 93 Wis. 604 (1896).

3 A subsequent act of the legislature waiving the reversion upon condition does not prevent the reversion if the condition is not performed. State *v.* Old Town Bridge Corp., 85 Me. 17 (1892).

4 St. Louis, etc. R. R. *v.* Belleville City Ry., 158 Ill. 390 (1895).

5 Henderson, etc. Assoc. *v.* People, 163 Ill. 196 (1896).

6 Santa Rosa, etc. R. R. *v.* Central St. Ry., 112 Cal. 436 (1896). See also § 634, *supra*, and §§ 913, 931, *infra*.

7 Greenwood *v.* Freight Co., 105 U. S. 13 (1881). "A grant of corporate privileges for a specified period can-

ever, the right of repeal is reserved by the legislature, then such reservation becomes a part of the contract, and the repeal of the charter rests in the discretion of the legislature.[1] Upon a repeal the corporate property becomes a fund to be applied, first to the payment of the debts of the corporation, and the balance to be dis-

not be resumed by the state within such period. If the charter be without limitation as to time it is forever irrepealable." Erie, etc. R. R. *v.* Casey, 26 Pa. St. 287 (1856). The legislature cannot forfeit a charter. Forfeiture can be decreed only by the courts. It is not a legislative function unless reserved. Allen *v.* Buchanan, 9 Phila. (Pa.) 283 (1873). Congress may repeal a charter granted by a territory. Mormon Church *v.* United States, 136 U. S. 1 (1890). A forfeiture of land by the government for non-compliance with the terms of the grant may be by legislative enactment. Farnsworth *v.* Minnesota, etc. R. R., 92 U. S. 49 (1875). The legislature cannot repeal a charter granted by the constitution of the state. New Orleans *v.* Houston, 119 U. S. 265 (1886). The legislature may repeal the charter of a fire-engine company, such company being in the nature of a municipal corporation. State *v.* Washington, etc. Co., 76 Miss. 449 (1899). See § 913, *infra.*

1 Under a reserved power to repeal at the pleasure of the legislature the courts cannot question the necessity or the legislative motives leading to a repeal. Greenwood *v.* Freight Co., 105 U. S. 13 (1881); Lothrop *v.* Stedman, 42 Conn. 583 (1875); Lothrop *v.* Stedman, 13 Blatchf. 134 (1875). See Sinking Fund Cases, 99 U. S. 700, 720 (1878); Northern R. R. *v.* Miller, 10 Barb. 260 (1851); Erie, etc. R. R. *v.* Casey, 26 Pa. St. 287, 302 (1856); Miners' Bank *v.* U. S. 1 Greene (Iowa), 553 (1848); McLaren *v.* Pennington, 1 Paige, 102 (1828); Crease *v.* Babcock, 40 Mass. 334, 344 (1839). If the power of repeal arises only upon an abuse of franchise the court may review the question whether there was an abuse. Erie, etc. R. R. *v.* Casey, 26 Pa. St. 287 (1856); Baltimore *v.* Pittsburgh, etc. R. R., 1 Abb. (U. S.) 9 (1865); s. c., 2 Fed. Cas. 570. Hence the legislature cannot forfeit a charter merely because the corporation has been incorporated elsewhere and has brought suits in the federal courts. Commonwealth *v.* Pittsburgh, etc. R. R., 58 Pa. St. 26 (1868). See, in general, Flint, etc. Plank-road Co. *v.* Woodhull, 25 Mich. 99 (1872); Montgomery *v.* Merrill, 18 Mich. 338 (1869); State *v.* Noyes, 47 Me. 189 (1859); Canal Co. *v.* Railroad Co., 4 G. & J. (Md.) 122 (1832); University of Maryland *v.* Williams, 9 G. & J. (Md.) 365 (1838); Cooley's Const. Lim. 106; Mayor, etc. *v.* Twenty-third Street, 113 N. Y. 311 (1889). Under this reserved power the state may authorize one corporation to build its road on a route which a prior corporation has designated but not acquired. *Re* Cable Ry., 40 Hun, 1 (1886). A general statute or constitutional provision reserving the right to repeal, alter, or amend charters enters into all charters granted subsequent thereto as much as if actually inserted in such charters. *Re* Lee's Bank of Buffalo, 21 N. Y. 9 (1860); Commissioners, etc. *v.* Holyoke Waterpower Co., 104 Mass. 446 (1870); Delaware R. R. *v.* Tharp, 5 Harr. (Del.) 454 (1854). See also § 2, *supra.* The repeal of a general incorporating act and the enactment of a new one does not repeal charters which have already been taken out under the old act. Freehold, etc. Assoc. *v.* Brown, 29 N. J. Eq. 121 (1878); United, etc. Assoc. *v.* Benshimol, 130 Mass. 325 (1881). *Contra,* Wilson *v.* Tesson, 12 Ind. 285 (1859).

tributed among the stockholders.[1] The question as to the right of a legislature to repeal a part of a charter, such as an exemption from taxation, is considered elsewhere.[2]

§ 641. *The assets upon dissolution — Distribution.*—Upon the dissolution of a corporation, all its property, both personal and real, is to be used to pay the debts of the corporation, and after the debts are paid the remainder is to be distributed among the stockholders.[3]

It was formerly believed to be the common law that upon the dissolution of a corporation all its assets belonged to the state, and all its debts were canceled, and that the creditors were not entitled to anything from the assets. This remarkable theory has been stated and restated in text-books and decisions of the courts for over one hundred years.[4] It is found in Blackstone's Commen-

1 See § 641, *infra.*

2 See §§ 501, 572*b*, *supra.*

3 Quoted and approved in Central, etc. *v.* Smith, 95 Pac. Rep. 307 (Col. 1908); Krebs *v.* Carlisle Bank, 2 Wall. (C. C.) 33 (1850); s. c., 14 Fed. Cas. 856; Heath *v.* Barmore, 50 N. Y. 302 (1872); Burrall *v.* Bushwick R. R., 75 N. Y. 211 (1878); James *v.* Woodruff, 10 Paige, 541 (1844); Frothingham *v.* Barney, 6 Hun, 366 (1876); Wood *v.* Dummer, 3 Mason, 308, 322 (1824); s. c., 30 Fed. Cas. 435. *Cf. Re* Hodges Distillery Co., L. R. 6 Ch. 51 (1870); Nathan *v.* Whitlock, 9 Paige, 152 (1841); Curran *v.* State, 15 How. 304, 307 (1853); Hastings *v.* Drew, 76 N. Y. 9 (1879), affirming s. c., 50 How. Pr. 254 (1887). The same rule prevails where the charter is repealed by the legislature. Lothrop *v.* Stedman, 13 Blatchf. 134 (1875); McLaren *v.* Pennington, 1 Paige, 102 (1828), by statute; Detroit *v.* Detroit, etc. P. R. Co., 43 Mich. 140 (1880); San Mateo County *v.* Southern Pacific R. R., 8 Sawyer, 238 (1882), per Field, J., holding that "the property of the corporation acquired in the exercise of its faculties is held independently of such reserved power, and the state can only exercise over it the control which it exercises over the property of individuals engaged in similar business" (p. 279). People *v.* O'Brien, 111 N. Y. 1 (1888). Where the capital stock is reduced and the corporate property over and above the reduced capital stock is distributed among the stockholders, this is not a dividend within the meaning of the New York tax statute. People, etc. *v.* Roberts, 41 N. Y. App. Div. 21 (1899). Real estate does not revert to the former owner upon the dissolution of the corporation owning such estate, but will be administered for the benefit of the corporate creditors and stockholders. Diamond, etc. Co. *v.* Husbands, 68 Atl. Rep. 240 (Del. 1898).

4 Hightower *v.* Thornton, 8 Ga. 486 (1850); Life Association *v.* Fassett, 102 Ill. 315 (1883); Commercial Bank *v.* Lockwood, 2 Har. (Del.) 8 (1835); State *v.* Rives, 5 Ired. L. (N. C.) 297 (1844); White *v.* Campbell, 5 Humph. (Tenn.) 38 (1844); Malloy *v.* Mallett, 6 Jones, Eq. (N. C.) 345 (1863), holding also that the stockholder's liability was extinguished; Port Gibson *v.* Moore, 21 Miss. 157 (1849); Bingham *v.* Weiderwax, 1 N. Y. 509 (1848); Owen *v.* Smith, 31 Barb. 641 (1860); State Bank *v.* State, 1 Blatchf. (Ind.) 267, 282 (1823); Acklin *v.* Paschal, 48 Tex. 147 (1877); St. Philip's Church *v.* Zion, etc. Church, 23 S. C. 297 (1885); Coulter *v.* Robertson, 24 Miss. 278 (1852); Bank of Mississippi *v.* Duncan, 56 Miss. 166 (1878); Ham-

taries and in the old works of Kyd on Corporations and Grant on Corporations. The courts, however, while upholding the rule theoretically, have quite uniformly refused to *apply* such a doctrine, and have invented various theories, fictions, and arguments for avoiding this supposed doctrine of the common law. Finally, in 1899, an English court denied that the common law ever countenanced such confiscation, and showed that in the seventeenth and eighteenth centuries many corporations were dissolved, and that in not a single case was any such doctrine applied.[1] It again may be said that, although the common law has its reproaches, this is not one of them. The American courts have always refused to follow the supposed common-law rule on this subject.[2]

Where the statutes in existence at the time of incorporation provide for the extension of corporate charters, a stockholder cannot prevent the corporation from extending its existence in accordance

ilton *v.* Accessory Transit Co., 26 Barb. 46 (1857).

1 *Re* Higginson and Dean, [1899] 1 Q. B. 325.

2 Quoted and approved in Griffith *v.* Blackwater, etc. Co., 55 W. Va. 604 (1904); Bacon *v.* Robertson, 18 How. (U. S.) 480 (1855); Heath *v.* Barmore, 50 N. Y. 302 (1872); Lum *v.* Robertson, 6 Wall. 277 (1867); Robinson *v.* Lane, 19 Ga. 337 (1856); Lothrop *v.* Stedman, 13 Blatchf. 134 (1875); s. c., 15 Fed. Cas. 922; Blake *v.* Portsmouth, etc. R. R., 39 N. H. 435 (1859); *Re* Woven Tape Skirt Co., 8 Hun, 508 (1876); Mumma *v.* Potomac Co., 8 Pet. 281 (1834); Fox *v.* Horah, 1 Ired. Eq. (N. C.) 358 (1841); Bingham *v.* Weiderwax, 1 N. Y. 509 (1848); Curry *v.* Woodward, 53 Ala. 371 (1875); 2 Kent, Com. 307, n.; Powell *v.* North Missouri R. R., 42 Mo. 63 (1867); Wood *v.* Dummer, 3 Mason, 308 (1824); s. c., 30 Fed. Cas. 435. Land conveyed to a corporation in fee does not revert to the grantor or his heirs on the extinction of the corporation. Wilson *v.* Leary, 120 N. C. 90 (1897), overruling Fox *v.* Horah, 36 N. C. 358. Statutes are frequently enacted to this effect. Nevitt *v.* Bank of Port Gibson, 14 Miss. 513 (1846); McCoy *v.* Farmer, 65 Mo. 244 (1877); Owen *v.* Smith, 31 Barb. 641 (1860). A deed of property to a railroad for fifty years or so long as its charter continues, which by charter is fifty years, passes the land to a corporation which by legislative enactment succeeds to the rights of the first corporation. Davis *v.* Memphis, etc. R. R., 87 Ala. 633 (1889). So far as land grants are concerned the consolidated company is the same as the old company. U. S. *v.* Southern Pac. R. R., 45 Fed. Rep. 596 (1891); rev'd on another point in 146 U. S. 570. A consolidated company succeeds to land owned by one of the consolidating companies. Cashman *v.* Brownlee, 128 Ind. 266 (1891). An agreement that upon dissolution of a telegraph company the telegraph line should go to the railroad is binding. Latrobe *v.* Western Tel. Co., 74 Md. 232 (1891). A deed duly authorized is good, though executed after the corporation is consolidated with another. Edison, etc. Co. *v.* New Haven, etc. Co., 35 Fed Rep. 233 (1888). On dissolution the real estate does not revert etc. Huber *v.* Martin, 127 Wis. 412 (1906).

with such statutes.[1] A deed made by a corporation after its charter has expired is a nullity.[2] The dissolution of a corporation after an execution has been levied upon its property does not prevent a sale.[3]

When the corporation owns a right of way or other franchise obtained from a municipality or by the exercise of the state's power of eminent domain, this right-of-way franchise is a corporate asset upon the dissolution of the corporation and may survive the death of the corporation. It does not revert to the state or municipality.[4]

1 Smith *v.* Eastwood, etc. Co., 58 N. J. Eq. 331 (1899).

2 Bradley *v.* Reppell, 133 Mo. 545 (1896); Marysville Inv. Co. *v.* Munson, 44 Kan. 491 (1890). Where by statute, after dissolution, the corporation continues for three years for the purpose of winding up, it may, during those three years, convey its real estate to a trustee in trust to wind up its business. Hanan *v.* Sage, 58 Fed. Rep. 651 (1893). A corporation cannot deed land after its charter has expired. Marysville Invest. Co. *v.* Munson, 44 Kan. 491 (1890).

3 Boyd *v.* Hankinson, 83 Fed. Rep. 876 (1897); rev'd on another point in 92 Fed. Rep. 49.

4 Where a legislature, under its reserved right of repeal, repeals a street railroad charter, the right to use the streets and operate the road does not revert to the state, but passes as property to the receiver for the benefit of the creditors and stockholders of the corporation. People *v.* O'Brien, 111 N. Y. 1 (1888). See also § 792, *infra.* In Pennsylvania the franchise of the right of way of a railroad vests, upon its dissolution, in the state, and the state may grant it to another railroad. Erie, etc. R. R. *v.* Casey, 26 Pa. St. 287 (1856). See also Plitt *v.* Cox, 43 Pa. St. 486 (1862). In Ohio it seems that the right of way reverts to the owner of the fee. New York, etc. R. R. *v.* Parmalee, 1 Ohio C. C. Rep. 239 (1885). See also, as to the rule in New York, Heard *v.* Brooklyn, 60 N. Y. 242 (1875); People *v.* White, 11 Barb. 26 (1851); Hooker *v.* Utica, etc. Turnp. Co., 12 Wend. 371 (1834). There is no reversion of the right of way on the dissolution of the company after fifty years. Davis *v.* Memphis, etc. R. R., 87 Ala. 633 (1889). A lottery grant cannot be repealed, when mortgaged by the corporation, until the mortgage is paid. Gregory *v.* Shelby College, 2 Metc. (Ky.) 589 (1859). Compare, in general, Turnpike Co. *v.* Illinois, 96 U. S. 63 (1877). Where the stockholders of an old plank-road company are still operating the road, but under another charter, they cannot be ousted from the latter by an injunction suit against their operating under the former. The court stated that it did not favor such a confiscating suit. People *v.* De Grauw, 133 N. Y. 254 (1892). An unused right of way does not revert to the original owner. McConihay *v.* Wright, 121 U. S. 201 (1887). See also § 906, *infra.* The state may grant an unused street-railway franchise to another company. Henderson *v.* Central, etc Ry., 21 Fed. Rep. 358 (1884). No reverter where the railroad takes a fee. Yates *v.* Van De Bogert, 56 N. Y. 526 (1874). See also, in general, Norton *v.* Walkill, etc. R. R. 42 How. Pr. 228 (1871); State *v.* Rives, 5 Ired. (N. C.) L. 297 (1844); Hopkins *v.* Whitesides, 1 Head (Tenn.), 31 (1858). Where a turnpike company is authorized to collect tolls only for fifteen years, the road is free after that date. People *v.* Anderson, etc. Co., 76 Cal. 190 (1888). The dissolution of a water-works company does not put an end to the contract between it and the city. Weatherly *v.*

This is the natural and logical result of the principle of law that a railroad company may make a contract to run longer than its chartered existence;[1] that a grant may be made by a city to a street railway for a period longer than the duration of the charter of the corporation;[2] that a corporation may take a deed of land in fee, although the company's duration is limited;[3] and may acquire a perpetual right of way under the same circumstances.[4] The lia-

Capital, etc. Co., 115 Ala. 156 (1897). In Haffcke *v.* Clark, 50 Fed. Rep. 531 (1892), the court said in a dictum that inasmuch as a license is not assignable, the dissolution of a corporation, which is the licensee, puts an end to the license. See note 4, below.

1 A contract between two railroad companies by which one is given the right to run its trains over the tracks of the other may be for a period beyond the duration of the charter of one of the companies, the court saying that the contingency that the company "will cease to exist and leave neither assigns nor successors is far too remote to have any influence upon the validity of this contract." Union, etc. Ry. *v.* Chicago, etc. Ry., 163 U. S. 564, 592 (1896). A corporation may lease its property for a hundred years, even though the statutes forbid any disposition of property which suspends the absolute power of controlling the same for more than two lives and twenty-one years, and may mortgage its interest as lessor. Sioux, etc. Co. *v.* Trust Co., 82 Fed. Rep. 124 (1897); aff'd, 173 U. S. 99 (1899). The agreement of a corporation to pay an annuity may be legal, even though it may extend beyond the life of the corporation. Burnes *v.* Burnes, 132 Fed. Rep. 485 (1904); aff'd, 137 Fed. Rep. 781. A national bank may take a lease of property for a term longer than its own chartered existence. Weeks *v.* International T. Co., 125 Fed. Rep. 370 (1903); aff'd, 203 U. S. 364. A lease for a longer period than the lessor's corporate existence is good during its existence and for any period to which its existence is extended not exceeding the term of the lease. Hill *v.* Atlantic, etc. R. R., 143 N. C. 539 (1906). A bank may take a lease of land for ninety-nine years even though its charter will expire before that time. Brown *v.* Schleier, 118 Fed. Rep. 981 (1902); aff'd, 194 U. S. 18.

2 Detroit *v.* Detroit, etc. Ry., 184 U. S. 368 (1902). A street railway company may legally receive from a city a grant of street rights for a period extending beyond the chartered life of the corporation. Detroit Citizens' St. Ry. *v.* Detroit, 64 Fed. Rep. 628 (1894), rev'g Detroit *v.* Detroit City Ry., 56 Fed. Rep. 867, and 60 Fed. Rep. 161, a case where a thirty-year street easement was given to a corporation having only fourteen years of corporate life. To same effect, People *v.* O'Brien, 111 N. Y. 1 (1888). A grant by a municipality to a street railway will not be construed as perpetual where other grants of other parts of the system are limited to twenty-five years and there was no intention indicated of making the grant unlimited. Blair *v.* Chicago, 201 U. S. 400, 485 (1906). A municipal grant to a telephone terminates with its dissolution, even though the grant did not specify any term. People *v.* Central, etc. Tel. Co., 83 N. E. Rep. 829 (Ill. 1908). See also § 913, *infra.*

3 Nicoll *v.* New York, etc. R. R., 12 N. Y. 121 (1854). See also § 694, note, *infra.*

4 Miner *v.* New York, etc. R. R., 123 N. Y. 242 (1890); Davis *v.* Memphis, etc. R. R., 87 Ala. 633 (1889); Bailey *v.* Platte, etc. Co., 12 Colo. 230 (1889).

bility of a corporation on a contract extending beyond the corporate existence is discussed elsewhere.[1] A traffic contract between two connecting telephone lines which does not specify the term of its duration will expire on the expiration of the charter of either of the companies.[2] On the dissolution of a corporation having no stockholders, the common-law rules of reverter and appropriation apply.[3] Upon

See note 4, p. 1829. Dissolution does not terminate a lease to a corporation. People *v.* National Trust Co., 82 N. Y. 284 (1880). A contract between a city and an individual as to wharves which is assignable and is assigned by the individual to a corporation does not cease merely because the corporate existence ceases. Fleitas *v.* City of New Orleans, 51 La. Ann. 1 (1898); also § 642, *infra.* A gas company may receive a municipal grant for a term of years extending beyond the life of the gas company as fixed by its charter. Keith *v.* Johnson, 109 Ky. 421 (1900).

1 See § 642, *infra.*

2 Campbellsville Tel. Co. *v.* Lebanon, etc. Tel. Co., 118 Ky. 277 (1904).

3 Upon the dissolution of a public or charitable corporation its property goes to the state and former owners, subject to the trust that the property shall still be used for similar purposes if those purposes be legal. Mormon Church *v.* U. S., 136 U. S. 1 (1890). Upon the dissolution to an eleemosynary corporation having no stockholders or creditors, the title of its land reverts to the donor. Danville Seminary *v.* Mott, 136 Ill. 289 (1891). A private corporation—a normal college—cannot by act of the legislature be converted into a public corporation and the property vested in the state. Bakewell *v.* Board of Education, 33 N. E. Rep. 186 (Ill. 1893). In California, on the dissolution of a corporation for literary purposes, its land goes to the state. People *v.* College of California, 38 Cal. 166 (1869). An incorporated volunteer fire department which has been supplanted by a regular organized municipal fire department has no power to put its property in trust for charitable purposes. The property must be divided among existing members. Hopkins *v.* Crossley, 132 Mich. 612 (1903). Where the purpose of the organization of a volunteer fire department ceases, and the fund is placed in the hands of trustees for specified purposes, which are not carried out, the money does not go to the state but belongs to the members and their personal representatives. Hopkins *v.* Crossley, 138 Mich. 561 (1904). Upon dissolution of a mutual insurance company having no stockholders, its assets, after the payment of its liabilities, belong to the state. Titcomb *v.* Kennebec, etc. Co., 79 Me. 315 (1887). But where an insurance company is organized both on the stock and mutual plan, upon a dissolution of the stock part of the organization the guaranty accumulations belong to the stockholders. Traders', etc. Ins. Co. *v.* Brown, 142 Mass. 403 (1886). Land reverts to the former owner. Mott *v.* Danville Seminary, 129 Ill. 403 (1889). Distribution of funds of incorporated association. Ashton *v.* Dashaway Assoc., 84 Cal. 61 (1890). As to unincorporated associations, see ch. XXIX, *supra.* The members of a military corporation, which is dissolved under a statute cannot by a suit in equity obtain control of its property which has been acquired by donation. Cummings *v.* Hollis, 108 Ga. 402 (1899). Where a police association receives gifts from the city and then dissolves, the money will be returned to the city. *In re* Minneapolis, etc. Assoc., 85 Minn. 302 (1902).

dissolution the stockholders are entitled to an immediate settlement of the corporate debts and a distribution of the residue.[1] Usually they are not obliged to accept the stock of another corporation as payment upon a final distribution, but may demand that the distribution be in cash.[2] They may also demand that the property be sold, unless the statutes provide otherwise.[3] The statutes of New Jersey seem to provide for distribution in kind.[4] A corporation which has sold its property and distributed most of its assets among its stockholders cannot use its remaining cash to buy stock in another corporation for the purpose of distributing such stock.[5] The stockholders upon dissolu-

1 Frothingham *v.* Barney, 6 Hun, 366 (1876). A committee appointed by the stockholders to sell the property for stock in a new corporation and dissolve the old corporation and distribute the assets may be liable to the stockholders if, after making such sale, they delay in dissolving the old corporation and distributing the assets until the new stock becomes worthless. Their liability is a question of negligence for the jury. *In re* Lincoln, etc. Co., 190 Pa. St. 124 (1899).

2 Quoted and approved in Craycraft *v* National, etc. Ass'n, 117 Ky. 229 (1904), holding that even though on dissolution the directors authorize the distribution of land in kind by deeds to stockholders in proportion to their interests, the final assets to be distributed among other stockholders, any surplus to be distributed among all proportionately, yet a title so derived is not indefeasible, inasmuch as dissenting stockholders may object. See § 671, *infra.*

3 See § 670, *infra.* A minority stockholder may enjoin a public sale of the property of a prosperous corporation, even though the company has been dissolved, under the New York statute, where he shows that the public sale is not being fairly advertised and conducted, and shows also that the dissolution is for the purpose of reorganization under the laws of another state and freezing out the minority, and that information could not be obtained as to the actual condition of the company. Treadwell *v.* United, etc. Co., 47 N. Y. App. Div. 613 (1900). Where in a dissolution proceeding an injunction has been issued against a corporation doing any further business or disposing of its property, a sale or mortgage of its property to one of its stockholders is illegal and will be set aside by the court, especially where it is made to a director for an inadequate consideration. Grant *v.* Lowe, 89 Fed. Rep. 881 (1898). Upon dissolution a company may sell its good will and trade name. Townsend *v.* Jarman, [1900] 2 Ch. 698. In distributing the assets the court has no power to give certain parts of the property to some stockholders and other parts to others, without the value thereof being ascertained, even though such stockholders originally contributed that which the court decreed should be returned to them. Clow *v.* Redman, 6 Idaho, 568 (1899). On the dissolution of a national bank its assets may be conveyed to a new bank from which some of the minority are excluded, and they cannot complain if the full value and the best price was thereby obtained. Green *v.* Bennett, 110 S. W. Rep. 108 (Tex. 1908).

4 See § 317, *supra,* where the courts passed upon the distribution by the Northern Securities Company of property owned by it when the capital stock was reduced to a nominal figure.

5 Ferry *v.* Latrobe, etc. Co., 155 Fed. Rep. 161 (1907).

tion may make a contract as to the mode of distribution.[1] The company by unanimous consent may distribute the assets without a dissolution, provided all creditors are paid.[2] Where the company is insolvent and all its property is sold and the proceeds divided among the stockholders, the creditors may compel them to repay the same.[3]

Upon dissolution a stockholder may file a bill for distribution of the assets.[4] Upon the expiration of the charter of a banking corpora-

1 White *v.* Boreing, 45 S. W. Rep. 242 (Ky. 1898). In the case Consumers', etc. Co. *v.* Quinby, 137 Fed. Rep. 882 (1905), a natural-gas company was so organized that all the stock was placed in the names of five trustees selected from the stockholders with irrevocable power to vote the stock as owners and elect a board of nine directors, and after the dividends had repaid to the stockholders their investment with eight per cent. interest, the price of gas was to be reduced to cost, so that there should be no further profits on the stock. The gas having given out the court held that the stockholders had a right to have the corporation wound up and its assets distributed to them. Where the state by a suit in the state court has forfeited the charter of a waterworks company, no receiver being appointed, and thereafter on a bill filed in the United States court a receiver is appointed by the latter court, and thereafter under a statute the governor of the state appoints a liquidator of the affairs of such corporation, and thereafter the liquidator is brought in as a party defendant to the suit in the United States court and interposes a plea, and thereafter the stockholders organize a new corporation and receive its stock in exchange for their stock in the old corporation, the state cannot maintain a suit to forfeit the charter of the latter corporaion and enjoin a transfer of the assets of the old corporation to the new corporation, on the ground that the stock of the new corporation is issued at a fictitious value, the proof being insufficient to sustain any such claim, and the plant itself not yet having been sold and its value ascertained. State *v.* New Orleans, etc. Co., 111 La. 1049 (1904).

2 A statutory liability for dividends paid out of the capital stock abrogates all common-law liability, and if such statute does not prohibit such dividends they may be declared and paid subject to such liability. People *v.* Barker, 141 N. Y. 251 (1894). See also § 546, *supra;* Rorke *v.* Thomas, 56 N. Y. 559 (1874). A city in buying a waterworks plant may take a deed of the plant itself, and also a transfer of all the shares of stock, and this does not prevent the former stockholders distributing among themselves the purchase price. Connor *v.* City of Marshfield, 128 Wis. 280 (1906). Although the state is prosecuting a suit to forfeit the charter for entering into a combination, yet a sale of part of the corporate property to a stockholder pending the suit is legal, and the receiver cannot follow the property. A writ of prohibition will issue against him. Havemeyer *v.* Superior Court, 84 Cal. 327 (1890). Where a corporation distributes all its assets among its stockholders without paying the debts, a corporate creditor may hold them liable; but he must first obtain a judgment against the corporation and execution must be returned unsatisfied. Lamar *v.* Allison, 101 Ga. 270 (1897). See §§ 548, 671, and 96 Pac. Rep. 271.

3 Mitchell *v.* Jordan, 36 Wash. 645 (1905). See also § 672, *infra.*

4 Brown *v.* Mesnard M. Co., 105

tion its affairs may be wound up without the intervention of the state.[1] Where the directors, are winding up a corporation properly the court will not appoint a receiver to do so.[2] A stockholder in a dissolved national bank may have a receiver appointed by a state court, and especially so where the funds are being diverted.[3] A receiver of an insolvent corporation which is subject to the bankrupt act must turn the property over to a trustee in bankruptcy upon the appointment of the latter.[4] On the termination of the charter of a bank

Mich. 653 (1895). Where a corporation has been dissolved at the instance of the state, a stockholder may file a bill for the appointment of a receiver to administer the assets. Olmstead *v.* Distilling, etc. Co., 73 Fed. Rep. 44 (1895), the court holding also that the appointment could not be questioned collaterally. Where a charter has expired, a court of equity has power to take charge of its property and wind up its affairs at the instance of a stockholder upon a proper showing. Stewart *v.* Pierce, 116 Iowa, 733 (1902). Where the stockholders have dissolved a corporation by resolution, under the West Virginia statute, the court will not interfere and appoint a receiver, unless it is shown that provision has not been made for payment of the debts. Mere cessation of business is not dissolution. Law *v.* Rich, 47 W. Va. 634 (1900). A corporation cannot appeal from a decree appointing a receiver of it, where the same decree dissolves the corporation, and no appeal is taken from that portion of the decree. State *v.* Fidelity, etc. Co., 113 Iowa, 439 (1901). Upon dissolution, if no receiver is appointed, the title to land vests in the stockholders as tenants in common, in Texas. Baldwin *v.* Johnson, 95 Tex. 85 (1901). Where a corporation is dissolved by lapse of its charter, but the directors by statute continue for the purpose of winding up the business, a receiver will not be appointed. Anderson *v.* Buckley, 126 Ala. 623 (1900). After the state has caused a charter to be declared illegal, the duty of the state is finished, and a receiver will not be appointed, all the debts having been paid and all the parties in interest being satisfied, the stockholders having been declared personally liable the same as in a copartnership. State *v.* New Orleans, etc. Co., 107 La. 562 (1902). Even though the time to wind up the affairs of a corporation after dissolution has expired, the stockholders may sue for the assets. Connecticut, etc. Co. *v.* Dunscomb, 108 Tenn. 724 (1902).

1 Clifford, etc. Co. *v.* Donovan, etc. Co., 195 Mo. 262 (1906).

2 Brookshire *v.* Farmers', etc., 73 S. C. 131 (1905). Where upon dissolution the directors become trustees to wind up its affairs and they do not do their duty, the court will appoint a receiver. Buckley *v.* Anderson, 137 Ala. 325 (1903).

3 Cogswell *v.* Second Nat. Bank, 76 Conn. 252 (1903). The appointment of a receiver does not prevent the directors adopting resolutions to bring about an equitable distribution of the assets of the company. *In re* C. Moench & Sons Co., 123 Fed. Rep. 965 (1903); aff'd, 130 Fed. Rep. 685. Where minority stockholders in a corporation, the charter of which has expired, file a bill in the state court to wind up its affairs, a creditor who subsequently commences a suit in the federal court cannot have a receiver appointed. Louisville Trust Co. *v.* Knott, 130 Fed. Rep. 820 (1904), rev'g Knott *v.* Evening Post Co., 124 Fed. Rep. 342.

4 Hooks *v.* Aldridge, 145 Fed. Rep. 865 (1906).

its good will is an asset, and if a director appropriates it to his own use he will be liable in damages or may be compelled to return it or to account for profits received from it.[1] When corporate assets are placed in the hands of a corporate officer or other person for distribution, a stockholder may file a bill in equity for his part, but in such a suit the corporation is a necessary party.[2] The remedy in such a case is not at law.[3] Where upon dissolution the trustees pay over to a

[1] Lindemann *v.* Rusk, 125 Wis. 210 (1905). Where on a consolidation the president of a constituent company receives for the benefit of all the stockholders the stock in the new company and also certain assets of the old company, a stockholder in a suit to compel him to account must join the constituent company and also other stockholders. Knickerbocker *v.* Conger, 110 N. Y. App. Div. 125 (1905). A judgment in a suit between the corporation and the president which fixes his liability is not binding on stockholders in a suit to adjust equities among the stockholders on winding up. Gund *v.* Ballard, 103 N. W. Rep. 309 (Neb. 1905).

[2] Young *v.* Moses, 53 Ga. 628 (1875). For the remedy and procedure when the directors on dissolution have divided the assets fraudulently, see Horner *v.* Carter, 11 Fed. Rep. 362 (1882) A stockholder in a national bank may bring suit in a state court to have the liquidating agent of the bank distribute the remaining assets, the creditors having been paid, even though such agent was appointed by the comptroller of the currency. Ingold *v.* Gilmore, 118 N. Y. App. Div. 727 (1907). The minority may bring the officers to an accounting for an unfair distribution of the bonds, etc., owned by a construction company. Meyers *v.* Scott, 2 N. Y. Supp. 753 (1888). The corporation may file a bill to distribute a specific fund only, and need not in that bill have a general distribution of all its funds. Pacific R. R. *v.* Cutting, 27 Fed. Rep. 638 (1886). If the directors, who by statute are made trustees to wind up the corporation upon dissolution, delay in so doing, the court will appoint a receiver. *Re* Pontius, 26 Hun, 232 (1882). Although the charter is forfeited at the instance of the state, yet the directors are trustees to wind up the company under the statute unless a receiver is appointed at the instance of a creditor or stockholder. Havemeyer *v.* Superior Court, 84 Cal. 327 (1890). Although the fund upon dissolution is small and the number of stockholders large, yet the directors cannot avoid their duty as to the distribution of the fund by turning it over to a court to administer. *Re* Centennial Board, 48 Fed. Rep. 350 (1891). Where trustees, who are bound to wind up the affairs of a corporation, sell its property with a covenant that they had authority to sell, they are liable personally if the assignment was void, there being no covenant against personal liability. Shannon *v.* Mastin, 108 S. W. Rep. 1116 (Mo. 1908).

[3] Brown *v.* Adams, 5 Biss. 181 (1870); s. c., 4 Fed. Cas. 350. *Cf.* Pacific R. R. *v.* Cutting, 27 Fed. Rep. 638 (1886); Hodsdon *v.* Copeland, 16 Me. 314 (1839). It has been held that surplus assets ought to be distributed in proportion as the subscriptions to the stock have been paid. Krebs *v.* Carlisle Bank, 2 Wall. (C. C.) 33 (1850); s. c., 14 Fed. Cas. 856; Sheppard *v.* Scinde, etc. Ry., 56 L. T. Rep. 180 (1887); aff'd, 57 L. T. Rep. 585 (1887); aff'd, H. of L., 60 L. T. Rep. 641 (1889); *Re* Hodges, etc. Co., L. R. 6 Ch. 51 (1870). On winding up, stockholders who have advanced on the subscription price more

trust company funds for distribution among the stockholders and the trust company does not pay the dividend to a certain stockholder he may sue the trustees therefor.[1] The stockholders may insist on the application of the statute of limitations as far as it is a bar to the claim of corporate creditors upon the assets.[2] The statute of limitations does not run as against the estate of a dissolved corporation.[3] Where the corporation has been dissolved, and its assets distributed, and its trustees discharged by a decree of court, a creditor who was a party to the suit cannot afterward maintain a bill against the trustees to reach unpaid subscriptions.[4] But often by statute, if the directors upon the dissolution of a corporation distribute the assets among the stockholders without paying the debts, they are personally liable for such debts.[5] The mode of distribution among corporate creditors, where some have other security and others not, is considered elsewhere.[6] The rights of the stockholders in the assets upon a dissolution depend upon the law of the country creating the corporation.[7] And these rights cannot be taken from the stockholders by an act repealing the charter.[8] In winding-up proceedings an

than the calls required, under an agreement of repayment with interest, are entitled to repayment before a general dividend is made. So held where full-paid stock was issued for property, but other stock for cash was not fully paid up. Exchange, etc. Co., L. R. 38 Ch. D. 171 (1888).

1 Janeway *v.* Burn, 91 N. Y. App. Div. 165 (1904); aff'd, 180 N. Y. 560.

2 Johnston *v.* Talley, 60 Ga. 540 (1878). On a bill to wind up an insolvent corporation the stockholder may prove that some claims against the company were not legally contracted. Crutchfield *v.* Mutual, etc. Co., 2 S. W. Rep. 658 (Tenn. 1886).

3 Ludington *v.* Thompson, 153 N. Y. 499 (1897). The running of the statute of limitations is not suspended by the dissolution of the corporation. Bradley, etc. Co. *v.* Norfolk, etc. Co., 101 Fed. Rep. 681 (1900).

4 Chavent *v.* Schefer, 59 Fed. Rep. 231 (1894). If a corporation has been dissolved, garnishee process does not lie against a stockholder at the instance of a corporate creditor to reach an unpaid subscription. Paschall *v.* Whitsell, 11 Ala. 472 (1847).

5 Keen *v.* Maple, etc. Co., 50 Atl. Rep. 467 (N. J. 1901), rev'g 61 N. J. Eq. 497. A solvent corporation does not hold its property in trust for its creditors, even though it is in process of liquidation, and hence a partial distribution of the assets of a bank to the stockholders during liquidation, when the bank was solvent and retained what seemed to be sufficient assets to pay its liabilities, cannot be recovered back subsequently by the receiver in an action at law, although it turned out that the remaining assets were not sufficient to pay all liabilities, no bad faith being involved. Lawrence *v.* Greenup, 97 Fed. Rep. 906 (1899). See also § 546, *supra.*

6 See § 763, *infra.*

7 Hamilton *v.* Accessory Transit Co., 26 Barb. 46 (1857).

8 Lothrop *v.* Stedman, 13 Blatchf. 134 (1875); s. c., 15 Fed. Cas. 922. The benefits given by a certificate issued by a fraternal benefit or life insurance association, cannot be modified by amendments to the by-laws, even though the certificate provided that the applicant should conform to

assessment may be levied upon stock which is not fully paid, in order to adjust the rights of the stockholders as between themselves.[1] On dissolution and distribution the stock of a bankrupt, whose estate has paid only a part of the calls, is considered paid up only to the extent of cash actually paid.[2] Where increased capital stock is only partly paid up, and a dissolution is had, the court will order repayment of all that was paid on the original capital stock and on the increased capital stock, and then a distribution of the surplus on the whole capital stock.[3] In the distribution of the assets of a corporation upon

all by-laws then in force or thereafter adopted, and even though the certificate of incorporation provided that beneficiaries should receive such sums as the by-laws from time to time prescribed. Evans *v.* So. Tier, etc. Assoc., 182 N. Y. 453 (1905).

1 Welton *v.* Saffery, [1897] A. C. 299. Upon dissolution the court may and will call in unpaid subscriptions where this is necessary in order to make a proper distribution. *Re* Sheppard's, etc. Co., 70 L. T. Rep. 3 (1893). In *Re* Anglo, etc. of W. A., [1898] 1 Ch. 327, the court ordered a call as a matter of form on subscriptions, so as to equalize the amount already paid on such subscriptions with a view to distribution on dissolution. The assets, after paying the debts, are distributed in proportion as the stockholders have paid in their subscriptions. Connecticut, etc. Co. *v.* Dunscomb, 108 Tenn. 724 (1902). A receiver's suit on notes given in payment for stock cannot be defeated on the ground that all the creditors have been paid. Pope *v.* Merchants' T. Co., 103 S. W. Rep. 792 (Tenn. 1907).

2 *Re* West Coast, etc. Ltd., [1906] 1 Ch. 1, aff'g [1905] 1 Ch. 597.

3 *Re* Driffield Gas L. Co., [1898] 1 Ch. 451. Where the original stock is paid for in cash at par, and then increased stock is paid for at the rate of $3 on $10, and upon the winding up of the company a large surplus exists for distribution, the court ordered that the original stock should first receive $7 on each $10, and then that the remaining assets should be distributed *pro rata* on all the stock. *Re* Weymouth, etc. Co., [1891] 1 Ch. 66. Where there is a surplus remaining after paying back all that the stockholders have paid in, the common-law rule is that such surplus is divided *pro rata* among the stockholders, even though some of the stock had been paid up and other stock only partially paid up. This rule may be varied by the charter so as to divide the surplus in proportion to the paid-up capital, and not in proportion to the number of shares, irrespective of the amount paid thereon. *Re* Mutoscope, etc. Syndicate, Ltd., [1899] 1 Ch. 896. On a dissolution and winding up, where part of the stock is paid up and part not, each class of stockholders is repaid the amount paid upon that class of stock, and then the surplus is divided proportionately. *Re* Wakefield, etc. Co., [1892] 3 Ch. 165. On a winding up, if it turns out that the profits had been systematically overestimated for many years, thereby depriving common stockholders of the dividends, an account should be taken and such dividends be then paid. *Re* Bridgewater, etc. Co., [1891] 2 Ch. 317. Founders' shares are a species of preferred or deferred stock; and where, on dissolution, the founders' shares are to have one-fifth of the surplus assets, the words "surplus assets" were construed to be the assets remaining after paying the debts, and also paying back whatever the stockholders had originally paid in. *Re* New Transvaal Co., [1896] 2 Ch. 750. Even though there are different classes of stock, a reduction of the

its winding up, the accumulated profits will be considered separate from the capital, if some of the stock is held in trust for life tenants and remaindermen.[1] Where on a reduction of the capital stock certain bad debts are set aside for the express benefit of the then existing stockholders of record, they are entitled to the same, even though they are not stockholders of record when the corporation is dissolved later.[2] In Maine it has been held that while a corporation may pay an ordinary dividend to a stockholder of record, yet that a dividend paid in the liquidation and winding up of the corporation must be paid to the holder of the certificate, even though such holder be a transferee who has not been recorded as such on the books of the company, and that the company is liable to him for dividends in liquidation, even though it has paid them to the registered stockholder, and that this rule applies to a pledgee of a certificate of stock as well as a purchaser of a certificate of stock.[3] After a national bank has gone into voluntary liquidation it cannot be required to transfer stock on its books.[4] Where a pledgee of stock is garnisheed and the company goes into liquidation, the garnishee process covers the distribution on the stock less his claim.[5] A contest

capital may be made on a different basis from the basis specified as applicable upon a dissolution and winding up. *Re* Credit Assurance, etc. Corp., [1902] 2 Ch. 601. Where stockholders in a national bank have been assessed irregularly, and a surplus remains after paying creditors, the stockholders who have paid the irregular assessments will first be repaid out of the surplus assets. *In re* Hulitt, 96 Fed. Rep. 785 (1899). Under the terms of a charter, distribution on dissolution may be according to the amount paid in, some of the stock not being full paid. Sheppard *v.* Murphy, 70 L. T. Rep. 3 (1893). Even though a holder of stock, which was only one-tenth paid up, sells a part to his brother at par, yet on the winding up of the company and the division of the property, they are to divide according to their stockholdings, and not according to the money they invested. Donner *v.* Donner, 66 Atl. Rep. 147 (Penn. 1907).

1 *Re* Rogers, 22 N. Y. App. Div. 428, 435 (1897); aff'd, 161 N. Y. 108.

2 Jerome *v.* Cogswell, 204 U. S. 1 (1907). Where, upon the sale of all the assets of one corporation to another, stock of the latter is issued to stockholders of the former, and it is provided that any surplus remaining from a certain fund shall be divided among all the stockholders of both companies, this interest in the surplus vests in the then existing stockholders individually, and this interest does not pass on a subsequent sale of his stock by a stockholder. Read *v.* Citizens', etc. R. R., 110 Tenn. 316 (1903).

3 Bath Sav. Inst. *v.* Sagadahoc Nat. Bank, 89 Me. 500 (1897). At any time before a dissolution is actually completed a stockholder may sell and transfer his stock. Central, etc. *v.* Smith, 95 Pac. Rep. 307 (Colo. 1908).

4 Muir *v.* Citizens', etc. Bank, 39 Wash. 57 (1905). See also § 872, *infra*, and § 266, *supra*.

5 Cooley *v.* Janes, 71 Kan. 297 (1905). An unrecorded pledgee of stock is not entitled to be notified of proceedings for a consolidation with

between the preferred and common stockholders as to who shall be entitled to the surplus will not be decided in a foreclosure suit, but the surplus will be paid to the corporation for distribution.[1] In the distribution of the assets of an insolvent corporation citizens of other states cannot be discriminated against.[2]

Debts due from the stockholder to the corporation are to be deducted from his interest in the assets.[3] And an assignment or transfer of stock by a stockholder after the dissolution of the corporation is merely an equitable assignment of his interest in the assets of the concern as it may appear upon the settlement.[4] Where profits have been earned and properly entered as profits on the corporation books they belong to the stockholder, even though thereafter the corporation becomes insolvent and is wound up before such profits are declared to be dividends. The creditors of the corporation are entitled to the *corpus* of the estate, but not to any profits. If there is preferred stock such profits go to that stock.[5]

A person who conveys property to the corporation in payment for stock may contract that upon dissolution he shall receive back that property.[6] The dissolution of a corporation pending a suit in

another company. A corporation is not liable to an unrecorded pledgee of its stock, even though a consolidation is brought about and the new stock issued to the pledgor, thereby depriving the pledgee of the value of the stock held in pledge, the corporation having acted in good faith. Cleveland City Ry. *v.* First Nat. Bank, 68 Ohio St. 582 (1903).

1 Continental Trust Co. *v.* Toledo, etc. R. R., 86 Fed. Rep. 929 (1898). On a foreclosure sale the court may order a distribution of any surplus remaining after the payment of the mortgage debt, and the court need not turn over such surplus to the insolvent corporation, but may decree that the surplus be divided among the stockholders after paying all general creditors who present their claims within a fixed time. Toledo, etc. R. R. *v.* Continental Trust Co., 95 Fed. Rep. 497 (1899).

2 Blake *v.* McClung, 176 U. S. 59 (1900).

3 James *v.* Woodruff, 10 Paige, 541 (1844); Nathan *v.* Whitlock, 9 Paige, 152 (1841); Purton *v.* New Orleans, etc. R. R., 3 La. Ann. 1932 (1848). Where a stockholder in an insolvent national bank does not pay the assessment levied by the comptroller, he cannot participate in a dividend to the stockholders after the debts are paid, such dividend being less than his assessment. Neither can his transferee, nor the purchaser of his stock at an execution sale. Richardson *v.* Wallace, 39 S. C. 216 (1893).

4 Quoted and approved in Muir *v.* Citizens', etc. Bank, 39 Wash. 57 (1905); James *v.* Woodruff, 10 Paige, 541 (1844); aff'd, 2 Denio, 574 (1845); Sewall *v.* Chamberlain, 82 Mass. 581 (1860). Money in the hands of the court on the liquidation of a company, even though it belongs to a stockholder, cannot be garnisheed for his debts under the English statute. Spence *v.* Coleman, [1901] 2 K. B. 199.

5 Bishop *v.* Smyrna, etc. Co., [1895] 2 Ch. 265.

6 Fish *v.* Nebraska, etc. Co., 25 Fed. Rep. 795 (1885). Where one of the organizers of the corporation, who is also its president, sells goods to it for stock, the corporation is protected in its title, even though it turns out that he held part of the goods to sell on

equity brought by it abates the suit, but it may be revived.[1] A suit cannot be instituted in the name of a dissolved corporation, inasmuch as it is dead, but by statute it is often provided that such suits may be brought for purposes of liquidation.[2] Where the corporation is dissolved, but by statute suits may be brought during the three succeeding years, a stockholder must request the directors to sue before he sues to compel a creditor to restore property illegally taken.[3] An order of the court that a person pay money to a corpo-

commission, but if he retains the stock and the company is dissolved, it is bound to respect the rights of the owner of the goods in distributing its assets. Wyeth *v.* Renz Bowles Co., 66 S. W. Rep. 825 (Ky. 1902).

1 Kelly *v.* Rochelle, 93 S. W. Rep. 164 (Tex. 1906). Upon dissolution a pending suit by the corporation abates. MacRae *v.* Kansas City, etc. Co., 69 Kan. 457 (1904). See also § 642, *infra.*

2 Neither a dissolved corporation nor its trustees can maintain a suit in its behalf. State *v.* Grant University, 115 Tenn. 238 (1905). Where a statute extending the existence of a corporation was unconstitutional, the corporation cannot maintain a suit to enjoin its grantee of land from violating a restriction in the deed. Clark *v.* American, etc. Co., 165 Ind. 213 (1905). A consolidation under a statute which provides that the consolidated corporation shall thereupon "form one consolidated corporation" is a dissolution of the constituent companies. A stockholder in one of the constituent companies may maintain a suit to have the consolidation declared illegal, and the value of his stock ascertained and paid, where he alleges that the terms of the consolidation were unfair and that the other constituent company had been grossly overcapitalized. Jones *v.* Missouri, etc. Co., 144 Fed. Rep. 765 (1906). A corporation is not dissolved until its charter expires or a decree to that effect rendered, and hence up to that time may institute a suit to collect its assets for voluntary liquidation. Wislon *v.* First State Bank, 95 Pac. Rep. 404 (Kan. 1908). Under the Nebraska statute a dissolved corporation may bring suit. Schmidt, etc. Co. *v.* Mahoney, 60 Neb. 20 (1900). Even though a Canadian corporation has been dissolved, yet if, under the statutes of Canada, it remains in force to wind up its business, it may bring suit in Rhode Island to recover a debt. Ham *v.* Banque Ville Marie, 22 R. I. 248 (1900). In the case of Singer, etc. Co. *v.* Hutchinson, 176 Ill. 48 (1898), the court held that the expiration of the two years prescribed by statute for a dissolved corporation bringing suits, etc., does not bar a writ of error sued out after the two years. Where by statute upon dissolution the directors are made trustees to wind up the affairs of the company, they may maintain a suit in another state, inasmuch as they are not receivers, but are successors of the corporation. Root *v.* Sweeney, 12 S. Dak. 43 (1899). See also § 642, *infra.*

3 General Electric Co. *v.* West Asheville Imp. Co., 73 Fed. Rep. 386 (1896). Even after dissolution a stockholder may file a bill to recover assets that have been wrongfully diverted. Boyd *v.* Hankinson, 92 Fed. Rep. 49 (1899). Under the New Jersey statutes a suit by a New Jersey corporation may be continued even though before trial the corporation is dissolved. Bucki, etc. Co. *v.* Atlantic, etc. Co., 128 Fed. Rep. 332 (1904). Even after dissolution, the directors of a New Jersey corporation may, under its statutes, be sued to obtain a conveyance of property which the

ration ceases upon the dissolution of the corporation.[1] Upon the expiration of a charter of a bridge company it can no longer charge tolls unless it obtains new authority therefor in accordance with the statutes.[2] A forfeiture of a charter by a state court does not affect the status of a receiver appointed by the United States court. Such receiver may proceed to administer the property.[3]

§ 642. *The liabilities upon dissolution, consolidation, or sale.*—As already seen, the old rule that upon dissolution all debts by or to the corporation are rendered unenforceable is no longer the law.[4] It has been held that the liability of a corporation to deliver goods, according to an executory contract, ceases upon such corporation passing into the hands of a receiver, where the receivership was accompanied by the usual injunction against the further transaction of business by the insolvent corporation. This conclusion is arrived at on the theory that the failure to perform was due to the operation of law, and hence that no damages could be recovered for breach of the contract.[5] The better rule, however, is that even at common law the obligations of a corporation do not cease by reason of its dissolution.[6] The dissolution of a company does not

corporation had sold. General Ry. etc. Co *v.* Cade, 122 N. Y. App. Div. 106 (1907).

1 Matter of Skelly, 109 N. Y. App. Div. 58 (1905).

2 Rockwith *v.* State, etc. Co., 145 Mich. 455 (1906).

3 City, etc. Co. *v.* State, 88 Tex. 600 (1895). But where, after an injunction has been obtained in the federal court, the corporation is dissolved in the state court, the suit in the federal court falls. Lang *v.* Louisiana Tanning Co., 56 Fed. Rep. 675 (1893).

4 See preceding section.

5 Malcomson *v.* Wappoo Mills, 88 Fed. Rep. 680 (1898), the court following the case of People *v.* Globe, etc. Ins. Co., 91 N. Y. 174 (1883), and refusing to follow Spader *v.* Mural, etc. Mfg. Co., 47 N. J. Eq. 18 (1890). "Where an insolvent corporation is forced into liquidation and dissolution, all its executory contracts perish with it, for this is an implied condition of their execution." The rule is otherwise as to a solvent corporation. "A receiver is not bound to carry out executory contracts of the corporation, but he may disregard them." No damages can be recovered for failure of the insolvent corporation or receiver to carry out the contract. Griffith *v.* Blackwater, etc. Co., 46 W. Va. 56 (1899). In the case of Liverpool, etc. Co. *v.* McNeill, 89 Fed. Rep. 131 (1898), the court held that the appointment of the receiver of two insolvent corporations had the effect of dissolving all contracts between such two corporations. A judgment declaring a corporation illegal, void, and the association dissolved puts an end to a contract by it to pay certain parties its bonds and stock if they would build its road. Vinal *v.* Continental, etc. Co., 32 Fed. Rep. 345 (1887).

6 Shayne *v.* Evening Post, etc. Co., 168 N. Y. 70 (1901). The voluntary dissolution of a corporation and the appointment of a receiver does not relieve it from performing its contracts when such dissolution was for that purpose and the company was able to perform its contracts, especially where the property is afterwards turned back to the corporation

put an end to its executory contract to employ a person,[1] nor to its obligations which were created for a period longer than the duration

by the receiver. Stannard *v.* Reid & Co., 114 N. Y. App. Div. 135 (1906). In the case Griffith *v.* Blackwater, etc. Co., 55 W. Va. 604 (1904), the court said: "Can the dissolution of the corporation have the effect of undoing that which was binding at the time it was done, and of releasing obligations fixed and unalterable by the parties themselves? It cannot be done upon any theory except that which was supposed once to have been a principle of the common law, under which the dissolution of a corporation canceled all its obligations, released it of its debts, vested the title to its personal assets in the king, and returned its real estate to the donors—a doctrine which Cook well says has been declared by the English court never to have been a part of the common law, and which has never been adopted, approved, and recognized in America. There is certainly no room for any such principle under the statutes of this state creating, regulating, and providing for the dissolution of corporations and of the distribution of their assets." The expiration of the charter of the corporation does not put an end to an existing statutory liability of the stockholder. Wheatley *v.* Glover, 125 Ga. 710 (1906). The stockholders are not individually liable for damages due to the negligence of the corporation, even though it has been dissolved. Hudson *v.* Limestone, etc. Co., 132 Fed. Rep. 410 (1904). Under the New Hampshire statutes, when a corporation is wound up under insolvency proceedings, all claims are allowed as of the same date, interest being added for those past due, and a rebate of interest made on those not yet due. An assignee in insolvency cannot agree that a trustee to whom the corporation pledged mortgages as security for debentures shall purchase such securities at a price named. Bank Com'rs *v.* New Hampshire, etc. Co., 69 N. H. 621 (1899).

1 Tiffin Glass Co. *v.* Stoehr, 54 Ohio, 157 (1896). A contract made by a corporation to pay when it is in funds is not enforceable if the company abandons business. Zimmer *v.* Brooklyn Sub. Ry., 6 N. Y. Supp. 316 (1889). A contract of officers for salary ceases upon the corporation passing into a receiver's hands, since performance is rendered impossible by judicial action and not by the fault of the corporation. Lenoir *v.* Linville, etc. Co., 126 N. C. 922 (1900). A contract of employment with a corporation is terminated by dissolution, the same as if the employer was an individual and had died. Louchheim *v.* Clawson, etc. Co., 12 Pa. Sup. Ct. 55 (1899). A contract whereby a stockholder sells his stock to an individual who guarantees that the former will be employed at a stated salary by the corporation for two years is enforceable against the person so purchasing the stock, even though the corporation passes into the hands of a receiver before the expiration of the two years and the employment is thereby stopped. Kinsman *v.* Fisk, 37 N. Y. App. Div. 443 (1899). A merger of two insurance companies under the New York statute forms a new corporation, and a person under contract of employment in one of the companies is not bound to work for the new company and may recover damages for breach of the contract. Globe, etc. Co. *v.* Jones, 129 Mich. 664 (1902). A contract of a corporation to pay its president $100 a month for a year ceases upon its becoming insolvent and a receiver appointed. Williamson, etc. Co. *v.* Roberts, etc. Co., 101 S. W. Rep. 421 (Tenn. 1907), the court fol-

of the corporate charter.[1] Where a contractor has but partially completed his contract, and a receiver is appointed, he is entitled to consider the contract as abandoned on that day, but before deciding he may wait a reasonable time to see what the parties in interest or the receiver do in regard to the completion of the contract.[2] In England an order for the compulsory winding up of a company operates as a notice to dismiss the servants and employees, and the appointment of a receiver and manager at the instance of a debenture holder has the same effect. This is on account of the change of personality, but does not apply where there is a voluntary winding up in order to transfer the business to another company.[3]

Where a corporation is dissolved before a lease taken by it runs out, the lessor may hold its assets liable for the breach of contract.[4] Where a receiver is appointed he generally finds a number of executory contracts in force—contracts of employment, or for rental of premises, or for purchases of material, etc. He then must decide whether he wishes to adopt any of these contracts as his own. If he does not adopt a particular contract, then that contractor has no preferred claim against the receiver, as a part of the receiver's expenses or disbursements, but has merely a claim against the corporation and its general assets, and this claim may be for past

lowing the New York rule, which is different from the New Jersey, Pennsylvania and Illinois rule. The principle of law that death terminates a contract of employment (1 Am. & Eng. Ency. of Law, 2d ed., p. 1223, and 20 id., p. 45) does not apply to a corporation, because it never dies except by expiration of its charter, which is known when the contract is made, or by voluntary or involuntary dissolution, which is its own fault. Not even an individual is released from his contracts by his insolvency. 20 Am. & Eng. Ency. of Law, 2d ed., p. 45. The old theory that the dissolution of a corporation puts an end to all contracts has been exploded as shown above.

1 See §§ 641, *supra*, 913, *infra*.

2 Commonwealth, etc. Co. *v.* North American T. Co., 135 Fed. Rep. 984 (1905). Where a contractor is prevented from completing his contract by the appointment of a receiver he may claim a statutory lien for work already done. Wetzel, etc. Ry. *v.* Tennis Bros. Co., 145 Fed. Rep. 458 (1906).

3 Midland, etc. Bank, Ltd. *v.* Attwood, [1905] 1 Ch. 357.

4 Kalkhoff *v.* Nelson, 60 Minn. 284 (1895); People *v.* National Trust Co., 82 N. Y. 284 (1880). Damages for breach of a contract should be allowed in liquidation, even though the time for the performance of such contract is not yet complete. Rosenbaum *v.* United States, etc. Co., 61 N. J. L. 543 (1898), rev'g 60 N. J. L. 294. Dissolution as allowed by statute may be had, even though it will enable a landlord to cancel a lease to the injury of secured corporate creditors. *Re* Criggleston, etc. Co., Ltd., 95 L. T. Rep. 81 (1906); aff'd, 95 L. T. Rep. 510, on the ground that the unsecured creditors might possibly thereby obtain something. The sureties on a lease to a corporation are not liable for the rental after the dissolution of the company,

sums due or for breach of contract, or both. On the other hand, if the receiver does adopt the contract, then as to sums becoming due before such adoption the contractor is a general creditor only, but as to sums becoming due after such adoption, they are a part of the receiver's expenses or disbursements and must be paid as such. The law is clear that a receiver may refuse to carry out an executory contract of the corporation. A receiver has no power, however, to cancel a lease except as to his own liability.[1] The liability of the insolvent corporation itself on rent accruing after the receiver is appointed is not affected by the insolvency and receivership.[2] A lessor, as a general creditor, may file a claim for rent to become due in the future under the lease.[3] After a receiver is appointed, interest ceases as between the creditors, but continues as against the corporation and its stockholders.[4] A pledgée of bonds of the corporation cannot be enjoined from selling the same, although dissolution proceedings are pending.[5] In distribution, debts not yet due participate with a rebate of interest for the unexpired time.[6] The adjudicated insolvency of the mortgagor operates to mature mortgage bonds in order that they may participate in the distribution of the general assets not covered by the mortgage, in case the mort-

inasmuch as the company is no longer liable. Mayor, etc. *v.* Letton, 97 L. T. Rep. 582 (1907).

1 Quoted and approved in Griffith *v.* Blackwater, etc. Co., 55 W. Va. 604 (1904), holding also that where with the consent of all the directors and stockholders, one of the directors is interested in a contract with the corporation, but upon the corporation becoming insolvent and being dissolved the court cancels the contract at the instance of creditors, such contractor is entitled to pay for services already rendered, and to reimbursement for actual and necessary outlays in connection with the contract.

2 The mere fact that a bank becomes insolvent and a receiver is appointed does not release it from subsequent rent on a lease, the landlord having reduced the damage as much as possible, any more than if the bank had abandoned the lease while continuing business. McGraw *v.* Union T. Co., 135 Mich. 609 (1904). New York, Pa., etc. R. R. *v.* New York, Lake Erie, etc. R. R., 58 Fed. Rep. 268 (1893); Chemical Nat. Bank *v.* Hartford Deposit Co., 161 U. S. 1 (1896).

3 *Re* New Oriental Bank, [1895] 1 Ch. 753. As to a claim for rent to become due, see People *v.* St. Nicholas Bank, 151 N. Y. 592 (1897). Where the receiver continues in possession under an existing lease, he is liable for the rent for the time he occupies the premises, and the lessor may put in a claim as a general creditor for the remainder of the rent. Shackell *v.* Chorlton, [1895] 1 Ch. 378. In the bankruptcy court the landlord cannot prove a claim for rent not yet due, but which would accrue thereafter under the lease. *In re* Arnstein, 101 Fed. Rep. 706 (1899).

4 People *v.* American, etc. Co., 172 N. Y. 371 (1902).

5 Matter of Binghamton Gen. El. Co., 143 N. Y. 261 (1894).

6 Jones *v.* Arena Pub. Co., 171 Mass. 22 (1898).

gage security is insufficient.[1] Upon a sale of the assets and the winding up of the company, bonds not yet due may be paid at par and accrued interest.[2] Bonds of an insolvent corporation become due on its dissolution, and accordingly the stockholders' statutory liability thereon commences at that date.[3] The liability of the corporation on indorsements is not considered in the distribution of assets by the receiver, except so far as such indorsements have matured and have not been paid.[4] Dissolution may put an end to a guaranty of dividends on the stock of the company.[5] Where suit for dissolution is instituted against an insurance company, the claims against it are figured at their value at the commencement of the suit, even though an insured person dies thereafter and before distribution.[6] A railroad company, having statutory power to extend the period of its existence, may make a lease of its railroad for a period of time extending beyond the duration of its charter, and such lease is valid and binding upon the company for at least the period of its existence.[7]

1 Union T. Co., etc. *v.* Thomas, 66 Atl. Rep. 450 (Md. 1907).

2 *Re* Southern, etc. Ry. Co., Ltd., [1905] 2 Ch. 78.

3 Ramsden *v.* Knowles, 151 Fed. Rep. 718 (1906). The statute of limitations begins to run against the stockholders' liability upon the insolvency of a Kansas corporation, even though its outstanding bonds do not become due for many years thereafter. Ramsden *v.* Knowles, 151 Fed. Rep. 721 (1907).

4 Oyster *v.* Short, 177 Pa. St. 601 (1896).

5 Lorillard *v.* Clyde, 142 N. Y. 456 (1894). A guaranty by an individual of future dividends on a going corporation is not a debt provable against him in bankruptcy. *In re* Pettingill & Co., 137 Fed. Rep. 143 (1905). A guarantee of dividends on stocks, so long as the certificates are outstanding, but not to exceed the period for which the company was incorporated, ceases upon the dissolution of the company, even though the guarantor owns a majority of the stock of the company and brings about the dissolution, unless the dissolution was for the purpose of escaping this liability. Mason *v.* Standard, etc. Co., 85 N. Y. App. Div. 520 (1903). *Cf.* § 775, *infra.*

6 People *v.* Commercial A. L. Ins. Co., 154 N. Y. 95 (1897). In winding up an insolvent insurance company the court will ascertain the present value of executory obligations of the company. Taber *v.* Royal, etc. Co., 124 Ala. 681 (1899), the court saying that "When it falls out that the company is unable longer to keep its promises, and its assets are taken possession of by the court, for *pro rata* application to its debts, the court has a right to fix a day up to which engagements under contract may be regarded as continuing, but after which the creditors may regard them as terminated on account of the altered condition of the company, disabling it further to meet its reciprocal promises. That is an option afforded to creditors by the court, in view of the contract relations of the parties, and is strictly in the nature of a rescission by them, and the proof by them in such cases is in the way of damages, and is measurable by the present value of their contracts."

7 Gere *v.* New York Central, etc. R. R., 19 Abb. N. C. 193 (1885). In this case the validity of a mortgage

A corporation that owns stock in another corporation may vote such stock in favor of dissolution of the latter, even though it was influenced so to vote by the fact that it has guaranteed dividends on the stock of the latter so long as the latter exists.[1] An important question arises in this connection where one corporation sells out all its property to another corporation leaving some of the debts of the former corporation unpaid. The rights and remedies of the creditors in such a case are fully considered elsewhere.[2] So also it frequently becomes important to know whether a consolidated company is liable for the debts of the constituent companies,[3] and whether a purchaser at a foreclosure sale is liable for the debts of the foreclosed corporation.[4]

Dividends paid to the stockholders out of the capital stock are illegal as against corporate creditors whether paid before or at the time of dissolution.[5]

The question of liability where the corporation is a mere "dummy" is considered elsewhere.[6]

Another question is whether a person or corporation which owns all the stock of another corporation is ever liable for the debts of the latter on the ground that the latter is a mere "dummy" for the former. This subject also is considered elsewhere.[7]

At common law, upon dissolution of a corporation, all suits by or against it abate.[8]

by the West Shore Railroad Company to become due four hundred and seventy-five years from its date, although the corporate existence of the company was only one hundred years, was not questioned, the court holding that a lease made at the same time for the same length of time by the company was legal. See also § 641, *supra*.

1 Windmuller *v.* Standard, etc. Co., 114 Fed. Rep. 491 (1902), also 115 id. 748. See a criticism on this case on page 1775, *supra*.

2 See ch. XL, *infra*.

3 See ch. LIII, *infra*.

4 See ch. LII, *infra*.

5 See § 546, *supra*.

6 See §§ 6, *supra*, and 663, 664, 709, *infra*.

7 See §§ 6, *supra*, and 663, 664, 709, *infra*.

8 McCulloch *v.* Norwood, 58 N. Y. 562 (1874); *Re* Norwood, 32 Hun, 196 (1884); Greeley *v.* Smith, 3 Story, C. C. 657 (1845); s. c., 10 Fed. Cas. 1075; Saltmarsh *v.* Planters', etc. Bank, 17 Ala. 761 (1850); Merrill *v.* Suffolk Bank, 31 Me. 57 (1849); Ingraham *v.* Terry, 11 Humph. (Tenn.) 572 (1851); Life Assoc. *v.* Fassett, 102 Ill. 315 (1882); Platt *v.* Ashman, 32 Hun, 230 (1884). A judgment against a corporation after its charter has been forfeited by decree of the court is void. Insurance Com'r *v.* United, etc. Co., 22 R. I. 377 (1901). Dissolution dissolves a pending attachment. Morgan *v.* New York, etc. Assoc., 73 Conn. 151 (1900). A judgment in Illinois rendered against a New York corporation after it has been dissolved is not evidence against the New York receiver, even though the suit was commenced before the dissolution, it appearing that the attorneys for the company had withdrawn their ap-

Where a corporation is dissolved while an infringement suit is pending against it the suit may be revived against the receiver.[1] Suit does not lie against a corporation which has been dissolved.[2]

pearance before the judgment and the receiver had not appeared. People *v.* Mercantile, etc. Co., 65 N. Y. App. Div. 306 (1901). Where the attorney fails to call the attention of the court to the fact that his client, one of the parties in the case, has been dissolved, he may be liable for costs thereafter. Salton *v.* New Beeston, etc. Co., [1900] 1 Ch. 43. An action for tort abates upon the expiration of the corporate charter. Grafton *v.* Union Ferry Co., 13 N. Y. Supp. 878 (1891). Corporate suits end when the charter expires. Logan *v.* Western, etc. R. R., 87 Ga. 533 (1891). Where by consolidation a corporation ceases to exist, suits against it abate. Council, etc. Ry. *v.* Lawrence, 3 Kan. App. 274 (1896). A dissolution of a corporation puts an end to a suit at law for damages for personal injuries. Grafton *v.* Union Ferry Co., 19 N. Y. Supp. 966 (1892). Upon dissolution of a corporation all suits abate. Marion Phosphate Co. *v.* Perry, 74 Fed. Rep. 425 (1896). The dissolution of a foreign corporation ends a suit against it. Wamsley *v.* Horton, 12 N. Y. App. Div. 312 (1896); aff'd, 153 N. Y. 687. A judgment in Illinois against a New York corporation that has already been dissolved in New York is not good in New York. Rodgers *v.* Adriatic F. Ins. Co., 87 Hun, 384 (1895). An action in tort for personal injuries abates upon the dissolution of the company. *Re* Yuengling Brewing Co., 24 N. Y. App. Div. 223 (1897). A judgment against a corporation after it has been dissolved is a nullity. Crossman *v.* Vivienda, etc. Co., 150 Cal. 575 (1907). A judgment may be entered against a corporation even though an assignee has been appointed under statutory proceedings. Anglo-American, etc. Co. *v.* Cheshire, etc. Inst., 124 Fed. Rep. 464 (1903); aff'd, 132 Fed. Rep. 968. A judgment against a corporation, which by expiration of charter has ceased to exist, may nevertheless be good against its property, if that fact is not availed of until after the statute of limitations has run against the individuals. Droege *v.* Emery, 105 S. W. Rep. 374 (Ky. 1907). See also § 641, *supra*.

1 Griswold *v.* Hilton, 87 Fed. Rep. 256 (1898). Even though a suit against a corporation for libel abates by reason of the dissolution of the corporation, yet it may be revived and continued against the former directors in order to reach assets in their hands as trustees, under the New York statute. Shayne *v.* Evening Post, etc. Co., 168 N. Y. 70 (1901). An action against a corporation may be continued against those who administer its assets where the corporation is dissolved pending the suit. Hepworth *v.* Union Ferry Co., 62 Hun, 258 (1891).

2 Dobson *v.* Simonton, 86 N. C. 492 (1882); Gold *v.* Clyne, 58 Hun, 419 (1890); aff'd, 134 N. Y. 262. The legislature may provide for suits against corporations after dissolution, thus changing the common-law rule. Stetson *v.* City Bank, etc., 2 Ohio St. 167 (1853); Foster *v.* Essex Bank, 16 Mass. 245 (1819). Under the New York statute dissolution does not bar an action for damages. Marstaller *v.* Mills, 143 N. Y. 398 (1894). After a corporation has been dissolved, by the repeal of its charter, a bill of review against it to set aside a decree in its favor cannot be maintained. Board of Councilmen, etc. *v.* Deposit Bank, etc., 120 Fed. Rep. 165 (1902); aff'd, 124 Fed. Rep. 18. As to a suit in New Hampshire against a New Jersey corporation which has

. . . But the statutes often contain a provision that the corporate existence shall be continued for a fixed time, pending the proceedings for dissolution, so that suits may be brought by and against the corporation for the purpose of closing the business and disposing of the assets.[1] A statute that corporations shall continue for a

been dissolved, see White Mountain, etc. Co. *v.* Morse & Co., 127 Fed. Rep. 643 (1904). Even though under a state statute a bank is being wound up and the property transferred to an assignee, yet this is not a dissolution preventing a suit against the bank in the federal court, although the enforcement of a judgment therein may be difficult. Cheshire, etc. Inst. *v.* Anglo-American, etc. Co., 132 Fed. Rep. 968 (1904). Even though a Connecticut corporation which owns a railroad in Kentucky is being wound up, in accordance with the statutes of Connecticut, and even though the company has assigned to the statutory receiver in Connecticut all its property, yet such an assignment is not an assignment for the benefit of creditors, and hence a creditor of the railroad may attach in Kentucky assets in that state. Huntington *v.* Chesapeake, etc. Ry., 98 Fed. Rep. 459 (1899). A suit to collect a debt against a corporation, the charter of which has expired, can be in a court of equity only. Stiles *v.* Laurel, etc. Co., 47 W. Va. 838 (1900). Suit does not lie against a dissolved corporation, and a statute authorizing suit against a domestic dissolved corporation does not apply to a foreign corporation. Fitts *v.* National, etc. Assoc., 130 Ala. 413 (1901). An irregular dissolution of a Connecticut corporation is no bar to a subsequent attachment against such corporation in New York state. Hammond *v.* National, etc. Assoc., 31 N. Y. Misc. Rep. 182 (1900); aff'd, 58 N. Y. App. Div. 453 (1901). A statute authorizing a dissolved corporation to bring suit enables such corporation to sue in the federal courts. Dundee, etc. Co. *v.* Hughes, 89 Fed. Rep. 182 (1898). Even after dissolution a stockholder may file a bill to recover assets that have been wrongfully diverted. Boyd *v.* Hankinson, 92 Fed. Rep. 49 (1899). A corporation may be sued as such for a tort committed by it after its charter has expired. Miller *v.* Newburg, etc. Co., 31 W. Va. 836 (1888). Where an attorney brings suit in the name of a corporation that has been dissolved before the action, he is liable for costs if beaten. Attleboro Nat. Bank *v.* Wendell, 64 Hun, 208 (1892). After dissolution has been decreed it is too late for a corporate creditor to bring an action to hold the directors liable for declaring dividends out of the capital stock, no fraud in obtaining the dissolution being alleged. Coxon *v.* Gorst, [1891] 2 Ch. 73. Upon dissolution, the directors becoming trustees by statute, the statute of limitations begins to run against claims against the secretary. Landis *v.* Saxton, 105 Mo. 486 (1891). A corporation may give a bond on appeal, even though the charter has been forfeited, an appeal having been taken from the judgment of forfeiture. Texas, etc. R. R. *v.* Jackson, 85 Tex. 605 (1893). See also § 641, *supra*.

1 Stetson *v.* City Bank of New Orleans, 12 Ohio St. 577 (1861); McGoon *v.* Scales, 9 Wall. 23 (1869); Mariners' Bank *v.* Sewall, 50 Me. 220 (1861); Muscatine Turn Verein *v.* Funck, 18 Iowa, 469 (1865); Thornton *v.* Marginal Freight Ry., 123 Mass. 32 (1877); Folger *v.* Chase, 35 Mass. 63 (1836); Crease *v.* Babcock, 51 Mass. 525, 567 (1846); *Re* Independent Ins. Co., Holmes, 103 (1872); s. c., 13 Fed. Cas. 13; Franklin Bank *v.* Cooper, 36 Me. 179 (1853); Nevitt *v.* Bank of Port Gibson, 14 Miss. 513

certain time after their dissolution for purposes of litigation does not apply to foreign corporations.[1]

Upon the dissolution of the corporation the liability of the stockholder as to any further business ceases. If the business is carried on thereafter by the agents, no liability therefor attaches to the former stockholders,[2] unless they expressly authorize it.[3]

A director who is a creditor of the corporation may share proportionately with other creditors in the assets.[4]

Where a company owing debts allows a foreclosure of a mortgage and buys in the property and holds it secretly in the name of a trustee, an execution may be levied on it by a judgment creditor of the company.[5] The directors are not personally liable for attorney fees for services rendered in a voluntary dissolution of the company.[6]

(1846). The life of the corporation is frequently extended by these statutes for three years. Herron *v.* Vance, 17 Ind. 595 (1861); Foster *v.* Essex Bank, 16 Mass. 245 (1819); Blake *v.* Portsmouth, etc. R. R., 39 N. H. 435 (1859); Von Glahn *v.* De Rosset, 81 N. C. 467 (1879); Michigan State Bank *v.* Gardner, 81 Mass. 362 (1860). Sometimes five years. Tuskaloosa, etc. Assoc. *v.* Green, 48 Ala. 346 (1872). *Cf.* Lincoln, etc. Bank *v.* Richardson, 1 Me. 79 (1820). A suit abates upon the expiration of the time limited, where by statute the corporation continues for five years after dissolution for the purpose of prosecuting and defending suits. Dundee, etc. Co. *v.* Hughes, 77 Fed. Rep. 855 (1896).

1 Olds *v.* City, etc. Co., 185 Mass. 500 (1904).

2 Central City Sav. Bank *v.* Walker, 66 N. Y. 424 (1876), aff'g 5 Hun, 34. Wilson *v.* Tesson, 12 Ind. 285 (1859). A contract made by the officers after the charter has been forfeited does not bind the stockholders. Wilson *v.* Tesson, 12 Ind. 285 (1859). Where a grain-dealing corporation becomes insolvent and a trustee is appointed and thereafter the president continues to do business on his own account, but uses the name of the corporation, moneys received by him are not subject to the debts of the corporation. Boyle *v.* Northwestern, etc. Bank, 125 Wis. 498 (1905).

3 National Union Bank *v.* Landon, 45 N. Y. 410 (1871).

4 Thompson *v.* Huron Lumber Co., 4 Wash. St. 600 (1892).

5 State *v.* McBride, 105 Mo. 265 (1891).

6 Drew *v.* Longwell, 81 Hun, 144 (1894).

PART IV.

FRAUDS — ULTRA VIRES ACTS — INTRA VIRES ACTS — NEGLIGENCE AND IRREGULAR CONTRACTS OF DIRECTORS, STOCKHOLDERS, PROMOTERS, AND AGENTS.

CHAPTER XXXIX.

FRAUDULENT ACTS OF DIRECTORS, MAJORITY OF STOCKHOLDERS, AND THIRD PERSONS.

A. THE OCCASION, SCOPE, AND PURPOSE OF THE SUBJECT HEREIN.

§ 643. *The cause and occasion of this subject.*—Perhaps the most striking feature of the modern era of industrial development is the growth, wealth, and power of corporations. They have built the railways, dug the canals, established the factories, carried the ocean commerce, and assumed control of the industries of Europe as well as of America. They have absorbed a large part of the surplus wealth of the world, and have been the means of making great profits. But these gains and profits have not always been honestly preserved and administered for the benefit of those who are entitled thereto—the stockholders of the company. Corporations, with their vast capital stock and their great income, have proved to be a temptation to corporate officers. These companies have been found to be efficient instruments of fraud and illegal gain. Corporations have become insolvent, and stockholders have lost their investments, while individuals have become millionaires.

The expense, difficulty, and delays of litigation; the power and wealth of the guilty parties; the secrecy and skill of their methods; and the fact that the results of even a successful suit belong to the corporation, and not to the stockholders who sue, all tend to discourage the stockholders, and to encourage and protect the guilty parties.

In England, ever since the year 1720, when the "South Sea Bubble" exploded and unsettled the finances of the kingdom, there have been many instances of "bubble companies" and dishonest promoters.

In America the cases involving a breach of trust by the directors arise generally out of the management of corporations, and not in their formation.

It is the purpose of this part of this work to explain, so far as is possible, the methods of those frauds, and to point out the remedy for the wrong.

§ 644. *The three classes of stockholders' wrongs herein—The corporation is ordinarily the party to remedy these wrongs.*—Stockholders' wrongs, arising from a breach of trust by directors or a majority of the stockholders or third persons, are clearly divisible into three classes. They are: first, fraudulent acts; [1] second, *ultra vires* acts; [2] third, negligence of corporate directors.[3]

There is another class of grievances—that of internal dissensions in the corporation and dissatisfaction with its policy and acts. These,

1 This is the subject of this chapter.

2 See ch. XL, *infra*.

3 See ch. XLII, *infra*.

however, are *intra vires* of the directors or majority of the stockholders. The law gives no remedy for such dissensions since the stockholder has the corporate elections as a remedy. The majority are to rule so long as they do so without fraud and within the powers of the corporation.[1] So also the decision of the board of directors is binding as regards the usual suits which a corporation might bring against third persons.[2]

It is to be borne in mind that frauds, *ultra vires* acts, and acts of negligence are injuries to the corporation; and the corporation is naturally the party to bring suit to rectify them. These frauds, *ultra vires* acts, and negligence of directors do not affect the stockholders directly; but they affect the stockholders indirectly by decreasing the corporate assets, and thereby affecting the value of the stock. Accordingly it is the duty of the corporation to bring suit to remedy these wrongs, just as it is the duty and right of the corporation to bring suit to remedy an ordinary trespass, conversion, or fraud, whereby third parties injure the corporate property and interests. That a corporation may bring suit to remedy the frauds, *ultra vires* acts or negligence of its trustees or directors was the decision of Lord Chancellor Hardwicke, in 1742, in the case of The Charitable Corporation against Sutton.[3]

§ 645. *But, the corporation failing to do so, a stockholder may bring the action.*—Notwithstanding this fact, however, that it was the duty and right of the corporation to bring suit to remedy these wrongs, it gradually became apparent that frequently the corporation was helpless and unable to institute the suit. It was found where the guilty parties themselves controlled the directors and also a majority of the stock, that the corporation was in their power, was unable to institute suit, and that the minority of the stockholders were being defrauded of their rights and were without remedy; and it became apparent that there was a wrong which had no remedy. The time came when the minority of the stockholders of a defrauded corporation—the corporation itself being controlled by the guilty parties—were given a standing in court for the purpose of taking up the cause of the corporation, and, in its name and stead, of bringing the guilty parties to an account. Accordingly, in 1843, in the leading case of Foss *v.* Harbottle,[4] a

1 See ch. XLI, *infra.*

2 See § 750, *infra.*

3 2 Atk. 400. In this case the court said: "Nor will I ever determine that a court of equity cannot lay hold of every breach of trust, let the person be guilty of it either in a private or public capacity." As to the power of the state to remedy such abuses, see § 635, *supra.*

4 2 Hare, 461.

stockholder brought suit in the name of himself and other defrauded stockholders, and for the benefit of the corporation, against the directors, for a breach of their duty to the corporation. This case was decided against the complaining stockholders on the ground that the complainant had not proved that the corporation itself was under the control of the guilty parties, and had not proved that it was unable to institute the suit. The court, however, broadly intimated that a case *might* arise when a suit instituted by the defrauded stockholders would be entertained by the court and redress given. Acting upon this suggestion, and impelled by the utter inadequacy of suits instituted by the corporation, defrauded stockholders continue to institute these suits and to urge the courts of equity to grant relief.[1] These efforts were unsuccessful in clearly establishing the rights of stockholders herein until the cases of Atwool against Merryweather, in England, in 1867,[2] and of Dodge *v.* Woolsey, in this country, in 1855.[3] These two great and leading cases have firmly established the law for both England and America, that where corporate directors have committed a breach of trust either by their frauds, *ultra vires* acts, or negligence, and the corporation is unable or unwilling to institute suit to remedy the wrong, a single stockholder may institute that suit, suing on behalf of himself and other stockholders and for the benefit of the corporation, to bring about a redress of the wrong done directly to the corporation and indirectly to all the stockholders.[4]

1 Mozley *v.* Alston, 1 Phil. Ch. 790 (1847); s. c., 16 L. J. (Ch.) 217, where the court said there was no reason assigned "why the corporation does not put itself in motion to seek a remedy;" Lord *v.* Copper Miners, 2 Phil. Ch. 740 (1848), where the court refused relief because the acts were capable of confirmation and had been confirmed by the majority; Gray *v.* Lewis, L. R. 8 Ch. App. 1035, 1050 (1873). See also MacDougall *v.* Gardiner, L. R. 1 Ch. D. 13 (1875), in regard to the principle of law decided by these cases.

2 L. R. 5 Eq. 464, n.

3 18 How. 331. The case of Hawes *v.* Oakland, 104 U. S. 450 (1881), is perhaps of even greater importance than Dodge *v.* Woolsey, and may take the place of the latter. See also Dickerman *v.* Northern T. Co., 176 U. S. 181, 188 (1900), where the above section is cited.

4 It is to be noticed that long prior to these cases it had been held by the courts in various cases that a stockholder's action herein would lie, but the principle was not clearly established until the foregoing decisions were made. Thus, in New York, as early as 1832, in the case of Robinson *v.* Smith, 3 Paige, 222 (1832), the remedy was declared to exist. In the early case of Preston *v.* Grand Collier Dock Co., 11 Sim. 327 (1840), a bill by a stockholder in behalf of himself and others to render certain persons liable as stockholders, they having subscribed in order to get a charter, and then declared that they subscribed as trustees for the corporation, was sustained.

The rule as formulated therein has been repeated, applied, explained, and extended by subsequent cases and by text books until a system of jurisprudence may be said to be based upon it. In bringing that class of suits stockholders are not liable for libel and slander by reason of allegations in their suit against directors for fraud. Not even a director who was not a party can sue them for libel.[1] Nor does a suit by a stockholder against the corporation for an injunction and a receiver on the ground that the corporation is insolvent render the stockholder liable to a suit for malicious prosecution, even if his suit failed, there having been no arrest of the person or seizure of property.[2]

§§ 646, 647. *The facts and conditions which allow and sustain a stockholder's suit herein.*—Before a stockholder can sustain a suit to remedy the frauds, *ultra vires* acts, or negligence of directors, he should be certain that three distinct facts or conditions exist in his favor. These are: first, that the acts complained of are such as amount to a breach of trust, and such as neither a majority of the directors nor of the stockholders can ratify or condone;[3] second, that the complaining stockholder himself is free from laches, acquiescence, or ratification of the acts to remedy which the suit is brought;[4] third, that the corporation has been requested and has neglected or refused to institute the suit; that the suit is instituted by *bona fide* stockholders as complainants, and that the corporation and the guilty parties and other proper parties have been made defendants.[5]

B. FRAUDS OF CORPORATE DIRECTORS, OF A MAJORITY OF THE STOCKHOLDERS, OR OF THIRD PERSONS, TO REMEDY WHICH A STOCKHOLDER MAY BRING SUIT.

§ 648. *Directors as trustees.*—It is frequently said, both in the cases and in the text-books, that the directors of a corporation are practically trustees, with the whole body of the stockholders as *cestuis que trust*.[6] The New York court of appeals, however, has

1 Runge *v.* Franklin, 72 Tex. 585 (1889). See also Kimball *v.* Post Pub. Co., 85 N. E. Rep. 103 (Mass. 1908).

2 Cincinnati, etc. Co. *v.* Bruck, 61 Ohio St. 489 (1900).

3 This subject is treated in the remainder of this chapter and in chapter XL, *infra*. See also, as to such ratification, § 740, *infra*.

4 See ch. XLIV, *infra*.

5 See ch. XLV, *infra*.

6 That directors occupy the position of trustees towards the stockholders, see European, etc. Ry. *v.* Poor, 59 Me. 277 (1871); Koehler *v.* Black River, etc. Co., 2 Black. 715 (1862). See also Green's Brice, Ultra Vires (2d ed.), p. 478, citing many cases. *Cf.* Smith *v.* Anderson, L. R. 15 Ch. D. 247 (1880); Imperial Hotel Co. *v.* Hampson, L. R. 23 Ch. D. 1 (1882); Angell & A. Corp., § 312, etc.; Pierce, Railroads, 36-44; Wickersham *v.* Crittenden, 93 Cal. 17 (1892). In Wasatch Min. Co. *v.* Jennings, 5 Utah, 243 (1887), the court well said in

recently said that directors are trustees in their relations towards the corporation, but not in their relations towards the stockholders.[1] And again, that "while courts of law generally treat the directors as agents, courts of equity treat them as trustees and hold them to a strict account for any breach of the trust relation. For all practical purposes they are trustees when called upon in equity to account for their official conduct."[2] The obligation of this trusteeship, whether to the corporation or to the stockholders, has been the basis of ascertaining what acts of directors constitute a fraud, and what remedies may be applied. A corporation may file a bill to compel its secretary and treasurer to account for funds coming into his hands and need not resort to a suit at law. Such a suit is practically one to compel a trustee to account.[3] A stockholder may, of course, contract with the corporation the same as a stranger.[4]

§ 649. *Director or other corporate officer interested in construction company — Contracts between a director and his company.* — It has been held that a director cannot, as against the dissent of a single stockholder, become a contractor with the corporation, nor can he have any personal and pecuniary interest in a contract between

reference to corporate directors: "Courts of equity have carefully refrained from defining the particular instances of fiduciary relations in such a manner that other and perhaps new cases might be excluded." The corporation, however, stands in no fiduciary relation towards its stockholders. Karnes *v.* Rochester, etc. R. R., 4 Abb. Pr. (N. S.) 107 (1867). As stated in Hoyle *v.* Plattsburgh, etc. R. R., 54 N. Y. 314 (1873), whether a director of a corporation is to be called a trustee or not, in a strict sense, there can be no doubt that his character is fiduciary.

1 Bloom *v.* National United, etc. Co., 152 N. Y. 114 (1897), aff'g 81 Hun, 120.

2 Bosworth *v.* Allen, 168 N. Y. 157 (1901). Directors are not technically trustees, and hence the statute of limitations relative to trustees is not applicable to a suit by a receiver against them for misfeasance. Boyd *v.* Mutual Fire Assoc., 116 Wis. 155 (1903). A receiver may bring a suit in equity to hold a director liable for misconduct where particular property or the proceeds thereof are involved; otherwise his remedy is at law. Mabon *v.* Miller, 81 N. Y. App. Div. 10 (1903).

3 Consolidated, etc. Works *v.* Brew, 112 Wis. 610 (1902). A treasurer sued by the corporation for money held by him as treasurer cannot offset a debt due from the corporation to him individually. Oregon, etc. Co. *v.* Schmidt, 60 S. W. Rep. 530 (Ky. 1901). A new treasurer may bring suit against a former treasurer to recover corporate funds, and such suit may be in equity. Hunter *v.* Robbins, 117 Fed. Rep. 920 (1902). The decision in American, etc. Co. *v.* Easton, 120 Fed. Rep. 440 (1903), that a suit by the corporation itself to recover secret profits made by a director in purchasing property for the corporation could not be maintained in equity, the remedy at law being sufficient, was reversed in 129 Fed. Rep. 1004.

4 Bramblet *v.* Commonwealth, etc. Co., 83 S. W. Rep. 599 (Ky. 1904). See also § 11, *supra*.

a third person and the company of which he is a director.[1] "Constituted as humanity is, in the majority of cases duty would be overborne in the struggle." Where a construction company contracts with a corporation, the director cannot be interested in the construction company at the time the contract is made, nor subsequently; and it is immaterial that the contract was fair, or even to the advantage of the corporation. The corporation, upon discovering the fact that the director is interested in the construction company, may compel him to pay over to the corporation all profits that he has derived from the construction contract.[2] Again, if a company contracting

[1] Port *v.* Russell, 36 Ind. 60 (1871), where an injunction was granted against the payment by a plank-road company of money to a construction company of which a director of the former was a member. The court said that the three leading American cases on the subject of frauds by directors are Michoud *v.* Girod, 4 How. 503 (1846); Cumberland, etc. Co. *v.* Sherman, 30 Barb. 553 (1859); and s. c., 20 Md. 117 (1863); and Hoffman Steam Coal Co. *v.* Cumberland, etc. Co., 16 Md. 456 (1860); and in England the case of Aberdeen Ry. *v.* Blakie, 1 Macq. 461 (1854). Where two contractors cause a railroad corporation to be formed, in which one contractor becomes a director, and the other directors are clerks of the second contractor, and the construction contract is made with these two, by means of "dummy" intermediaries, at an improvident price, one of the contractors cannot compel the other to divide the profits. Jackson *v.* McLean, 36 Fed. Rep. 213 (1888). A president is personally liable on loans by his bank to an insolvent person with whom he has other interests. First Nat. Bank *v.* Reed, 36 Mich. 263 (1877). A waiver of the statute of limitations by the board of directors is illegal where the party benefited was a director and was present when the resolution was passed. Lowndes *v.* Garnett, etc. Co., 33 L. J. (Ch.) 418 (1864). Although the officers of a railroad company take in their names lands which are donated to the railroad, yet the railroad cannot compel them to give up the lands, if the railroad company had no power to acquire such lands. Case *v.* Kelly, 133 U. S. 21 (1890). Where a corporation gives a building contract to one of its directors on his representation that the price is the actual cost of the work, when in fact he had already arranged to subcontract it at a less figure, it is a question for the jury as to whether fraud was involved. Keystone, etc. Co. *v.* Bate, 187 Pa. St. 460 (1898); s. c., 196 Pa. St. 566. A contract between a director and a corporation whereby the former gets a commission for selling the product of the latter may be disregarded by a receiver of the corporation. Griffith *v.* Blackwater, etc. Co., 46 W. Va. 56 (1899).

[2] Quoted and approved in Rutland, etc. Co. *v.* Bates, 68 Vt. 579 (1896). See § 662, *infra*. It is illegal for directors to be stockholders in a construction company to which a construction contract is let. Gilman, etc. R. R. *v.* Kelly, 77 Ill. 426 (1875). See also Bayliss *v.* Lafayette, etc. Ry., 8 Biss. 193 (1878); s. c., 2 Fed. Cas. 1079; Paine *v.* Lake Erie, etc. R. R., 31 Ind. 283 (1869); Flint, etc. Ry. *v.* Dewey, 14 Mich. 477 (1866), where a director had become interested in the construction work after the contract had been given. To same effect, see Thomas *v.* Brownville, etc. R. R., 109 U. S. 522 (1883),

with the corporation secretly gives to the contracting agent of the latter a subcontract for the construction work, the corporation may

rev'g 2 Fed. Rep. 877, where, however, it is held that bonds issued to a construction company in which a director is interested cannot be altogether repudiated, but are valid to the extent of the actual value of work done. See also Ryan *v.* Leavenworth, etc. Ry., 21 Kan. 365 (1879), holding also that a stockholder in a corporation which is a stockholder in the defrauded corporation may sue to remedy the wrong to the latter; European, etc. Ry. *v.* Poor, 59 Me. 277 (1871). See also Risley *v.* Indianapolis, etc. R. R., 62 N. Y. 240, 248 (1875); Whitman *v.* Bowden, 27 S. C. 53 (1887), where a building committee of a joint-stock company secretly contracted with themselves. Where the president, in order to get control of the corporation, causes a meeting of the board of directors to vote stock in payment for services and property whose value is much less than the par value of the stock, the stock being voted to outside parties, but thereafter secretly transferred to the president, a stockholder may compel him to return the stock to the corporation for cancellation. Perry *v.* Tuskaloosa, etc. Co., 93 Ala. 364 (1891). In Lewis *v.* Meier, 14 Fed. Rep. 311 (1882), the remarkable decision is made that the corporation cannot have such a contract set aside, since the corporation is responsible for the frauds of its directors, and hence both parties are *in pari delicto*. Where one of the common council and of the committee granting a street-railway franchise to individuals who convey the same to a corporation becomes a stockholder in that corporation as soon as it is formed, the franchise is void as having been fraudulently obtained. Finch *v.* Riverside, etc. Ry., 87 Cal. 597 (1891). Where three out of a board of five public officers give a contract for the supply of water to the town, and one of the three is interested in the contract, the contract is illegal. Santa Ana Water Co. *v.* San Buenaventura, 65 Fed. Rep. 324 (1895). Under the Kentucky statutes a contract between a city and a printing company, in which company a member of the common council is a stockholder, is illegal. Nunemacher *v.* Louisville, 98 Ky. 334 (1895). Where two competing street-railway companies apply for the right to lay tracks, and the board of public works grants the right to a company in which one of the members of the board is a stockholder, the other company may have the grant set aside. Traction Co. *v.* Board of Public Works, 56 N. J. L. 431 (1894). Where one corporation buys a street railroad from another, a stockholder in the former cannot question the validity of bonds issued by the latter and expressly assumed by the former, nor can he raise the question of fraud in constructing the road. Smith *v.* Ferries, etc. Ry., 51 Pac. Rep. 710 (Cal. 1897). The president of a gas company cannot let to a partnership of which he is a member a contract to erect a gas plant for the corporation. If the contract is abandoned and a suit brought on a *quantum meruit*, the value of the labor and materials used must be clearly proved. Sims *v.* Petaluma, etc. Co., 131 Cal. 656 (1901). Where an agent to sell is able to sell for more than he accounts for to his principal, the latter cannot recover the difference unless the sale was actually made. Edison *v.* Gilliland, 42 Fed. Rep. 205 (1890). Where the rolling-stock is purchased by the directors in the name of a trustee of a car trust, he being merely a figure-head, payments being made from the funds provided for the building of the road under the construction contract, the

attack the whole contract and recover back the profits realized therefrom.[1] A contract is not valid and enforceable against the corpora-

court held that there was such a mingling of the funds and of the interests of the directors as directors with their interests as purchasers of the rolling-stock that the title to the rolling-stock passed to the company, and the car trust was invalid. The court said: "Any arrangement by which the road is equipped with rolling-stock belonging to another corporation should be distinct, unequivocal, and above suspicion." McGourkey *v.* Toledo, etc. Ry., 146 U. S. 536, 567 (1892). Even though directors are interested in the construction company which takes the bonds, and the property is foreclosed and is bought in by the directors, yet the railroad company cannot set aside the transaction unless it offers to pay to the directors what they have expended or offers to take the property subject to such mortgage bonds. San Antonio, etc. Ry. *v.* San Antonio, etc. R. R., 25 Tex. Civ. App. 167 (1900).

A director who owns the assets of a business which is cognate to the business of his corporation may sell the same to his corporation at an advanced price, and he need not disclose what he paid for it, and a stockholder cannot compel the director to pay to the corporation the profit he has made. The sale may be rescinded, but the court has no power to force the director to sell at a lower price. Burland, etc. *v.* Earle, etc., [1902] A. C. 83.

1 "According to my view of the law of this court, I take it to be clear that any surreptitious dealing between one principal and the agent of the other principal is a fraud on such other principal cognizable in this court." Panama, etc. Tel. Co. *v.* India Rubber, etc. Tel. Works Co., L. R. 10 Ch. App. 515 (1875). In this case the secret subcontractor was the agent and engineer of the corporation. He received a commission for his work, and the work was to be accepted subject to his approval. Where a national bank and two of the directors of a corporation are secretly interested in the profit made by selling property to such corporation for stock, the corporation may hold them liable for such profit. The defense of *ultra vires* on the part of the bank is not good. Zinc, etc. Co. *v.* First, etc. Bank, 103 Wis. 125 (1899). The case of Currier *v.* New York, etc. R. R., 35 Hun, 355 (1885), goes still further, and holds that a stockholder may compel the contractors to disgorge when they obtain the contract with the corporation through their associates or hirelings being made directors. An agreement of an attorney to share his fees with a director who votes and aids him in getting the company's business is void. The courts will not compel the attorney to carry out the agreement. All parties are left as they are found. Attaway *v.* Third Nat. Bank, 93 Mo. 485 (1887). See also Lindley, Company Law, pp. 328, 368. Where the managing director of the Union Pacific Railroad caused a contract for its construction to be given to a person who acted as his agent, and the director then formed the Credit Mobilier company, a Pennsylvania corporation, and had the construction contract assigned to it, and all the stockholders of the railroad were invited to become stockholders in the latter company, and all the facts herein were more or less known to all parties, a court of equity refused to enjoin the Credit Mobilier from collecting the contract price of the construction work. Union Pac. R. R. *v.* Credit Mobilier, 135 Mass. 367 (1883). Although an assistant engineer of the company is secretly interested with the contractor in the profits of the construction, yet where

tion where the parties contracting with the corporation have given to the directors of the corporation a secret interest in the profits of the contract.[1] In England it has been decided that even though it is legal under the statutes to provide that no calls shall be made on certain shares, except upon a winding up, yet where the directors are the subscribers for such shares and do not fully inform other subscribers of the situation, they may be compelled at the instance of a stockholder to pay at the same time that the others pay, even though there was no actual fraud, the parties having acted in good faith.[2]

In Massachusetts, however, the supreme court, with characteristic independence and recognition of actual conditions, has said in regard to a contract between a corporation and one of its directors: "It was not illegal or void because made with a director,—the only person likely to be willing to make it. In this country it very generally has been deemed impracticable to adopt a rule which absolutely prohibits such contracts." [3]

the former had nothing to do with the letting the contracts or accepting the work, and merely testified in an arbitration in the settlement, but did not testify falsely, the parties need not give up their profits. Union R. R. *v.* Dull, 124 U. S. 173 (1888). In Fox *v.* Hale, etc. Co., 108 Cal. 369 (1895), the president was held liable for fraud in reducing ores belonging to the company.

1 Quoted and approved in Rutland, etc. Co. *v.* Bates, 68 Vt. 579 (1896); Wardell *v.* Railroad Co., 103 U. S. 651 (1880). A contract by which a person agrees to construct a railroad is not enforceable if by a simultaneous contract he agrees to divide his profits with five of the seven directors. Stanton *v.* Sturgis, 140 Fed. Rep. 789 (1905). A person who brings about a contract whereby the president obtains a secret profit in a corporate contract cannot recover for his services. Van Valkenburgh *v.* Thomasville, etc. R. R., 4 N. Y. Supp. 782 (1889). Where the directors appropriate the money of the corporation to themselves, a minority stockholder may bring them to account. Sage *v.* Culver, 71 Hun, 42 (1893); aff'd, 147 N. Y. 241. Where the directors are secretly interested in the construction contract and are to have a portion of the profits, bonds issued under the contract are void except in *bona fide* hands. Vanderveer *v.* Asbury Park, etc. Ry., 82 Fed. Rep. 355 (1897). See also § 650, *infra.*

2 Alexander *v.* Automatic, etc. Co., [1900] 2 Ch. 56, rev'g [1899] 2 Ch. 302.

3 The court held that a director may be employed by a corporation to settle claims against it, he to receive five per cent. of the face value of the company's bonds used in settlement, and also to receive whatever discount he could get from the claims, where he did not vote on the question of his employment, and a jury has found that the contract was made in good faith and was not improvident, it being shown that the company was pressed and had no other way of raising money, and that the director advanced his own money. A receiver cannot recover back the amount so paid the director. Ft. Payne, etc. Mill *v.* Hill, 174 Mass. 224 (1899). Notwithstanding a resolution for the issue of stock in payment for a patent does not recite that the patentee is to have a salary, yet that fact may

In New Jersey the highest court has just decided that a director may contract with the corporation, *if the contract is a fair one,* and if it is made without concealment, and if it is approved by a majority of the stockholders in meeting assembled.[1] Such also seems to be the rule in New York.[2] On the other hand it has very properly been decided in California that if the contract is an unfair one, no amount of publicity or ratification by a majority of the stockholders can legalize it.[3] Thus unreasonable salaries voted by a majority

be shown by parol evidence, and the fact that the corporation re-assigned the patent as security for such salary is not necessarily proof of fraud, even though the patentee is president of the corporation. Gay *v.* Fair, 175 Mass. 521 (1900). A purchaser of bonds from a director cannot defeat the sale on the ground that the director was by statute disqualified, he being interested in the construction work for which bonds were issued. Crittenden *v.* Cobb, 156 Fed. Rep. 535 (1907).

1 Even though the directors are to receive a commission on bonds which they sell for the corporation, yet if the stockholders are notified of the same and ratify the transaction in meeting assembled, the minority stockholders cannot complain, the transaction itself being a fair one. The directors may vote their own stock at such meeting and the ratification is legal, even though their stock was necessary in order to carry the resolutions. The court said: "Like other stockholders, they had a right to be influenced by what they conceived to be for their own interest, and they cannot lawfully be denied the right, nor can it be limited or circumscribed by the fact that they occupied the position of directors in the company." The court further said: "In Leavenworth *v.* Chicago Railway Co., 134 U. S. 688, it was held that the action of the stockholders validated the contract where nine out of thirteen directors were personally interested. In the case of Nye *v.* Storer, 168 Mass. 53, and Bjorngaard *v.* Goodhue County Bank, 49 Minn. 483, a like infirmity in contracts was held to be eliminated by the vote of a majority of stockholders." Hodge *v.* United States Steel Corp., 64 N. J. Eq. 807 (1903).

2 Even though a lessor railroad and a lessee railroad have directors in common and they compromise as to which company shall have the benefit of a saving in interest by the refunding of the bonds of the lessor, yet if a majority of the stockholders of the lessor ratify the agreement, the minority cannot complain, unless it is shown that the ratification was obtained by fraud or concealment. Continental Ins. Co. *v.* New York, etc. R. R., 187 N. Y. 225 (1907). Inasmuch as in New York an agreement of a contractor to divide with the officers of the company profits made in the construction of the railroad is legal, unless avoided by the corporation, and is not subject to collateral attack, such a contract will be sustained in Pennsylvania if the contract was made in New York and pertained to a New York corporation, even though such corporation was thereafter consolidated with a Pennsylvania corporation. Rumsey *v.* New York, etc. R. R., 203 Pa. 579 (1902). A director may sue on a contract between himself and the company. Vonnoh *v.* Sixty-seventh, etc., 55 N. Y. Misc. Rep. 222 (1907).

3 Where a majority of the directors of an irrigation company are members of an association which desires to obtain water from such corporation, a contract to that effect

of the directors to themselves as officers are not legal, even though the officers own a majority of the stock, and even though the prosperity of the corporation and the value of its stock have increased.[1] A majority of the stockholders in interest cannot ratify the officers unlawfully taking for their own use its moneys in excess of their salaries or the value of their services.[2] Where directors are interested in a contract with a corporation a minority stockholder may insist on the contract being a reasonable one, even though a majority of the stockholders have approved it, it appearing that those particular directors constituted a majority of the board and also owned a majority of the stock.[3] The proper rule is that such a transaction should be approved by a majority in interest of the stockholders, at a meeting called for that purpose, and that even then a court of equity has power to set the transaction aside, at the instance of a dissenting stockholder, if it is unfair, and if he is prompt in his application to the court. In a stockholder's suit to cancel an alleged agreement by which the corporation is to pay to a director royalties on a void and worthless patent, the allegation that such director and his sons constitute a majority of the board and that the sons are without means and are supported by their father, is material and not impertinent.[4] A director who controls a corporation and its board and causes it to purchase worthless bonds from other corporations in which he is interested, whereby he makes a large profit, may be compelled to pay over the profit.[5] This seems to leave it with the court to decide whether the contract is a fair one or not, with power to set the contract aside, if it is manifestly unfair.[6]

which is solely for the benefit of the association is illegal and may be repudiated by the corporation, even though such contract was openly made, and even though the directors were guilty of laches in not causing the contract to be set aside, and in the meantime the association has spent its money in installing its plant. Goodell *v.* Verdugo, etc. Co., 138 Cal. 308 (1903), the court saying, "the publicity alone of an illegal and unauthorized act of the directors of the corporation does not make it legal or valid."

1 Jacobson *v.* Brooklyn, etc. Co., 184 N. Y. 152 (1906).

2 Von Arnim *v.* American Tubeworks, 188 Mass. 515 (1905).

3 Booth *v.* Land, etc. Co., 68 N. J. Eq. 536 (1905).

4 Burden *v.* Burden, 124 Fed. Rep. 250 (1903).

5 Pepper *v.* Addicks, 153 Fed. Rep. 383 (1907). A director who is instrumental in causing the company to loan money where he was personally interested and acted in bad faith in overvaluing the security, may be held personally liable for the loss. Exploring, etc. Co. Ltd. *v.* Kolckmann, 94 L. T. Rep. 234 (1905).

6 A contract between an officer and a corporation, if fair and made in good faith and without undue and unjust benefit or advantage to the officer, and of advantage to both parties, will be enforced by the courts.

Moreover, this principle of law is a shield and not a sword. The guilty party cannot avail himself of it.[1] Hence, even though all the directors of a corporation organize another company to buy out the first-named company, and they are directors in the second company also, yet, if all the facts are fully stated, the sale is legal and the new company cannot repudiate the sale on that ground.[2] Where the president by secret agreement is to participate in a construction contract, he cannot enforce such contract, and hence bonds issued to the contractor are not affected by the Ohio statute prohibiting the sale, directly or indirectly, of bonds to an officer at less than par.[3] Even though the president has authority to make contracts, yet he cannot

If otherwise, such a contract is voidable at the option of the corporation or its creditors or stockholders. Wyman *v.* Bowman, 127 Fed. Rep. 257 (1904). In the case People *v.* Republic, etc. Ass'n, 97 N. Y. App. Div. 31 (1904), it was held that where a contract in which a majority of the directors were personally interested is attacked on the ground of being merely voidable, it is good up to the time of disaffirmance. The court seems to have the same power that it has as to contracts between two corporations having directors in common. See § 658, *infra.*

1 Where a railroad construction contract is assigned to trustees, to be carried out and the profits to be paid to the stockholders of a designated corporation, the stockholders may compel the trustees to pay over such profits. The trustees cannot set up that they were also directors of the railroad. Hazard *v.* Dillon, 34 Fed. Rep. 485 (1888). A person sued on a contract by a corporation cannot claim that the contract is unenforceable because another of the parties thereto was a director of the corporation. Stewart *v.* Lehigh Valley R. R., 38 N. J. L. 505 (1875). Where a corporation has assumed a personal contract between the president and one of the directors, if the president has accepted the corporation as liable on the contract, he cannot thereafter hold the director liable on such contract. Munson *v.* Magee, 161 N. Y. 182 (1900). A lessor to the corporation who is also its manager and director cannot repudiate the lease on the ground that the company was organized for an unlawful business. Consolidated, etc. Co. *v.* Wild, 94 Pac. Rep. 285 (Colo. 1908).

2 Even if the promoters stated that a certain part of the plant was in full operation, yet if there was no fraud, and that part of the plant was put in operation soon afterwards, the court, instead of setting aside the sale may give damages for the delay. Misrepresentations, although not fraudulent, are sufficient ground for relief. The fact that the directors are not independent, but represent the vendor, is immaterial, if that fact is made known to the parties. Lagunas, etc. Co. Ltd. *v.* Lagunas Syndicate Ltd., [1899] 2 Ch. 392.

3 Continental Trust Co. *v.* Toledo, etc. R. R., 86 Fed. Rep. 929 (1898). Although the president is secretly to participate in the construction contract, yet if the company does not rescind the contract on this ground, and the corrupt relation is terminated before the completion of the contract, bonds issued under the contract are valid. Continental Trust Co. *v.* Toledo, etc. R. R., 86 Fed. Rep. 929 (1898); aff'd in Toledo, etc. R. R. *v.* Continental T. Co., 95 Fed. Rep. 497 (1899).

cancel a contract which he is personally interested in having canceled.[1] Where a director of a construction company compels an iron concern to agree to give a bonus to the construction company under threat that otherwise the railroad would be run on another route, the contract cannot be enforced.[2] Where one corporation owns stock in another corporation, and a committee of the board of directors of the former, in selling such stock, provide for the purchaser purchasing also similar stock owned by the directors and their friends, but not providing for similar stock owned by other stockholders, the contract is illegal.[3] However, there are many cases in which the above rules do not apply. Thus, where the director was a surety for the contractor, and the latter failed, the former, who finished the construction work under compulsion by the company, may set up its acquiescence as a bar to its suit to recover from him the profits of the transaction.[4] Again, where a director purchased an interest in the construction contract after it had been entered into, but sold that interest before any work was done thereunder, the illegality of his connection with the construction company cannot affect the legality of his sale of that interest.[5] Even though a director prevents a removal of the company's business to another location on advantageous terms, his reason being that he did not get a secret bonus, yet he is not personally liable for damages for so doing, it appearing that the information which he gave to the parties who were about to deal with the corporation was correct.[6] Where the business of a lumber railroad has been exhausted, it is legal for the majority of the directors to vote to extend the road, even though the extension is to enable them to market their own timber.[7] Upon the consolidation of two companies, it is legal for one of the companies to pay the president and vice-president of the other company a sum of money in consideration of their agreeing not to engage individually in the same business during the period of ten years within a defined territory. A stockholder in the company in which such persons were officers cannot compel the officers to account for the money if the consolidation itself was acquiesced in and the transaction was honest in fact.[8]

1 Wallace *v.* Oceanic, etc. Co., 25 Wash. 143 (1901). An officer of a bank cannot legally compromise a claim in which he is interested on the other side. Leonhardt *v.* Citizens' Bank of Ulysses, 56 Neb. 38 (1898).

2 Woodstock Iron Co. *v.* Richmond, etc. Co., 129 U. S. 643 (1889).

3 Kelsey *v.* New England, etc. Ry., 62 N. J. Eq. 742 (1901).

4 Kelley *v.* Newburyport, etc. R. R., 141 Mass. 496 (1886).

5 Barnes *v.* Brown, 80 N. Y. 527 (1880).

6 Hale *v.* Mason, 160 N. Y. 561 (1899).

7 Bucksport, etc. R. R. *v.* Edinburgh, etc. Co., 68 Fed. Rep. 972 (1895).

8 Bristol *v.* Scranton, 57 Fed. Rep.

But a settlement between a corporation and its creditors, made by a board of directors of whom a majority are interested in the matter adversely to the corporation, is voidable as against the corporation and non-assenting stockholders, even though the settlement may have been for the best interests of the corporation at the time.[1] In England it is customary to insert in the by-laws a provision that if a director is interested in a corporate contract without declaring his interest, his office is thereby vacated.[2] A person dealing with a director, and taking from him notes or securities which the corporation has issued, must investigate as to the legality of the issue of such securities.[3]

A contract between a director and the corporation is voidable, and not void. Accordingly, if none of the stockholders object to such a contract it is legal.[4] A corporation may maintain a suit to

70 (1893); aff'd, 63 Fed. Rep. 218 (1894).

1 Higgins *v.* Lansingh, 154 Ill. 301 (1895). A deed of all the corporate property authorized at a meeting of the board of directors of which no notice was given and only four out of seven were present, and three of the four were interested in the company which purchased the property, is invalid, and may be set aside by a judgment creditor of the selling corporation. Summers *v.* Glenwood, etc. Co., 15 S. D. 20 (1901).

2 See Turnbull *v.* West Riding, etc. Co., 70 L. T. Rep. 92 (1894). Where the by-laws provide that "the office of director is vacated if a director be concerned in any contract," a director ceases *ipso facto* to be a director upon his being secretly interested in the profits of a contract with the corporation, but if he is re-elected at the next election he then again becomes a director, and hence the company cannot recover back the salary paid to him except for a period from the date of the contract to the next election. *Re* Bodega Co. Ltd., [1904] 1 Ch. 276.

3 See § 293, *supra*, and § 727, *infra*.

4 If all parties assent to a guaranty by the company of bonds and stock in another company owned by directors of the first company, such guaranty, being in consideration of a lease, will not be set aside. Barr *v.* New York, etc. R. R., 125 N. Y. 263 (1891). Creditors cannot object to a contract between the corporation and a director where the stockholders have assented thereto and the contract is a fair one. Welch *v.* Importers', etc. Bank, 122 N. Y. 177 (1890). A director of a corporation in which a director is interested may purchase corporate property from trustees to whom an embarrassed corporation has conveyed the same to pay its debts, and return the remainder to such latter corporation, and especially is a stockholder estopped from complaining after four years delay, with knowledge of the facts, large improvements having been made and the value of the property having greatly increased. Kessler & Co. *v.* Ensley Co., 141 Fed. Rep. 130 (1905); aff'd, 148 Fed. Rep. 1019. Where neither the corporation nor any stockholder objects, it is legal for the directors to have an interest in the profits of a contract for the construction of the road, and they may compel the contractor to pay over to them their part of the profits. The contract was voidable, not void. Robison *v.* McCracken, 52 Fed. Rep. 726 (1892); aff'd, 57 Fed. Rep. 375, *sub nom.* McCracken *v.* Robison.

cancel stock which the directors and president voted to themselves as commissions for selling the stock of the company.[1] Where the directors own all the stock of a corporation, the usual rules pre-

Bonds issued at their full par value to the president in payment for work done by him under a contract between himself and his company are valid and enforceable where all the stockholders assented to such contract. Arkansas, etc. Co. *v.* Farmers', etc. Co., 13 Colo. 587 (1889). Where all the stockholders unite in the issue of watered stock to the president for his own use, and assent to a contract between him and the company, the corporation itself cannot subsequently complain. Arkansas, etc. Co. *v.* Farmers', etc. Co., 13 Colo. 587 (1889). The letting of a construction contract to one who owns ninety-nine one-hundreths of the stock, in payment for such stock, is legal, although he as president issues it to himself, where a *bona fide* board of directors ordered it in the usual discharge of their duties. The fact that the contractor received stock and bonds four times in par value the value of the work is not fatal where no fraud is alleged and the actual cost of the work is not alleged. But where the contractor then entered into a contract whereby the mortgage was to be foreclosed, and he was to participate at the sale, all for the purpose of cutting off other creditors, he is liable to them. Cleveland, etc. Co. *v.* Crawford, 9 Ry. & Corp. L. J. 171 (Chicago 1891). In McGourkey *v.* Toledo, etc. Ry., 146 U. S. 536 (1892), the court, speaking of a contract in which the directors were interested, said: "Did the vice of these contracts lie in an attempted concealment of the actual facts, as is frequently the case where preferences are secretly reserved in assignments, there would be much force in this suggestion; but if it inheres in the very nature of the contract,—if there be a thread of covin running through the web and woof of the entire transaction,—in other words, if the purpose be unlawful, it is not perceived that an open avowal of such purpose make it the less unlawful. We do not wish to be understood as saying that the transaction in question necessarily involved actual fraud on the part of those participating in it." A contract between the president and a third party from whom the company buys lumber, that such third party shall pay him a commission, is not illegal *per se*. The president may collect such commissions unless it is shown that the agreement was concealed from the corporation, or that the president was exercising some discretion or trust. Jameson *v.* Coldwell, 23 Oreg. 144 (1892). But see S. C. 25 Oreg. 199. Bondholders cannot sustain a bill in equity to remove a trustee who holds the stock of various gas companies as collateral security for the payment of their bonds, even though such trustee has voted such stock in favor of directors who have made improvident contracts in which such directors were personally interested, it appearing that by the terms of the trust agreement the trustee was to vote such stock as the pledgors directed, until default on the bonds, and it not being shown that the trustees knew that such default had been made. Moreover, such removal will be denied when the trust agreement itself provides for the removal of the trustee by vote in writing of one-third in interest of the bondholders at a meeting called for that purpose, and no reason is shown for disregarding this mode of changing the trustee. Dillaway *v.* Boston, etc. Co., 174 Mass. 80 (1899). See also ch. XLIV, *infra*.

1 Central, etc. Co. *v.* Madden, 68 Atl. Rep. 777 (N. J. 1908).

venting a director from contracting with the corporation do not apply.[1] A contract between a corporation and all its stockholders cannot be attacked by the corporation or its receiver, and can be attacked only by creditors who have been actually defrauded thereby.[2] Where with the consent of all the directors and stockholders, one of the directors is interested in a contract with the corporation, but upon the corporation becoming insolvent and being dissolved the court cancels the contract at the instance of creditors, such contractor is entitled to pay for services already rendered, and to reimbursement for actual and necessary outlays in connection with the contract.[3] In some of the states there is a statute prohibiting a director from voting on a contract in which he has a personal interest.[4] A stockholder may be interested in the construction company, and bonds may be issued to him, even though he owns a majority of the stock and thereby has control.[5] A stockholder who is also secretary of the board, but not a member of the board, may contract with the company.[6] Where the manager, in order to continue a profitable contract which he has with the corporation, keeps up a deadlock in the board of directors, due to there being a vacancy, he is bound to prefer the interests of the company, or else to terminate his employment and rely on his contract.[7] An agreement by which the engineer of a corporation shares in the profits of a person contracting with the corporation cannot be enforced unless the corporation knew and approved thereof.[8] Where only a money judgment is sought by a minority stockholder against directors for incurring debts and allowing the corporate property to be sold on execution the directors being personally interested in the contracts under which the work was done, a court of equity has no jurisdiction, there not being involved any discovery or accounting or setting aside of the sale or judgment. The mere fact that the contract made by the directors was voidable, is no ground for the court of equity interfering in the

1 McCracken *v.* Robison, 57 Fed. Rep. 375 (1893). On the organization of a company the directors may issue stock to themselves for property where they are the sole stockholders. The presumption is that the stock was issued for full value. Turner *v.* Fidelity, etc., 2 Cal. App. 122 (1905).

2 Great Western, etc. Co. *v.* Harris, 128 Fed. Rep. 321 (1903); aff'd, 198 U. S. 561.

3 Griffith *v.* Blackwater, etc. Co., 55 W. Va. 604 (1904).

4 The Virginia statute that a director shall not vote on a contract in which he is personally interested was applied in Triplett *v.* Fauver, 103 Va. 123 (1904).

5 Porter *v.* Pittsburg, etc. Co., 120 U. S. 649, 670 (1887). *Cf.* § 662, *infra.*

6 Hitt *v.* Sterling, etc. Co., 111 Iowa, 458 (1900).

7 Kane *v.* Schuylkill, etc. Co., 199 Pa. St. 198 (1901).

8 Smythe's Estate *v.* Evans, 209 Ill. 376 (1904).

absence of conspiracy or fraud.[1] In England there is a statute, under which the court has power, on the application of creditors, to direct the official receiver to prosecute criminally a director for alleged offenses as director, such prosecution to be carried on at the expense of the assets of the company.[2]

§ 650. *Secret gifts to directors from persons contracting with the corporation.*—It is a well-established principle of law that a director commits a breach of trust in accepting a secret gift or secret pay from a person who is contracting or has contracted with the corporation, and that the corporation may compel the director to turn over to it all the money or property so received by him.[3] Thus, an agreement of a third person to pay a certain sum to a director if a certain location of a railroad is adopted, or an agreement to allow him to participate in the profits derived from such location, is not an enforceable contract.[4] So also where a director receives a commission from one who obtains a loan from the corporation through the director's influence, the latter may be compelled to pay over the commission to the corporation.[5] A treasurer who receives a secret commission from a party selling to a corporation must turn the same over to the corporation.[6]

1 Godfrey *v.* McConnell, 151 Fed. Rep. 783 (1906).

2 *Re* London, etc. Corp. Ltd., [1903] 1 Ch. 728.

3 Quoted and approved in McClure *v.* Trask, 161 N. Y. 82 (1899).

4 Wardell *v.* Railroad Co., 103 U. S. 651 (1880); Bestor *v.* Wathen, 60 Ill. 138 (1871); Linder *v.* Carpenter, 62 Ill. 309 (1872); Fuller *v.* Dame, 35 Mass. 475 (1836), holding that a promissory note given therefor is void. See also § 649, *supra*, and Union Pac R. R. *v.* Durant, 3 Dill. 343 (1874); s. c., 24 Fed. Cas. 628, holding that where the president uses his power oppressively and by threats to compel citizens to convey lands to him for the company, the court will decree a reconveyance to the grantors, but this decision was reversed in 95 U. S. 576; Holladay *v.* Patterson, 5 Oreg. 177 (1874), where the agreement to pay money to a director and president of a railway if a depot was located in a certain place was held unenforceable. A subscription, however, conditioned upon the location of a depot is valid. See § 83, *supra*. *Cf.* § 681, *infra*. In Cook *v.* Sherman, 20 Fed. Rep. 167 (1882), the court refused to enforce specifically a contract whereby corporate officers agreed to purchase lands, the purpose of all the parties being to influence thereby the location of the railroad. A note for $5,000 given to a general manager to use his influence to have the company remove its mill is illegal. Lum *v.* McEwan, 56 Minn. 278 (1894). An agreement to convey land to a person in consideration of his endeavoring to have a depot located on the land is illegal and not enforceable, where such person already had an agreement with the officers of the railroad by which they were to receive a part of such land. Reed *v.* Johnson, 27 Wash. 42 (1901).

5 Farmers', etc. Bank *v.* Downey, 53 Cal. 466 (1879); Imperial, etc. Assoc. *v.* Coleman, L. R. 6 H. L. 189 (1873).

6 In this case the commission was

A similar rule was applied where a director of an insolvent insurance company accepted a secret gift for reinsuring the company's risks in another insurance company.[1] And, in general, whenever an officer or agent of the corporation accepts a secret gift or participates in the profits of a contract with the corporation, without the assent of the stockholders, the corporation is entitled to the gifts or profits, and a stockholder may bring the suit to compel the officer or agent to pay over.[2]

received by an outside party in the way of stock issued at par, which he immediately and secretly turned over to the treasurer. Rutland, etc. Co. *v.* Bates, 68 Vt. 579 (1896).

1 Bent *v.* Priest, 86 Mo. 475 (1885); Gaskell *v.* Chambers, 26 Beav. 360 (1858), where the director received a secret gift for bringing about a consolidation. *Contra*, if all assented. Southall *v.* British, etc. Assoc., L. R. 6 Ch. App. 614 (1871).

2 "All persons who stand in a fiduciary relation to others must account for all the profits made upon moneys in their hands by reason of such relation. . . . Agents, guardians, directors of corporations, officers of municipal corporations, and all other persons clothed with a fiduciary character, are subject to this rule." Perry on Trusts (3d ed.), § 430. In Chandler *v.* Bacon, 30 Fed. Rep. 538 (1887), the president and secretary were held liable for stock received by them secretly from a patentee to whom all the capital stock had been issued for his patent. Directors receiving stock as a gift from one who sells property to the company for stock will be compelled to give it up to the company. So also will an outside party who aided in the bribe and took some stock himself. Paducah, etc. Co. *v.* Mulholland, 24 S. W. Rep. 624 (Ky. 1894). Where the party selling property to the company for stock gives part of the stock to directors, a person who afterwards becomes president and takes a part of this stock as a gift is liable for it or its value to the company, even though he did not know of the fraud until after he took the stock. Paducah, etc. Co. *v.* Hays, 24 S. W. Rep. 237 (Ky. 1893). In Yale Gas Stove Co. *v.* Wilcox, 64 Conn. 101 (1894), a promoter and director was compelled to restore to the corporation the cash or stock which he had received secretly as a gift from a party who had sold patents to the company. The same case holds that such a contract cannot be enforced by the promoter against the patentee. Where the incorporating act required all the proceeds of sales of lots by a cemetery company to be used for embellishments, and the directors proceed to buy land for a consideration of $500,000 in bonds, of which bonds $480,000 were turned back by the vendor to the directors, who divided them among themselves, the bonds are void in the hands of directors. The directors in this case had erected over the entrance to the cemetery a statue of Immortality, and had done so "with great pomp and solemnity." Campbell *v.* Cypress Hills Cemetery, 41 N. Y. 34 (1869). A suit by a corporation itself to recover secret profits made by a director in purchasing property for the corporation may be maintained in equity. American, etc. Co. *v.* Easton, 129 Fed. Rep. 1004 (1903), rev'g 120 Fed. Rep. 440. Although the officers of a railroad company take in their names lands which are donated to the railroad, yet the railroad cannot compel them to give up the lands, if the railroad company had no power to acquire such lands.

The contract being illegal it cannot be enforced by the guilty officer or agent as against the party with whom it is made.[1]

Case *v.* Kelly, 133 U. S. 21 (1890). Land given to the president in consideration of the company extending its line belongs to the corporation, even though the corporation had no power to acquire such property. Scott *v.* Farmers', etc. Bank, 97 Tex. 31 (1903). In Tyrrell *v.* Bank of London, 10 H. L. Cas. 26 (1862), a solicitor was compelled to repay with interest a secret gift; General Exch. Bank *v.* Horner, L. R. 9 Eq. 480 (1870), where the manager was paid a large sum in order to obtain his aid to a consolidation scheme. Where the company pays to its solicitor a commission for stock which he induces the president to take, he must repay the commission on the winding up. *Re* Stapleford Colliery Co., 49 L. J. (Ch.) 253 (1880). A manager who takes secret gifts from parties with whom he contracts for his company must disgorge the same. He also may be dismissed and his contract salary stopped. Boston, etc. Co. *v.* Ansell, L. R. 39 Ch. D. 339 (1888). Where corporate agents organize local branch companies on a basis prescribed by the parent company, and the agents demand and obtain from the local company more than the parent company prescribed, the excess belongs to the parent company. Sheridan *v.* Sheridan, etc. Co., 38 Hun, 396 (1886). Directors borrowing money from the corporation and giving notes therefor cannot defend against the notes on the ground that a discount thereon was to be allowed to them. Alford *v.* Miller, 32 Conn. 543 (1865). See Western U. Tel. Co. *v.* Union Pac. Ry., 3 Fed. Rep. 721 (1880)); and *quære*, as to the effect of the contract between the complainant and defendant where one of the minor provisions was that the railway officers were to have free telegraph service for themselves and families. Although the purchasing agent of a railroad company buys coal from a coal company in which such agent owns one quarter of the stock, the dividends received by such agent on such stock may be retained by him, although the railroad company was ignorant of the fact that he was such stockholder, there being no proof of fraud and the coal being sold cheaper than the going rate. Clark *v.* American Coal Co., 86 Iowa, 436 (1892). Nine years' delay on the part of a minority stockholder in complaining of the act of the directors in causing the corporation to purchase stock upon which they received a secret profit is fatal to the suit. Cullen *v.* Coal Creek, etc. Co., 42 S. W. Rep. 693 (Tenn. 1897).

1 A person suing for services rendered in procuring a construction contract cannot collect if he was not instrumental in obtaining the contract, or if he gave a secret commission to the agent of the party who was to pay the whole commission, unless the principal ratified the contract with knowledge of such commission to the agent. Smith *v.* Seattle, etc. Ry., 72 Hun, 202 (1893). The officers cannot recover secret commissions on sales to the corporation where the corporation repudiated the purchase by reason of such commissions and then bought from the same parties at a lower figure. Jameson *v.* Coldwell, 25 Oreg. 199 (1894); s. c., 23 Oreg. 144. A secret commission paid to the agent of the other party to the contract invalidates the contract. Findlay *v.* Pertz, 66 Fed. Rep. 427 (1895). "It seems to be illogical to contend that a contract can be avoided as between the officer and the corporation, and yet be held to be valid in favor of the officer against the party with whom he has contracted." Gillig *v.* Barrett, N. Y. L. J.,

The party paying the bribe may also be held liable in damages to the defrauded party.[1] An agreement to turn over the control

Jan. 6, 1891. A general manager of a road cannot enforce a contract by which he was to receive stock in another road for aiding the latter in procuring municipal bonds, his aid being due to his influence as general manager. Sargent *v.* Kansas Mid. R. R., 48 Kan. 672 (1892). A contract whereby a party who is about to sell his business to a corporation to be organized agrees secretly to give $5,000 of stock to a party who agrees to subscribe openly for $5,000 of the stock is not enforceable, it appearing that the party who was thus to get the extra stock objected to the amount of stock to be issued to the vendor, and withdrew his objection only upon this agreement, and it appearing also that he afterwards became a director and voted to purchase the property at the price demanded by the vendor. Koster *v.* Pain, 41 N. Y. App. Div. 443 (1899). Even though the agent of a corporation represents to it that a party owns certain property and will sell it to the corporation for $7,500 in bonds and $30,000 in stock, and the purchase is made on those terms, and the vendor keeps the bonds and gives the stock to such agent, and the agent sells a portion of the stock to a *bona fide* purchaser, yet the latter cannot rescind the sale on the ground of fraud. Foushee *v.* Snyder, 54 S. W. Rep. 730 (Ky. 1900). The agreement of a person who sells property to a corporation that he will divide the profits with the manager does not invalidate the sale where such agreement was made after the sale itself had been made, and was made under threat of the manager to repudiate the contract. Yellow, etc. Co. *v.* Daniel, 109 Fed. Rep. 39 (1901). Cobb *v.* Crittenden, 161 Fed. Rep. 510 (1908).

1 The president and managing agent renders his corporation liable for a bonus of stock in another corporation which he gives secretly and corruptly to the agent of the latter corporation in order to get a contract for the former corporation. Grand Rapids, etc. Co. *v.* Cincinnati, etc. Co., 45 Fed. Rep. 671 (1891), holding the former corporation liable for the par value of the stock, inasmuch as it was the original issue of that stock. Even though a person does not know that a promoter to whom he has given an option on his property is a director in the company which proposes to buy it, yet if he discovers this fact before he closes the transaction he must pay to the company the commission which he agreed to pay to the promoter; and even though the company has recovered from the promoter such part of the commission as the promoter actually received, yet the company may recover the balance from the vendor of the property, although such balance had been waived by the promoter in consideration of what was actually paid to him. It is unnecessary to rescind the contract. Grant *v.* Gold, etc. Syndicate, [1900] 1 Q. B. 233. Where the directors of a corporation sell out its assets in consideration of a person paying the debts, and the latter organizes a new corporation and gives to the old directors stock in the new corporation equal to their stock in the old, but does not give anything to the other stockholders of the old corporation, the directors and the person so purchasing the assets are liable to the old corporation for the value of the stock so given to the directors. A pledgee of the stock of the old corporation may bring suit for that purpose. Smith *v.* Smith, etc. Co., 125 Mich. 234 (1900). Even though a director prevents a removal of the company's business to another location on advantageous terms, his rea-

of a co-operative insurance company is illegal, and money received therefor may be recovered back by a receiver of the company.[1]

There is another large class of cases, particularly in England, wherein persons who desire to form a company for the purpose of purchasing and working certain property, such as patents and mines, cause their friends to accept the position of directors or agents, and then give them money or stock in compensation therefor. This is still a common practice in business, but the courts have uniformly held that a stockholder or the corporation or a receiver on the winding up may compel such directors or agents to pay over to the corporation the money received, or, if stock was received, then to pay to it the value of such stock.[2]

son being that he did not get a secret bonus, yet he is not personally liable for damages for so doing, it appearing that the information which he gave to the parties who were about to deal with the corporation was correct. Hale *v.* Mason, 160 N. Y. 561 (1899).

1 McClure *v.* Law, 161 N. Y. 78 (1899). Money received by a director of a co-operative insurance company for substituting other directors and transferring its business to another company can be recovered back on the ground of fraud, and such director is chargeable with notice of the facts which he knew or might have learned by the exercise of reasonable care. McClure *v.* Wilson, 70 N. Y. App. Div. 149 (1902). Directors who have been held liable for moneys paid to directors of another company to induce the latter to resign and turn over the assets of such company cannot recover back such money from the parties who received it. Gilbert *v.* Finch, 173 N. Y. 455 (1903).

2 *Re* Westmoreland, etc. Co., [1893] 2 Ch. 612. A gift by a promoter to a director of a company whilst there are any questions open between the company and the promoter must be accounted for by the director to the company; and the company is entitled to the highest value of the gift at any time between the wrongful act and the time when it came to their knowledge. Eden *v.* Ridsdales, etc. Co., L. R. 23 Q. B. D. 369 (1889); Pearson's Case, L. R. 5 Ch. D. 336, aff'g L. R. 4 Ch. D. 222 (1876), the court saying: "Whether the purchase was or was not an advantageous one for the company . . . is a question wholly immaterial for us to consider; he cannot, in the fiduciary position he occupied, retain for himself any benefit or advantage that he obtained under such circumstances;" Leeke's Case, L. R. 6 Ch. App. 469 (1871); De Ruvigne's Case, L. R. 5 Ch. D. 306 (1877); Ormerod's Case, 25 W. R. 765 (1877), where the director was elected and the gift received even after the contract was made. The court said: "If it is unlawful that a man may be bought as a director, it must be decided by some one else. I never will decide it;" Weston's Case, L. R. 10 Ch. D. 579 (1879), where the director was held liable for the full price of the stock less what he paid therefor; *Re* Eskern Slate, etc. Co., 37 L. T. 222 (1877), where the articles of association allowed the gift, but were held to be fraudulent; McKay's Case, L. R. 2 Ch. D. 1 (1875), where the secretary of the corporation was compelled to pay over; Hay's Case, L. R. 10 Ch. App. 593 (1875), where the court said: "No agent can in the course of his agency derive any benefit whatever without the sanction or knowledge of his principal;" *Re* Englefield Colliery Co., L. R.

A vendor of property to a corporation may, however, pay the officers of the corporation for services in promoting and organizing

8 Ch. D. 388 (1878); Emma Silver Min. Co. *v.* Lewis, L. R. 4 C. P. D. 396 (1879), where the mining experts of the corporation were compelled to disgorge; *Re* Carriage, etc. Assoc., L. R. 27 Ch. D. 322 (1884); *Re* Drum, etc., Co., 53 L. T. 250 (1885), where the party gave money to the directors. See also Madrid Bank *v.* Pelly, L. R. 7 Eq. 442 (1869), where the directors were held liable for the money received by them, but for no more; Nant-y-Glo, etc. Co. *v.* Grave, L. R. 12 Ch. D. 738 (1878), holding that the corporation may sue herein the same as a liquidator; Mitcalfe's Case, L. R. 13 Ch. D. 169 (1879), where a director was held liable for the market value of stock given to him by the person to whom the stock was issued as full paid in consideration of property. There was no evidence that the director acted unfairly or acted as a promoter. He was held liable, although he had sold part of the stock. The secretary need not give up a profit which he made as one of the promoters. Sale, etc. Gardens, Ltd., 78 L. T. Rep. 368 (1898), rev'g 77 L. T. Rep. 681. Where the directors vote money to a promoter, and he invests it in the company's debentures and divides them among the directors, the latter must refund the money so voted, and cannot offset a debt due to them from the company. *Re* Anglo-French Co-op. Soc., L. R. 21 Ch. D. 492 (1882). Money paid to directors by the person selling to the company, in order to induce them to become directors, cannot be retained. *Re* Brighton Brewery Co., 37 L. J. (Ch.) 278 (1868). Where the company's agent, in negotiating a contract, procures a larger sum for the company than it demands, on a secret agreement that it should pay him the increase, he cannot collect it. *Re* Owens, Ir. Rep. 7 Eq. 235, 424 (1873). Where the owners of property, the promoters, the directors, and the solicitor sold to the company property the title to which was bad, and divided the proceeds, each was made to repay the amount received by him. Phosphate Sewage Co. *v.* Hartmont, L. R. 5 Ch. D. 394 (1877). And see many English cases in Healey, Company Law and Pr., pp. 543, 544. Directors will be compelled, upon the dissolution of the company, to pay to it the par value of stock which has been presented to them by the promoters in order to induce them to act as directors, even though the arrangement was known to all stockholders, it appearing that stock had been offered to the public without mention of these facts, although the public did not subscribe for any of the stock. So far, however, as the contract between the promoter and the company discloses the facts, the directors were protected. *Re* Postage Stamp, etc. Co., [1892] 3 Ch. 566. Where a director is required to hold a certain amount of stock, and he takes that stock with a secret agreement by which the promoter is to purchase the stock from the director at a certain price whenever the director so desires, and after the company becomes insolvent the director sells the stock to the promoter at such price and receives the money, the director may be compelled to turn in the money to the corporation. *Re* North Australian, etc. Co., [1892] 1 Ch. 322. Directors who have been obliged to repay money which they and others received for turning over the assets of the company to another company, they having no interest which could legally be the subject of such sale, cannot recover back from such other persons the amount paid by the latter. There can be no contribution demanded by a joint tort-feasor. Gilbert *v.* Finch, 173 N. Y. 455 (1903).

the company and procuring the purchase of his lands, there being no fraud or concealment in the matter.[1]

Even though a party purchases property and makes a partial payment thereon, yet, where he then proceeds to form a corporation and controls the corporation, and acts as a director in taking over the property at a largely increased price, the corporation may compel him to turn over to it all the profit he has made by the transaction.[2] In any case, unless all persons interested are fully informed of the facts and assent thereto, the promoter, director, or vendor may be brought to account.[3] Thus, a person who agrees with the

1 Dexter *v.* McClellan, 116 Ala. 37 (1897). Where one company buys out another, the former may agree to pay a certain sum to the directors and secretary of the latter "as compensation for loss of office." This agreement is legal if the stockholders of the selling company ratify the same. The notice of a meeting of the stockholders, however, to ratify such an agreement, must specify such payment, in addition to stating that the object of the meeting is to ratify the agreement generally. A circular subsequently sent to the stockholders referring to the payment to the directors and secretary is not sufficient, even though it was sent before the meeting was held. Kaye *v.* Croydon, etc. Co., [1898] 1 Ch. 358. Even though the purchaser of land from a corporation has agreed to pay a director one-half of the net profit such purchaser might make in case the director resold the land, yet if the director did not vote for the sale and a full disclosure was made to the board, and the price received is the full value thereof, and the company was in liquidation, a profit thereafter received by the director does not belong to the corporation. Tenison *v.* Patton, 95 Tex. 284 (1902). A commission paid to a director on the purchase of land by the company does not invalidate a purchase-money mortgage where there was no fraud and the fact was known to the directors. Blood *v.* La Serena, etc. Co., 134 Cal. 361 (1901).

2 The only way he could have avoided this result would have been by making a full disclosure of all the facts, and by furnishing the company with a board of directors capable of forming a competent and impartial judgment as to the wisdom of the purchase and the price to be paid. The company may enjoin him from voting or selling stock. Plaquemines, etc. Co. *v.* Buck, 52 N. J. Eq. 219 (1893).

3 Where the promoters paid to a person who was to act as chairman of the directors, and his firm who underwrote 10,000 shares, a commission of 12,000 shares, the court held that 10,000 of the 12,000 was for the use of his name, and only 2,000 shares for the commission, and hence he was liable, at the instance of an investor in the stock, to pay to the corporation the difference between the amount paid for the stock and its actual value the day after an allotment, the transaction not being fully disclosed in the prospectus. A clause in the prospectus that there "may" be various trade contracts and business arrangements and underwriters' agreements, followed by the usual waiver as to them, does not apply to such a contract, inasmuch as the word "may" was misleading. Cackett *v.* Keswick, 85 L. T. Rep. 14 (1901); aff'd, [1902] 2 Ch. 456. As regards the duties and liabilities of a promoter, pure and simple, see the next section. That a director is disqualified to buy for the

owner of patent-rights to form a corporation to buy them is a promoter, and is liable to give up a secret gift given to him by the patentee, especially where such promoter was a director when the purchase was made by the company.[1] A secretary is not liable as a promoter even though he accepts a gift from the promoter.[2] Where the general manager acts as an intermediary in selling all the stock

corporation from himself, see § 652, *infra*. The cases now under consideration involve a combination of frauds. Thus, where the owner of property agrees with two persons that if they form a company to purchase the property he will secretly pay them a certain amount, and they form a company and act as a minority of the directors, and it purchases the property even at a fair valuation, the court, upon a corporate insolvency, will refuse to allow the two persons their salaries and will declare their agreement to be a fraud. *Re* Hereford, etc. Co., L. R. 2 Ch. D. 621 (1876). Where the directors, who were also promoters, had purchased property before the company was formed, and then sold to the company at an advance, and induced the public to subscribe by representations that the price paid was the original price paid by them to the original vendors, they must pay the secret profit to the company. Simons *v.* Vulcan, etc. Co., 61 Pa. St. 202 (1869). Where the directors had purchased property before the company was formed, and then as directors bought it for the company at an advance, the title passing direct from the first vendor to the company, and the directors' interest being concealed, the court held the directors liable to the company for their profit, the suit being brought by stockholders. Hichens *v.* Congreve, 1 Russ. & M. 150 (1829); s. c., 4 Russ. 562. Under similar facts and to same effect, Benson *v.* Heathorn, 1 Y. & C. 326 (1842). A stockholder cannot rescind a subscription for fraud where a person purchased a patent outright on condition that he could resell it, and then proceeded to promote and organize a company and to sell to it the patent at an advanced price, even though he was a director, it being clearly known to all that he owned and sold the patent as his own. Gover's Case, L. R. 1 Ch. D. 182 (1875). Where parties purchase property and agree absolutely to pay therefor themselves, and not by the issue of the stock of a corporation to be formed, or by the money of that corporation, the fact that they intend to and do then form a company to buy the property from themselves at an advance does not render them liable to the company for the profit. If they had formed the company partially or completely before they purchased, the case might be different. The court referred to the word "promoters," but only to refuse to use it on account of its indefiniteness. One of the parties purchasing the mine and afterwards selling to the company was a director in the latter at the time of purchase. The right to rescind was barred by the fact that the company had lost the property, a leasehold, by non-payment of rent. Ladywell Min. Co. *v.* Brookes, L. R. 35 Ch. D. 400 (1887). It is to be borne in mind in all transactions of this kind that the objections mentioned above may be obviated by the unanimous consent of the stockholders or by their acquiescence or participation with knowledge, all of which is considered in § 662 and ch. XLIV, *infra*.

1 Yale Gas Stove Co. *v.* Wilcox, 64 Conn. 101 (1894).

2 *Re* Sale, etc. Co., 78 L. T. Rep. 368 (1898).

of the company and he makes a secret profit, the stockholders may compel him to pay it over.[1]

Even though three persons, who own all the stock of a corporation, enter into a contract to sell it, and one of them secretly receives a higher price for his holdings of the stock, yet the other vendor cannot by an action in *assumpsit* claim a part of such extra price. His remedy, if he has any, is in equity for an accounting, or an action for deceit.[2]

§ 651. ***Promoters' frauds on the corporation.***—A promoter is a person who brings about the incorporation and organization of a corporation. He brings together the persons who become interested in the enterprise, aids in procuring subscriptions, and sets in motion the machinery which leads to the formation of the corporation itself.[3] The supreme court of the United States says: "The

1 Barbar *v.* Martin, 67 Neb. 445 (1903). See also §§ 320, 321, *supra*, and § 662, *infra*.

2 Cummings *v.* Synnott, 120 Fed. Rep. 84 (1903). See also §§ 320, 321, *supra*.

3 Quoted and approved in Burbank *v.* Dennis, 101 Cal. 90 (1894), Dickerman *v.* Northern T. Co., 176 U. S. 181, 203 (1900), South, etc. Co. *v.* Crommer, 101 S. W. Rep. 22, 26 (Mo. 1907). See *v.* Heppenheimer, 69 N. J. Eq. 36, 71 (1905) and Cox *v.* National, etc. Co., 61 W. Va. 291 (1907). The Telegraph *v.* Loetscher, 127 Iowa, 383 (1904). An interesting description of the "promoter" is given by Judge Lurton, in McMullen *v.* Ritchie, 64 Fed. Rep. 253, 260 (1894), as follows: "He was a man of great ability, enormous energy, and a towering ambition for great enterprises. As a promoter or 'boomer' he seems to be unrivaled; a man of large general information and robust constitution, extraordinarily sanguine, desperately pugnacious, generous as a prince, and possessing no degree of caution whatever. His ambition was to make millions." Great difficulty is experienced in determining who is and who is not a promoter. An old English statute defined a promoter as "every person acting, by whatever name, in the forming and establishing of a company at any period prior to the company" being fully incorporated (7 & 8 Vict., c. 110, § 3). Other definitions are, "one who undertakes to form a company with reference to a given project and to set it going, and who takes the necessary steps to accomplish that purpose." Twycross *v.* Grant, L. R. 2 C. P. D. 469, 541 (1877); Bagnall *v.* Carlton, L. R. 6 Ch. D. 371, 381, 382, 407 (1877). See also New Sombrero Co. *v.* Erlanger, L. R. 5 Ch. D. 73, 118 (1877); Erlanger *v.* New Sombrero Co., L. R. 3 App. Cas. 1218, 1268 (1878); Whaley Bridge, etc. Co. *v.* Green, L. R. 5 Q. B. D. 109 (1879); Emma Silver Min. Co. *v.* Lewis, L. R. 4 C. P. D. 396, 407 (1879), where Lindley, J., said: "The term 'promoter' involves the idea of exertion for the purpose of getting up and starting a company (of what is called 'floating' it), and also the idea of some duty towards the company imposed by or arising from the position which the so-called promoter assumes towards it." See also *Re* Great Wheal Polgooth, 32 W. R. 107 (1883), holding that the solicitor was not a promoter; *Re* Great Western, etc. Co., L. R. 31 Ch. D. 496 (1886), practically overruling *Ex parte* Valpy, L. R. 7 Ch. App. 289 (1872). But see Tyrrell *v.*

promoter is the agent of the corporation and subject to the disabilities of an ordinary agent. His acts are scrutinized carefully, and he is precluded from taking a secret advantage of the other stockholders."[1] A person who procures subscriptions and aids in organizing the company and frames the papers and manages the procuring of options and the vesting of title is a promoter, even though he is also a subscriber.[2] A trust company may be liable in connection with the issue of stock, where it issues receipts for the same and it turns out that by reason of liens on the stock the stock itself is worthless.[3]

It is legal for persons to contract to form a corporation and to provide for its future management and control.[4] But it is not legal for promoters to cause the board of directors to vote stock to such promoters for services already performed.[5] A lower court in New Jersey has held that it is the duty of promoters to furnish the cor-

Bank of London, 10 H. L. Cas. 26 (1862). An agent of a person selling property to the corporation may also be a promoter of the latter and liable as such. Lydney, etc. Co. *v.* Bird, L. R. 33 Ch. D. 85 (1886), reversing L. R. 31 Ch. D. 328. For other definitions, see Ladywell Min. Co. *v.* Brookes, L. R. 35 Ch. D. 400 (1887); Healey, Company Law and Pr. (3d ed.), p. 35. In Emma Silver Min. Co. *v.* Grant, L. R. 11 Ch. D. 918 (1879), s. c., L. R. 17 Ch. D. 122, a promoter is defined as "a trustee, agent, or person in a fiduciary position as regards the company; one who has undertaken a duty towards the company of such a character as incapacitates him from making a secret profit at the expense of the company." No doubt a very little will make people promoters of a company, if it can be seen that they were really doing something in the way of speculation for their own interest and not acting merely as agents for others. Glasier *v.* Rolls, L. R. 42 Ch. D. 436 (1889). A banker is not a promoter. *Re* Imperial Land Co., L. R. 10 Eq. Cas. 298 (1870). Where a mining company is practically reorganized by selling out to a new and larger company having the same directors, and the stock is sold to the public, if the prospectus discloses all the facts excepting the amount of profit which one of the directors made as a stockholder in the former company, he is not liable to the new company for such profit as a promoter thereof, although it might have been ground for rescinding the contract of purchase. *Re* Lady Forrest, etc., [1901] 1 Ch. 582. A vendor of property which is afterwards transferred by the vendee to a corporation is not a promoter of the corporation. South Missouri, etc. Co. *v.* Crommer, 101 S. W. Rep. 22 (Mo. 1907).

1 Dickerman *v.* Northern T. Co., 176 U. S. 181, 204 (1900), citing § 651, *supra.*

2 Quoted and approved in Richlands Oil Co. *v.* Morriss, 61 S. E. Rep. 762 (Va. 1908). Woodbury, etc. Co. *v.* Loudenslager, 55 N. J. Eq. 78 (1896).

3 McClure *v.* Central Trust Co., 165 N. Y. 108 (1900).

4 King *v.* Barnes, 109 N. Y. 267 (1888).

5 Where a company issues fully paid-up stock to parties in payment for services rendered to the company in its formation, and in establishing its business, such a payment is a mere pretense, and such persons are liable on such stock as unpaid stock, if the company becomes insolvent. *Re* Eddystone, etc. Ins. Co., [1893] 3 Ch. 9. See also § 46, *supra.*

poration with a competent and independent board of directors to negotiate the purchase of property for which stock is issued, and such directors should act wholly in the interest of future stockholders and not be biased or influenced by the persuasions or friendship of the proposed vendors. It is the duty of promoters to tell all the facts to the board of directors, including the actual cost of properties which are to be sold, and they should ask for investigation as to the value and cost of reproduction.[1] A promoter is considered in law as occupying a fiduciary relation towards the corporation.[2] He is an agent of the corporation, and is subject to the disabilities of such. There are two classes of cases in which he may be guilty of a breach of his duties to the company.

First, where he sells property to the corporation. If he purchased the property before he began promoting the company, he may sell to the company at an advance without disclosing his profit.[3] But where the promoter obtains merely an option on property and then causes a company to be formed to which he sells it at a profit, without disclosing the amount of that profit, he is liable in damages to subscribers for the stock.[4] He is liable also to the corporation itself,

1 See *v.* Heppenheimer, 69 N. J. Eq. 36 (1905). But see Old Dominion Copper Co. *v.* Lewisohn, 210 U. S. 206 (1908), as to the supposed duty to have an independent board of directors.

2 Promoters occupy a fiduciary relation towards the corporation and other stockholders. Fred. Macey Co. *v.* Macey, 143 Mich. 138 (1906).

3 A person who buys property at a foreclosure sale and then organizes a company to take it over, and who discloses the price which he paid at such sale, should disclose the fact that he had previously bought a part of the mortgage bonds of the bankrupt company and had made a profit thereby. *Re* Olympia, Limited, [1898] 2 Ch. 153. A person who purchases land and partly pays therefor may afterwards cause a corporation to be organized to purchase the land at a higher figure, and is not liable to the corporation for the profit if there was no concealment of the fact. He may also legally pay a commission to parties to induce them to subscribe for stock. The fact that he was a director in the corporation does not necessarily change the rule. Milwaukee, etc. Co. *v.* Dexter, 99 Wis. 214 (1898). Persons owning land may form a corporation and may sell such land to the corporation for more than they paid for it. Spaulding *v.* North Milwaukee, etc. Co., 106 Wis. 481 (1900). A prospectus need not state what a person paid for property which he has sold to the company, it appearing that he was the absolute owner of the property when he sold it to the company. Brookes *v.* Hansen, [1906] 2 Ch. 129. Promoters who sell their property to the corporation must disclose the whole truth, otherwise the corporation may elect to cancel the purchase or collect from them the profits they receive. Camden Land Co. *v.* Lewis, 101 Me. 78 (1905). Where promoters purchase properties before organizing the company they are not liable to the company for their profits. Tompkins *v.* Sperry, etc. Co., 96 Md. 560 (1903).

4 Quoted and approved in Richlands

and this liability may be even greater than any actual profit received by him, especially where stock was issued to him and the corporation has become insolvent. He may then be liable for the

Oil Co. *v.* Morriss, 61 S. E. Rep. 762 (Va. 1908). In Brewster *v.* Hatch, 122 N. Y. 349 (1890), the plan adopted was as follows: The promoters took an option for which they gave $5,000, and by which they had the privilege of purchasing certain mines at any time within four months for $135,000. This agreement is set forth in the case. They then issued a prospectus to the public, soliciting subscriptions to a corporation thereafter to be formed to purchase the mines for all its capital stock, which was to be $1,500,000. The stock was offered to the public at forty cents on the dollar. Subscriptions for $610,000 par value were received, netting $244,000. The corporation was then formed, the promoters making themselves directors, and the above plan carried out. A subscriber then sued the promoters for damages. The court held that the plaintiff could recover. The defendants were not mere vendors of the stock. The fatal defect seems to have been in the fact that the promoters did not buy the property before offering the stock. On the contrary they merely obtained options, and would have abandoned them if the stock had not been taken. Moreover they placed the stock before the corporation was organized. All this made them fiduciary agents of the subscribers. If they had been intrinsically vendors of the stock, it was admitted that they would not have been liable. Where a promoter causes the stockholders in various electric companies to turn in their stock to a new corporation in exchange for bonds of the latter, and also gives to such stockholders the right to purchase, at $30 a share, stock in the latter, a stockholder who has done so and then discovers that the promoter has made $20,000,000 profit in stock of the new company, may bring suit to compel the promoter to turn over the profit to the corporation and may join the new corporation as a party defendant. It is no defense that the board of directors of the latter thinks it inexpedient that the suit be brought. Groel *v.* United, etc. Co., 70 N. J. Eq. 616 (1905). The court said: "The authorities hold that it is a matter of discretion in the court whether to permit a suit to be brought by a stockholder on behalf of his corporation, and that the court will exercise its discretion, having in view the circumstances of the parties, their relationships to each other and to the cause of action, the refusal to sue," etc. In the case of Franey *v.* Warner, 96 Wis. 222 (1897), where promoters purchased land for $32,727 and sold it to the corporation for $45,000 without divulging the profit, the court held that a stockholder could not rescind his subscription, inasmuch as the corporation was innocent, but that he might have a judgment against the promoters for his *pro rata* share of the profit. See also Franey *v.* Wauwatosa Park Co., 99 Wis. 40 (1898). A person holding an option right to purchase land for $6,000 may cause a corporation to be organized to purchase such land for $8,500, thereby giving a profit to the promoter, for which the company may issue to him its stock, it being known in advance that such promoter was the owner of such option and would sell the same at that price. Richardson *v.* Graham, 45 W. Va. 134 (1898). In South Joplin Land Co. *v.* Case, 104 Mo. 572 (1891), it was held that a person who secures an option on a property with a view to organizing a corporation and selling the property to it, and who, together with another person employed by him, forms the company

actual original value of the stock.[1] The principles of law applying to promoters who sell property to the corporation for large quanti-

and places the stock on representations that the property cost $2,000 more than it actually did, and also that certain notes would be included in the sale, but after the company is organized informs the stockholders that the notes were not included, though they were received by himself, is accountable to the corporation for the profits thus realized by himself, as he occupied a position of trust towards the subscribers, and could not make secret profits out of the transaction. The court said that persons who "project and form a corporation, by soliciting and procuring others to subscribe for and take shares of stock, for the purpose of selling or turning over to the company property which they own, or have a right to acquire by executory contract, do occupy a double position. On the one hand they represent their own interest in respect of the disposition of the property; on the other, they represent the proposed corporation." The court also said that a vendor is a promoter, and is bound to protect the interests of those who ultimately constitute the company "if he assumes to act for them, or if he induces them to trust him, or to trust persons who are under his control and who are practically himself in disguise. He also assumes such duty if he calls the company into existence in order that it may buy what he has to sell; but he does not assume such duty by negotiating with persons who have themselves assumed that duty, and who are in no way under his influence." Where the person holding an option for the purchase of a mine represents that he is to pay a certain price for the mine, and induces parties to form a corporation and to have the corporation purchase the mine at that price, the corporation may rescind the contract if the actual price paid by such person was much less. But the corporation cannot recover back its expenses. Cortes Co. *v.* Thannhauser, 45 Fed. Rep. 730 (1891). An owner of land who gives an option thereon to an irresponsible party and then aids the latter in forming a corporation to take over the land for stock and acts as one of the directors, is a promoter of the corporation and is liable to parties who purchase the stock on misrepresentations as to the transaction, but is to be credited with the actual value of the property. Hayden *v.* Green, 71 Pac. Rep. 236 (Kan. 1903). Where promoters having an option on land obtain subscribers to the stock of a proposed corporation on a prospectus stating that the land was worth $250,000, and that it would only cost $175,000, and it turns out that the promoters realized a secret profit of $30,000 from the $175,000, a subscriber to the stock is not bound to pay unless he has ratified the transaction with full knowledge of the facts, even though the facts do not come to his knowledge for a long time. West End, etc. Co. *v.* Nash, 51 W. Va. 341 (1902). A promoter who has merely an option to purchase stock which he then sells to a new corporation is merely an agent of the vendor and a dividend declared on the stock of the new corporation before the option is exercised belongs to the vendor. Rowe *v.* White, 112 N.Y. App.Div. 688 (1906); aff'd, 189 N. Y. 523, 96 Pac. Rep. 528.

1 Where promoters pay out less than $30,000 to secure options on land and then sell the options to a corporation for $700,000 of stock of the latter, the corporation assuming the purchase price of the land, and then issue a prospectus which is misleading and does not state the facts about the issue of stock, and the corporation becomes insolvent, they are liable to the corporation for the fair market value of the stock at the time the

ties of watered stock and bonds are considered elsewhere.[1] Under the New Jersey statutes it is held that where promoters organize a corporation and through a dummy board of directors cause stock to be issued for property at an overvaluation, the stock will not be considered fully paid up and the promoters will be held liable as such stockholders.[2] So also if he purchased after he began promoting and then sold to the company, the sale is valid only when he informs the directors that the property belongs to him, and when, also, the di-

stock was issued, or as soon thereafter as it had a market value. The liability is not for unpaid stock, but for fraud as promoters in making a secret profit and not making a full disclosure to the stockholders. The promoters owe a duty to future stockholders. The land need not be tendered back. The promoters are to be credited with their actual disbursements and to be charged with the fair market value of the stock, with interest, and also with dividends. The suit should be brought by the corporation itself and not by its receiver, according to the Massachusetts decisions. Hayward *v.* Leeson, 176 Mass. 310 (1900). Where promoters are liable to the corporation for stock illegally issued to them, the stock is to be valued not by the first sale, but by its value after it acquired a recognized market value, with interest from that date. East Tennessee, etc. Co. *v.* Leeson, 183 Mass. 37 (1903), being the same case as Hayward *v.* Leeson, 176 Mass. 310. A promoter who obtains an option on land, and then forms a corporation to purchase the land at an advanced price without disclosing his profit, is liable to the corporation for such profit, and if the corporation refuse to sue for it a stockholder may bring suit, even though other stockholders are not in a position to complain. Exter *v.* Sawyer, 146 Mo. 302 (1898). A corporation may hold liable in damages a person who has sold property to it in payment for stock where the corporation was induced to make the purchase by false representations, even though such false representations were made not to the corporation but to its promoters before the incorporation took place. Schoefield, etc. Co. *v.* Schoefield, 71 Conn. 1 (1898). Where a person obtains an option on land at $2,500 an acre and then with other persons forms a corporation and sells it to the corporation at $2,700 an acre, payable partly in cash and partly by mortgage, the profit being concealed from the other subscribers to the stock, and the promoter being a director at the time of the purchase, he and those who co-operated with him are liable to return to the corporation such profit, but such liability cannot be enforced in a suit against the sureties on his bond as treasurer. First, etc. Co. *v.* Hildebrand, 103 Wis. 530 (1899). In a suit against promoters for selling to a corporation land on which they had an option and receiving stock in payment, in such a manner that they pay nothing for the stock, a defendant who is not clearly alleged to have received some of the stock is not liable. Pietsch *v.* Krause, 112 Wis. 418 (1901); s. c., 93 N. W. Rep. 9 (1903). Promoters who obtain an option and then sell the property to a corporation at a secret profit in payment for stock may be held liable by the receiver upon the insolvency of the corporation for the difference between what they paid and what they received, without regard to the actual value. Central T. Co. *v.* East Tennessee, etc. Co., 116 Fed. Rep. 743 (1902).

1 See ch. 3, *supra*, and § 655, *infra*.

2 See *v.* Heppenheimer, 69 N. J. Eq. 36 (1905). See also §§ 46, 47, *supra*.

rectors are competent and impartial judges as to whether the purchase ought or ought not to be made.[1] In a recent celebrated litigation the

1 Erlanger *v.* New Sombrero Co., L. R. 3 App. Cas. 1218 (1878); New Sombrero Co. *v.* Erlanger, L. R. 5 Ch. D. 73 (1877); *Re* Coal, etc. Co., L. R. 20 Eq. 114 (1875); s. c., L. R. 1 Ch. D. 182; Lindsay Petroleum Co. *v.* Hurd, L. R. 5 P. C. 221 (1874). Promoters of a corporation are bound to the exercise of good faith toward all the stockholders, to disclose all the facts relating to the property, and to select competent persons as directors, who will act honestly in the interest of the stockholders, and are precluded from taking a secret advantage of other stockholders. Dickerman *v.* Northern T. Co., 176 U. S. 181 (1900). Even though all the directors of a corporation organize another company to buy out the first-named company, and they are directors in the second company also, yet if all the facts are fully stated, the sale is legal and the new company cannot repudiate the sale on that ground. Even if the promoters stated that a certain part of the plant was in full operation, yet if there was no fraud and that part of the plant was put in operation soon afterwards, the court, instead of setting aside the sale, may give damages for the delay. Misrepresentations, although not fraudulent, are sufficient ground for relief. The fact that the directors are not independent, but represent the vendor, is immaterial if that fact is made known to the parties. Lagunas, etc. Co. Ltd. *v.* Lagunas Syndicate, Ltd., [1899] 2 Ch. 392. But where a person purchases property for the sole purpose of creating a corporation to take it over from him and to pay him therefor an excessive price in cash and stock, netting a large profit to him, the stock being offered to the public, and he causes the incorporation to be made and directors to be named, who are his dummies, he is a promoter and can be held liable by such corporation for the profit he has made, unless he fully disclosed in a prospectus the fact that he had formed the corporation and that he had made such profit. Especially is this the rule where the prospectus gave a false impression. He occupies a fiduciary relation towards the purchasers of the stock. It is immaterial that the directors approved of the transaction with full knowledge. Non-disclosure in such a case is a misfeasance in the nature of a breach of trust. *Re* Leeds, etc., [1902] 2 Ch. 809. In Emma Silver Min. Co. *v.* Grant, L. R. 11 Ch. D. 918 (1879), s. c., L. R. 17 Ch. D. 122, the promoter was compelled to disgorge a gift given to him by the vendors of a mine to the corporation, but he was allowed to retain therefrom his disbursements. It is immaterial that the sale was a fair one. The court said: "He must let his company know what profit he has taken, and deal with them, so to say, at arms' length;" South Durham Iron Co. *v.* Shaw, 14 W. N. 159 (1879); Beck *v.* Kantorowicz, 3 K. & J. 230 (1857); Whaley Bridge, etc. Co. *v.* Green, L. R. 5 Q. B. D. 109 (1879), holding also that if the vendor has not yet paid the money to the promoter the corporation may recover it from the former; Twycross *v.* Grant, L. R. 2 C. P. D. 469 (1877), disapproving Craig *v.* Phillips, L. R. 3 Ch. D. 722 (1876). Where a person who is the owner of land buys options on adjoining lands and takes deeds for the whole for $66,000 (the deeds reciting the consideration as $80,000), and then sells the same to a corporation, which he forms, for $80,000 cash and $40,000 stock, and then divides the stock among the stockholders, keeping the cash himself, he is liable to refund to the corporation his profit, the court holding open the question as to whether he was liable for the profit of

supreme court of Massachusetts held that where a person buys property for the purpose of forming a corporation to take it over, and this plan is carried out by the use of dummies as directors, who issue stock therefor, the par value of which is many times greater than the actual value of the property, the corporation itself may thereafter rescind the transaction and return the property and demand back the stock,

the others. Woodbury, etc. Co. *v.* Loudenslager, 55 N. J. Eq. 78 (1896). In *Re* Hess Mfg. Co., 23 S. C. of Can. 644, 658 (1894), the court said of a promoter: "It was incumbent upon him to sell the land for no excessive price; he was bound to misrepresent nothing which could influence the company in determining whether to buy or not; to conceal nothing that it was material should be known in order to enable them to form a sound judgment on that question, and to put them in possession of all material information. Further, it was, above all, the duty of Dr. Sloan, as a vendor selling property to a company towards which he stood in a fiduciary relation, to see that the executive management of the company was in the hands of a thoroughly independent board of directors, a board over which he could exercise no influence, and which would, as the expression is, keep him at 'arms' length' in making the bargain." But the court held that the promoter is not liable unless the company rescinds and restores whatever it has received. In this case the court stated that although the promoter stands in a fiduciary relation to the company, yet that he is not necessarily a trustee of property which he acquires to sell to the company; and that even if he were, the remedy is rescission and the turning back of the property to him. In Densmore Oil Co. *v.* Densmore, 64 Pa. St. 43 (1870), the court refused to hold the defendants liable who owned property and formed a company, and sold the property to the company at a profit, without disclosing the original price, but without misrepresenting that price. The court said, however, "that where persons form such an association, or begin or start the project of one, from that time they do stand in a confidential relation to each other, and to all others who may subsequently become members or subscribers; and it is not competent for any of them to purchase property for the purpose of such a company, and then sell it at an advance without a full disclosure of the facts. They may account to the company for the profit, because it legitimately is theirs." Where a promoter, after the company is formed, buys land for $6,000 and sells it to the company at $12,000, and represents to a subscriber for stock that the land cost $12,000 originally, the stockholder may recover from the promoter the amount paid for his stock. Short *v.* Stevenson, 63 Pa. St. 95 (1869). In Rice's Appeal, 79 Pa. St. 168 (1875), where a promoter elected the directors and sold property to the corporation at an exorbitant price, taking payment in money, stock, and bonds, the court refused to allow the bonds upon the winding up. In McElhenny's Appeal, 61 Pa. St. 188 (1869), where a person bought land for $2,000, and then induced others to join him in organizing a company to purchase it for $40,000 after he had sold it to them for $12,000, is liable to account to the company for his part of the $28,000 profit, but not for his $10,000 profit. A person may purchase property and then proceed to form a corporation and sell the property to it at an advanced price. He is not bound to disclose his profit, nor is he liable therefor unless he makes misrepresentations. Lungren *v.* Pennell, 10 W. N. Cas. 297 (Pa. 1881).

even though all the stockholders, directors and officers approved the transaction when it was carried out, it appearing that the property received was worthless and that it was a part of the original plan to sell a large part of the stock to the public, which plan was carried out, and it appearing also that the original stockholders and officers were merely representatives of the vendor, and that there was no independent judgment on the part of the board of directors. The court pointed out that this was a different case from one where it was not contemplated that the public should become interested, except by purchase from the original stockholders.[1]

1 Hence where a person buys all the stock of a corporation for about $613,000 and some real estate for about $175,000, and sells the former to a corporation, formed by him for that purpose, for $2,500,000 par value of stock, having also an actual value of $2,500,000, and sells the real estate for $750,000 par value of stock, having also the same actual value, but it turns out that the real estate was worthless, the corporation so issuing the stock may maintain a separate suit for rescinding the sale and issue of stock for the real estate, or for damages, if the stock cannot be returned, it appearing that the promoter was a director at the time of the sales, and that the fair market value of the stock at the time of issue was par, and so continued to be for a long time thereafter; it further appearing that he made no disclosure of the facts to the corporation and did not see to it that the corporation had adequate independent advice. The court said "that is an obligation resting upon every fiduciary who makes a sale of his own property to his beneficiary, no matter whether it is a case of trustee and *cestui que trust*, guardian and ward, solicitor and client, or promoter of a corporation and the corporation itself. There is no pretense that in the transaction in question the plaintiff corporation was represented by an independent board." It is no defense that every stockholder and director knew of and acquiesced in the transaction at the time, it appearing that the stock was afterwards sold to the public wihout any disclosure of the facts. Old Dominion, etc. Co. *v.* Bigelow, 188 Mass. 315 (1905), the court refusing to follow Old Dominion, etc. Co. *v.* Lewisohn, 136 Fed. Rep. 915; aff'd, 148 Fed. Rep. 1020, involving the other issue of stock. The court pointed out that in cases to the contrary it was not contemplated that other parties should become interested in the stock, except by purchase from the original stockholders. If there are two such promoters it seems that in a suit against one, he is liable for the whole stock so issued.

The federal decisions on this same transaction are as follows: Even though the vendors of property to a newly formed corporation receive an excessive price therefor in fully paid stock, yet if it is a closed transaction the corporation cannot thereafter hold them liable for the overvaluation, notwithstanding the corporation thereafter sells other stock to the public at par for cash without disclosing the transaction. Old Dominion Copper, etc. Co. *v.* Lewisohn, 210 U. S. 206 (1908), the court saying: "At the time of the sale to the plaintiff, then, there was no wrong done to any one. Bigelow, Lewisohn and their syndicate were on both sides of the bargain, and they might issue to themselves as much stock in their corporation as they liked in exchange for their conveyance of their land." The court said also that under the decisions a purchaser of stock from the

The supreme court of the United States, however, subsequently passed on the same transaction and held very properly that the vendors would have no claim excepting, of course, for actual fraud, and that the theory that the corporation is not bound until an independent board of directors passes upon the transaction has no basis in the decisions, and the court distinguished Erlanger *v.* New Sombrero Phosphate Co., 3 App. Cas. 1218, aff'g 5 Ch. D. 73, on the ground that in the latter case the purchase was not completed until the stock had been taken by the public in ignorance of the facts. Even though the owners of mining claims organize a corporation in New Jersey, and they themselves as directors, together with dummy directors, cause the corporation to purchase the claims for $750,000 par value of stock, although the mining claims were worth but $5,000 and even though thereafter additional capital stock is sold by the corporation to the public for cash at par, yet the corporation cannot rescind the transaction, inasmuch as there were no other stockholders at the time of the transaction, and hence no one was deceived. Old Dominion, etc. Co. *v.* Lewisohn, 136 Fed. Rep. 915 (1905). The United States circuit court of appeals, in affirming this decision, said (148 Fed. Rep. 1020): "The bill prays for relief as follows: First, that the sale of the mining claims to the complainant by Leonard Lewisohn, the defendants' testator, and Albert S. Bigelow, a citizen of Massachusetts and not a party to this action, be rescinded, and the real estate reconveyed to the defendants, upon receipt by the complainant of the consideration paid therefor; second, that defendants return to the complainant the consideration paid by complainant for said property, namely 30,000 shares of its capital stock, or account therefor; third, that, if the court shall decide that the complainant is not entitled to rescind the sale of said real estate to it, then and in that event that the court ascertain the amount of damages sustained by complainant and direct the defendants, as executors, to pay the amount to complainant. We are unable to perceive how this relief, or any part thereof, can be granted the complainant upon the facts alleged in the bill. The fundamental difficulty with the bill is that it fails to state any facts showing that the complainant was in any way injured or defrauded by the transactions complained of. At the time of the transfer by Bigelow and Lewisohn to the company, Bigelow and Lewisohn and their representatives owned the entire issue of stock of the corporation. The sale by them to the corporation was in effect a sale by them to Bigelow and Lewisohn. A corporation can only act through the human beings who compose it. It cannot be deceived or defrauded unless its stockholders and directors are deceived or defrauded. The corporation knew all that Bigelow and Lewisohn knew, and no one of the original parties to the transfer was defrauded by the exchange of the stock controlled by Bigelow and Lewisohn for the real estate controlled by them. It may be that such a large overcapitalization as is alleged in the bill might mislead and deceive careless and credulous purchasers of the stock; but we are not now dealing with the case of a stockholder alleging concealment, fraud, and misrepresentation. The stockholders, aparently, have no complaint—at least they have not propounded any. . . . . The subscribers for the 20,000 shares subsequently issued were not deceived. They asked for no statement and received none. They got what they purchased, and are not complainants here." Bonds issued to promoters in payment for options on the property of competing companies of small and uncertain prospective value are void under the

corporation could not complain at all.[1] The highest court in New York has recently held that a stockholder in a holding corporation cannot maintain a suit in behalf of the corporation on the ground that its promoters made large, unlawful and secret profits by being interested in the constituent company whose stock was turned in to the holding company in exchange for the stock of the latter, it appearing that when the stock was so turned in the promoters were the only parties interested. If any of the original parties were defrauded, their remedy is a suit at law for damages against the guilty parties. The court said: "We have here nothing more than the ordinary transaction of parties coming together and agreeing in writing to form a corporation that shall take over from them certain definitely understood properties and cash, for which is to be issued its entire capital stock. It is doubtless true that in many instances there is great overcapitalization, and that the general public is frequently misled by the large amounts of preferred and common stock issued by corporations. The rights of the public are not involved in this litigation. . . . The stockholders of the constituent companies and the individual defendants were the organizers of the corporation and became its first stockholders; they dealt wholly between themselves as sellers and buyers, organizers and corporation; no other persons had any interest in this initial transaction; if fraud had been practiced by any one of the organizers upon those associated with him, the cause of action would have vested in the party injured."[2] It is clear that where there is no

Pennsylvania constitution, and cannot be turned in to apply on the purchase price at a bankrupt sale. Wiegand *v.* Lewis, etc. Co., 158 Fed. Rep. 608 (1908), aff'g *In re* Wyoming, etc. Co., 153 Fed. Rep. 787. See also § 38, *supra*.

1 See preceding note.

2 Blum *v.* Whitney, 185 N. Y. 232 (1906). Even though two of the directors sell to the corporation certain patents for $3,000,000 full-paid stock, being the entire capital stock, and give to the corporation $750,000 of the same as treasury stock, and even though the patents are worth but $10,000, neither the corporation nor a purchaser of treasury stock at fifty cents on the dollar can compel them to return the stock nor hold them liable thereon, but the remedy, if any, is to rescind the transaction and return the patents and demand a return of the stock or the value of such part of the stock as they have sold. Such is the rule, even though the statutes of the state prohibit the issue of stock at less than par. The court said (p. 477): "Whether they knew that the value of the patents did or did not exceed $10,000 was entirely immaterial. They had a right to hold the letters patent until they were offered the price at which they were willing to sell. They sold them to this company for its whole capital stock, agreeing with the company that that was the value of the patents. I know of no principle which would justify a court of equity in compelling the owners of these patents to accept any consideration for their transfer to the corporation except that agreed

intent to sell stock to outsiders, a promoter with the consent of all parties interested may take such profit as may be agreed upon,[1] and is not liable even to creditors.[2] The rule is different where existing minority stockholders object to a fresh issue of stock and bonds.[3] There are cases which hold that if the intent is to sell the stock to

on, and, upon the ground that the patents are not worth the sum agreed on as a consideration for the transfer, decree that the vendors must pay back to the company the consideration they had received, less the real value." A purchaser of the treasury stock has of course a remedy at law if there were false representations. Insurance Press *v.* Montauk, etc. Co., 103 N. Y.App. Div. 472 (1905). Even though promoters obtain options on a large number of malting plants, and take subscriptions to stock in a corporation to be organized for the purpose of taking over the plants, and use the proceeds of the subscriptions to pay for the plants and furnish a working capital for the company, and receive from the corporation, in payment for the plants, stock sufficient to fill the subscriptions and also to leave with the promoters $500,000, as a profit preferred stock and $7,740,000 common stock, yet neither the corporation nor its stockholders can hold them liable for such profit in stock, there being no proof that the plants were not worth the amount of the stock issued for them, nor that the sale had been rescinded, and there being no complaint made by the original subscribers to the stock and the original subscription having recited that such stock would be so issued for the properties. Hutchinson *v.* Simpson, 92 N. Y. App. Div. 382 (1904).

1 A person holding an option to purchase lands for $120,000 may agree with a promoter that a company shall be formed to take over the same for $150,000 where all the parties interested knew the facts and his profit was represented by common stock. Selover *v.* Isle, etc. Co., 91 Minn. 451 (1904). See also §§ 46, 47, *supra.*

2 Even though by arrangement between promoters and the owner of a business, the busines is sold to a corporation for £22,000 in full-paid shares of stock and £3,000 cash, the latter to go to the vendor, and all the stock to go to the promoters, and thereafter the company is wound up and its assets sold for £480, yet the promoters are not liable to creditors, inasmuch as all the stockholders knew of the transaction and no stock was sold or intended to be sold to outsiders, and the creditors might have ascertained the facts from the public registry if they desired, and even though the promoters became directors. The court said: "It cannot be suggested that mere inadequacy of price was sufficient of itself to invalidate the contract. You must show that, these shares not having been paid for at all, the contract for purchase was a colorable transaction, and that in truth and in fact, *qua* value, these shares were not part of the consideration, but were a gift. . . . I see nothing in these affidavits or in anything else in the case to lead me to say that this transaction was not a real transaction, but a colorable transaction hiding the real transaction behind it." *Re* Innes & Co. Ltd., [1903] 2 Ch. 254, rev'g 88 L. T. Rep. 123. See §§ 46, 47, *supra.*

3 Where directors are interested in a contract with a corporation a minority stockholder may insist on the contract being a reasonable one, even though a majority of the stockholders have approved it, it appearing that those particular directors constituted a majority of the board and also owned a majority of the stock. Booth *v.* Land, etc. Co., 68 N. J. Eq. 536 (1905). See also §§ 41, 649, *supra.*

the public, the transaction may be fraudulent.[1] Where the promoters misrepresent the price paid by them for property sold by them to the company, they are liable to the company for their profits, even though the property is worth all that the company paid for it.[2] But the corporation itself, all of whose stock has been issued in payment for a mine, cannot hold a vendor liable for misrepresentations as to the value of the property.[3] The corporation cannot be compelled to pay to promoters such part of the purchase price as they were to have for their profits, where they misrepresented the price which the original owner of the property was to receive.[4]

If the promoter conceals the fact that he is selling his own property to the company, the latter may rescind the sale;[5] or, if the

1 Where promoters buy property with a view to organizing a corporation to take it over, and it is taken over with a purchase-money mortgage nearly equal to the price paid, together with a large bonus of stock, yet even though they are the only stockholders, if thereafter the balance of the capital stock was sold to outsiders to whom misrepresentations were made as to the cost of the land, the promoters are liable to the corporation for their profits. The suit must be at law, and is barred by the six-year statute of limitations. Pietsch *v.* Milbrath, 123 Wis. 647 (1904). This seems to have the same basis as the decision by the supreme court of Massachusetts in the case Old Dominion, etc. Co. *v.* Bigelow, 188 Mass. 315, and other cases in this section. Where options on mining land cost \$52 and the holders turn them in to the corporation for \$600,000 of stock, a *bona fide* purchaser of other stock may maintain a suit to cancel the stock so issued to the promoters. Richlands Oil Co. *v.* Morriss, 61 S. E. Rep. 762 (Va. 1908).

2 Burbank *v.* Dennis, 101 Cal. 90 (1894). Where promoters obtain an option on property for \$75,000, and organize a company for \$100,000 capital stock, and, as directors of the company, with other friendly directors, purchase the option for \$100,000, and sell \$75,000 of the stock at par and thereby have the remaining \$25,000 of stock as profit, and the purchasers of the \$75,000 of stock supposed that the actual price paid was \$100,000, the corporation may compel such promoter to return and cancel the \$25,000 of stock, and it is immaterial that the property was worth \$100,000, the actual facts not having been disclosed to the corporation or its stockholders. The court said: "The promoter of a company stands in the relation of a trustee to it and those who become subscribers to its stock so long as he maintains the power of control over it." Yeiser *v.* United States, etc. Co., 107 Fed. Rep. 340 (1901).

3 Stratton's, etc. *v.* Dines, 126 Fed. Rep. 968 (1904); aff'd, 135 Fed. Rep. 449.

4 Tegarden Bros. *v.* Big Star, etc. Co., 71 Ark. 277 (1903).

5 Where promoters represent to capitalists that it will cost \$1,900,000 to purchase a company to be reorganized, when in fact it costs them but \$1,400,000, and the capitalists advance the former sum, and the promoters organize a company and carry out the reorganization and give to the capitalists a part of the stock with bonds, the latter as stockholders may compel the promoters to pay the extra \$500,000 to the company, even though the promoters controlled all the stock at the time the property was taken over, the essence of the transaction

promoter was a promoter at the time he purchased the property, the company may recover from the promoter the profit made by him.[1] If the promoter owns the property at the time of forming the company, and sells it to the company at an advance over its cost to him, and then induces persons to subscribe by stating that he made no profit thereby, he is liable in equity to account to them for the injury they have sustained.[2]

being that the capitalists were the stockholders in the new company from the beginning, and it is no defense that for each dollar advanced by the capitalists they were to receive a dollar in bonds and a dollar in stock. Arnold *v.* Searing, 67 Atl. Rep. 831 (N. J. 1907). Where several persons agree to form a corporation to take over property which they intend to purchase, and one of them purchases it and misrepresents the price, he may be held liable by the corporation for his secret profit. Johnson *v.* Sheridan, etc. Co., 93 Pac. Rep. 470 (Ore. 1908). Where promoters obtain an option on property for $40,000, but cause the written option to state the price as $60,000, on which $20,000 has been paid, and then by misrepresentations cause their associates to organize a company and take over the property and pay the $40,000 and issue to them $20,000 in stock, they may be compelled to give up the stock for cancelation. Cuba, etc. Co. *v.* Kirby, 112 N. W. Rep. 1133 (Mich. 1907). A promoter who obtains an option on a patent for $3,000, and induces other people to join him in organizing a corporation to purchase it for $15,000, claiming that the latter was the lowest sum at which the patent can be bought, may be compelled to return $12,000 to the company, but other persons are not liable, even if they also solicited subscriptions, without knowing, however, of the fraud. Second Nat. Bank *v.* Greenville, etc. Co., Ohio Circuits (1899) 274. Lindsay Petroleum Co. *v.* Hurd, L. R. 5 P. C. 221 (1874); Erlanger *v.* New Sombrero Co., L. R. 3 App. Cas. 1218, aff'g New Sombrero Phosphate Co. *v.* Erlanger, L. R. 5 Ch. D. 73 (1877); *Re* Ambrose Lake, etc. Co., L. R. 14 Ch. D. 390 (1880); *Re* Cape Breton Co., L. R. 29 Ch. D. 795 (1885). But not if the company is unable to restore the property, where the disability to restore it is due to the company and not the promoter. Western Bank *v.* Addie, L. R. 1 Sc. App. (H. L.) 145 (1867); Phosphate Sewage Co. *v.* Hartmont, L. R. 5 Ch. D. 394 (1877); Head *v.* Tattersall, L. R. 7 Exch. 7 (1871); *Re* Cape Breton Co., L. R. 29 Ch. D. 795 (1885). The company may rescind as to part if the transaction is severable. Maturin *v.* Tredinnick, 2 N. R. 514 (1863); s. c., 4 N. R. 15. Where a mine was sold to a company for $30,000, the promoters representing that they did not have any interest therein, and it afterwards was discovered that they received $20,000 of the price, the corporation succeeded in having the whole purchase set aside and the $30,000 and interest and expenditures refunded. St. Louis, etc. Co. *v.* Jackson, 5 Cent. L. J. 317 (1877, St. Louis Ct.).

1 *Re* Cape Breton Co., L. R. 26 Ch. D. 221 (1884); aff'd, L. R. 29 Ch. D. 795; Lydney, etc. Co. *v.* Bird, L. R., 33 Ch. D. 85 (1886), reversing L. R. 31 Ch. D. 328; Tyrell *v.* Bank of London, 10 H. L. Cas. 26 (1862); Benson *v.* Heathorn, 1 Y. & C. Ch. 326 (1842); Emma Silver Min. Co. *v.* Grant, L. R. 11 Ch. D. 918 (1879); s. c., L. R. 17 Ch. D. 122. *Re* Ambrose Lake, etc. Co., L. R. 14 Ch. D. 390 (1880).

2 Getty *v.* Devlin, 54 N. Y. 403 (1873); s. c., 70 N. Y. 504 (1877); Getty *v.* Donelly, 9 Hun, 603 (1877);

Second, a promoter may commit a breach of trust by accepting a commission or bonus from a person who sells property to the cor-

Brewster *v.* Hatch, 10 Abb. N. Cas. 400 (1881); aff'd, 122 N. Y. 349. See also chs. IX and XX, *supra*. Where promoters transfer worthless copyrights for $100,000 common stock and then by misrepresentations as to the value of the preferred stock sell it, in order to raise money for the company, the purchaser may hold them personally liable, even though with each share of preferred stock so sold they contributed one-half of a share of common stock. Grover *v.* Cavanaugh, 82 N. E. Rep. 104 (Ind. 1907). In the important case of Ex-Mission, etc. Co. *v.* Flash, 97 Cal. 610 (1893), where persons purchased land at $5 an acre and subsequently proceeded to organize a corporation to purchase it at $25 an acre, representing to the stockholders that $25 an acre was the lowest price at which the land could be purchased, it being concealed from the stockholders that one of their number, a large subscriber, was interested in the contract, and that the organizers of the corporation were his agents, the corporation caused to be set aside a mortgage and foreclosure thereof which was given to the promoters in part payment for such land, and the notes were ordered canceled. In this case it appears that the representation was made that $25 per acre was the lowest price for which the land could be purchased, and that the subscribers came "in on the ground floor at bedrock figures." Where a prospectus contained a material misrepresentation which induced a person to subscribe he may maintain a suit to rescind the subscription, even though the prospectus stated that there were certain contracts not mentioned in the prospectus and that the subscribers would be held to have had notice of the same, and even though the subscription contract contains a provision that the subscriber has notice of that which in fact is concealed from him. The misrepresentation in this instance was a misleading and ambiguous statement and also the non-disclosure of an agreement to which the promoter was a party, such agreement not relating to the formation of the company or his subscription to its stock. The court rescinded the subscription and held the directors personally liable for loss sustained by the subscriber. Greenwood *v.* Leather, etc. Co. Ltd., [1900] 1 Ch. 421. The Solicitors' Journal (vol. 31, p. 740) has summarized the law on this subject: "Where the promoter had originally bought, not for himself, but for a company to be afterwards formed, in such a case it was an ordinary instance of purchase by an agent, and the company would be entitled both to keep the property and to call upon the promoter to repay the profit he had made. But it is for the company to prove this relationship of principal and agent, and also that it existed at the time of the original purchase. Hence, where this is not shown, the above rule does not apply, not even although the promoter subsequently becomes a director of the company. In this case it is his duty to inform the company of the profit he is making; and in default they are entitled, if they so choose, to a rescission of the contract. But they cannot affirm the contract and also claim the profits; and if rescission of the contract has become impossible, they seem to have no remedy at all." Where a promoter to whom nearly the entire stock has been issued sells a part of it on the fraudulent representation that the stock belongs to the company, and then causes the company to be wound up and himself to be released from certain subscriptions, and the property to be sold by a trustee named by him, the court will appoint a receiver

poration. The company may compel a promoter to turn his profit into the corporate treasury,[1] or the company may rescind its purchase of the property.[2]

at the instance of the party so defrauded, for the purpose of recovering back the property of the company. Du Puy v. Transportation, etc. Co., 82 Md. 408 (1896). Where the promoters represented that property cost them

1 A promoter, who for a cash consideration from a patentee organizes a corporation to purchase the patent and acts as a director, is liable to the corporation for the money so received by him, the payment having been concealed, and the suit may be brought within a reasonable time after the fraud is discovered. The Telegraph v. Loetscher, 127 Iowa, 383 (1904). Where the promoters receive pay from the contractor, such pay being in excess of their disbursements, the company may compel them to turn in the amount to the company, although all the original stockholders and directors knew of the transaction. Mann v. Edinburgh, etc. Co., [1893] A. C. 69; Hichens v. Congreve, 4 Russ. 562 (1828); s. c., 1 Russ. & M., 150; Beck v. Kantorowicz, 3 K. & J. 230 (1857); Phosphate Sewage Co. v. Hartmont, L. R. 5 Ch. D. 394 (1877); Bagnall v. Carlton, L. R. 6 Ch. D. 371 (1877); Emma Silver Min. Co. v. Grant, L. R. 11 Ch. D. 918 (1879); Whaley Bridge, etc. Co. v. Green, L. R. 5 Q. B. D. 109 (1879), holding also that, if the bonus has not yet been paid to the promoter, the company may claim it from the person contracting with it. *Cf.* Arkwright v. Newbold, L. R. 17 Ch. D. 301, 319 (1881); Lydney, etc. Co. v. Bird, L. R. 33 Ch. D. 85 (1886), reversing L. R. 31 Ch. D. 328; Albion, etc. Co. v. Martin, L. R. 1 Ch. D. 580 (1875). The promoter is allowed a reasonable sum for disbursements. Lydney, etc. Co. v. Bird, L. R. 33 Ch. D. 85 (1886). *Cf.* Emma Silver Min. Co. v. Grant, L. R. 11 Ch. D. 918 (1879); Bagnall v. Carlton, L. R. 6 Ch. D. 371 (1877); South Durham Iron Co. v. Shaw, 14 W. N. 159 (1879). The promoter must disgorge, though by his efforts the company paid for the property less than it was worth. Emma Silver Min. Co. v. Grant, L. R. 11 Ch. D. 918 (1879); s. c., L. R. 17 Ch. D. 122. The statute of limitations bars the suit. Metropolitan Bank v. Heiron, L. R. 5 Exch. D. 319, 325 (1880). But only from the time when the facts are known to the directors, or, if the directors are also implicated, to the stockholders. *Re* Fitzroy, etc. Co., 50 L. T. 144 (1884). Where promoters, in collusion with the owner of a mine, pay him $20,000 therefor, and cause him to transfer it to a corporation for $100,000 of the capital stock, and then induce third persons to buy such stock at par on representations that the mine cost the promoters $90,000, and then receive from the owner of the mine the proceeds from the sale of the stock, less the $20,000, the corporation may compel them to pay over the profits to it. Pittsburg Min. Co. v. Spooner, 74 Wis. 307 (1889). Even though promoters agree that dividends shall be paid before they receive salaries as directors, and such salaries shall be paid only from profits, and even though the corporation adopted a resolution to that effect as specified in the agreement, yet a receiver cannot recover back the salaries paid from the capital with the consent of the stockholders. Mills v. Hendershot, 70 N. J. Eq. 258 (1905).

2 Munson v. Syracuse, etc. R. R., 103 N. Y. 58 (1886); Erlanger v. New Sombrero Co., L. R. 3 App. Cas. 1218 (1878); Lindsay Petroleum Co. v. Hurd, L. R. 5 P. C. 221 (1874); Bagnall v. Carlton, L. R. 6 Ch. D. 371 (1877). *Cf.* Smith v. Sorby, L. R. 3 Q. B. D. 552, n. (1875).

If the commission or bribe paid to the promoter consisted of shares of stock, then the company may recover from him the amount received by him upon a sale of the shares and all dividends previously received, together with interest;[1] or, if he still holds the shares, the company may recover the value of the stock together with interest.[2] The party who sells the property to the corpora-

$23,000, at which price they turned it in to the corporation, and as a fact it cost them $13,000, they are each liable for the $10,000 profit, even though they did not personally make the representations, a conspiracy being shown. Fountain, etc. Co. *v.* Roberts, 92 Wis. 345 (1896). Where promoters have a right to purchase land for $31,000, and induce persons to join with them to form a corporation to purchase the land at $55,000, and represent to such persons that $55,000 is what the land actually costs, the persons so induced to subscribe may have the purchase of the land rescinded. Hebgen *v.* Koeffler, 97 Wis. 313 (1897). Where a promoter misrepresents to subscribers the cost of property which is to be and is sold to the corporation for cash, the corporation may rescind. Limited Inv. Assoc. *v.* Glendale Inv. Assoc., 99 Wis. 54 (1898). In Franey *v.* Wauwatosa Park Co., 99 Wis. 40 (1898), the subscription was held to be binding, although the promoters were individually liable to the subscribers for the profit made by the promoters. Where promoters represent that the territorial rights which they sell to a corporation cost a certain sum, when in fact one-half of that sum went to them, the corporation may compel them to pay to it such one-half. Cook *v.* Southern, etc. Co., 75 Miss. 121 (1897). Statements that a large part of the capital stock had been taken by the parties themselves, and that the parties themselves would continue the management of the concern; concealment of the fact that a large quantity of the stock was to be issued for the good-will of the business; and statements leading to the conclusion that all subscribers for stock stood on an equal footing,—constitute material misrepresentations, and will sustain a rescission of the subscription if untrue. Such statements and concealments made to agents or brokers who are selling stock are the same as though made to the subscribers for the stock. Hence, where partners organize a corporation to take over their business, each of the partners is liable for misrepresentations and concealments of the others committed while engaged in promoting and bringing out the enterprise. They are liable as promoters. Walker *v.* Anglo-Am. etc. Trust Co., 72 Hun, 334, 341 (1893). Where the chief promoter of a proposed manufacturing corporation obtains donations from property owners to the proposed corporation on his agreement that $75,000 of stock should be subscribed for within a certain time and then proceeds to organize the company, he, himself, subscribing for $25,000 of the stock, and the corporation then purchases certain worthless patents and agency contracts and issues therefor $63,250 of full-paid stock, including the $25,000 subscribed for by him, and afterwards the corporation collects $4,000 of such donations and borrows money from such promoter and gives him a mortgage therefor, his mortgage is not good as against the parties who donated the $4,000. Moore *v.* Universal, etc. Co., 122 Mich. 48 (1899).

1 Emma Silver Min. Co. *v.* Lewis, L. R. 4 C. P. D. 396 (1879).

2 McKay's Case, L. R. 2 Ch. D. 1 (1875); Pearson's Case, L. R. 4 Ch. D. 222, L. R. 5 Ch. D. 336 (1877);

tion through the promoter may also be liable to the corporation for the promoter's profits.[1] If, however, the vendor had nothing to do with the formation of the corporation he is not liable.[2] The vendor of land to a corporation is not responsible for the misrepresentations of his agent to a party who purchases stock of the corporation, such vendor not having taken part in organizing the corporation or selling its stock.[3] The vendors of a mining property of a corporation are not liable for the misstatements of such corporation in selling its stock, in order to pay for the mine, even though they knew that a prospectus had been issued and they accepted payment from the corporation.[4] A promoter may be liable to parties whom

Re Fitzroy, etc. Co., 50 L. T. 144 (1884); Nant-y-glo, etc. Co. *v.* Grave, L. R. 12 Ch. D. 738 (1878); and see § 650, *supra;* Chandler *v.* Bacon, 30 Fed. Rep. 538 (1887), where promoters were compelled, at the option of the corporation, to transfer stock back to it or pay over the amount received by them for stock sold, or to pay to it the market value of stock which they as promoters had received from him to whom all the capital stock had been issued in payment for a patent. The agent of the person who deals with the corporation may recover his compensation from that person, but he cannot recover compensation for improperly influencing the agents of the corporation to make the contract. Lydney, etc. Co. *v.* Bird, L. R. 31 Ch. D. 328 (1885); Arkwright *v.* Newbold, L. R. 17 Ch. D. 301 (1881); Davison *v.* Seymour, 1 Bosw. (N. Y.) 88 (1857), where the court said: "There was secrecy, applications to individuals, a concealed promise of compensation, and utter ignorance and recklessness as to the competency of the party whose cause he was promoting and whose reward he was to receive."

1 Even though a person does not know that a promoter to whom he has given an option on his property is a director in the company which proposes to buy it, yet if he discovers this fact before he closes the transaction he must pay to the company the commission which he agreed to pay to the promoter, and even though the company has recovered from the promoter such part of the commission as the promoter actually received, yet the company may recover the balance from the vendor of the property, although such balance had been waived by the promoter in consideration of what was actually paid to him. It is unnecessary to rescind the contract. Grant *v.* Gold, etc. Syndicate, [1900] 1 Q. B. 233.

2 Even though the agent of a landowner forms a corporation, which purchases the land at a profit to the owner, and even though such agent receives a part of the profit, yet if the vendor did not contemplate and had nothing to do with the formation of the corporation he cannot be held liable for the profit. Forest, etc. Co. *v.* Bjorkquist, 110 Wis. 547 (1901). Although a person owning land employs an agent to sell it, and the agent, without the principal's knowledge, organizes a company and turns in the land at an advanced price, yet neither the corporation nor its stockholders can have the sale rescinded on the ground that the owner of the land was guilty of a promoter's fraud. Godfrey *v.* Schneck, 105 Wis. 568 (1900).

3 Hoyer *v.* Ludington, 100 Wis. 441 (1898).

4 Wiser *v.* Lawler, 189 U. S. 260 (1903).

he induces to sell property to the corporation, a secret profit having been taken by him.[1] Where in a contract between a number of manufacturers and bankers as promoters for the organization of a corporation to take over the plants, the bankers secretly gave a larger price to some of the vendors than was specified in the agreement, one of the vendors who did not receive such secret price may file a bill for an accounting of the secret profits, and may join as parties defendant the corporation, and the parties taking the secret profit, and the promoters.[2] Where a holding company turns the control for a number of years over to a person controlling competing companies, and

1 Promoters who cause some thirty-nine owners of paper mills to turn their property into a single corporation in exchange for bonds and stock of the latter are bound to disclose to such property owners the profit made by themselves as promoters. Promoters are entitled to a reasonable sum for their services and expenses, but are not entitled to a large profit which they realize without the knowledge of the parties "who represented the substantial interests in the new corporation," being the parties whom the promoters induced to sell their properties to the corporation in exchange for bonds and stock. But even though a large number of owners of paper mills are induced to turn their property into a single corporation in exchange for bonds and stock of the latter, and the promoters secretly receive a large quantity of additional profit, and even though the total amount of bonds and stock issued is about twice the price actually paid to the owners for the properties, yet this does not invalidate the mortgage securing the bonds, and the remedy of the parties who so turned in their properties is against the promoters and not in defense of a suit to foreclose the mortgage. Dickerman *v.* Northern T. Co., 176 U. S. 181 (1900). A contract between the owner of property and a promoter, by which the former agrees to sell his property to a corporation to be formed by the latter, with a specified capital stock, cannot, a year after the transaction has been carried out, be made the basis of a suit in equity to compel the promoter to cancel excessive stock which was issued to the promoter, there being no allegation that the promoter still had the stock. The remedy of the vendor is at law. Even though several vendors to the corporation had a similar claim, yet one of them cannot file such a bill in equity in behalf of himself and others. Brehm *v.* Sperry, 92 Md. 378 (1901). The vendors of a mine to a corporation, the title not to pass until full payment, are not estopped from reclaiming possession, even though they knew that the vendee had assigned his interest to a corporation and stock of the corporation sold to the public. Wiser *v.* Lawler, 7 Ariz. 163 (1900); aff'd, 189 U. S. 260. Where a promoter induces an owner of timber land to convey it to a corporation for stock, one-quarter to go to the owner and three-quarters to the promoter, for which the promoter pays nothing, the owner may cause the whole transaction to be set aside. Cranor Co. *v.* Miller, 147 Ala. 268 (1906).

2 Shutts *v.* United, etc. Co., 67 N. J. Eq. 225 (1904). One of the vendors who was secretly to have a higher price than the others may recover the higher price, even though he may possibly be under legal obligation to divide it with the other vendors. Boice *v.* Jones, 106 N. Y. App. Div. 547 (1905). See also § 320, *supra*.

such person causes contracts to be made between the various companies and then sells his own companies at a large profit, the holding company may compel him to divide the profit with it, it appearing that all the transactions were to secure such profit and the profit was due to all the companies being so united. If there is no other basis of division, the profits will be divided half to each.[1]

The subscriber for stock may sue the directors for fraudulent representations if they knew that the promoter was secretly receiving large illegal profits.[2] Bondholders cannot complain of promoters in the same way that the corporation may.[3] Where the court authorizes the receiver to sue promoters for secret profits, the proceeds of the suit to belong to the creditors who agree to pay the expenses, costs, etc., a creditor who delays taking part until it is evident that a large sum will be recovered, will not be allowed to come into such suit.[4]

Under the English statute prohibiting commissions for underwriting, a plan by which a company sells its property to an individual and he agrees to organize a new company to take over the property and pay him a profit is illegal.[5] A sale of the assets at foreclosure sale, and purchase thereof by a reorganized company, does not carry a cause of action against promoters for fraud.[6]

A plaintiff may, upon the trial, be compelled to elect whether he sues to hold the promoters liable for fraud, or whether he sues in behalf of all stockholders and for the benefit of the corporation.[7]

1 Bay State, etc. Co. *v.* Rogers, 147 Fed. Rep. 557 (1906).

2 Persons induced to subscribe by a prospectus stating that a certain price was paid for a business, when in fact a large part of that price went as a bonus to promoters, may sue the directors for fraudulent misrepresentations. Capel *v.* Sim's, etc. Co., 58 L. T. Rep. 807 (1888). Where a promoter induces a person to subscribe and pay for stock by representing that property conveyed by the promoter to the company cost the promoter $20,000, when in fact it cost him $14,000, the subscriber may sue the promoter for damages for false representations. Teachout *v.* Van Hoesen, 76 Iowa, 113 (1888). See also ch. XX, *supra*. *Cf.* Glasier *v.* Rolls, L. R. 42 Ch. D. 436 (1889), where merely deceit was involved.

3 Banque, etc. *v.* Brown, 34 Fed. Rep. 162, 196 (1888). *Cf.* §§ 42, 43, *supra*, and § 735, *infra*. A receiver will not be directed to hold promoters liable until after the visible assets have been exhausted. Land, etc. Co. *v.* Asphalt Co., 121 Fed. Rep. 587 (1902).

4 McEwen *v.* Harriman, etc. Co., 138 Fed. Rep. 797 (1905).

5 Booth *v.* New Afrikander, etc. Co., 87 L. T. Rep. 509 (1902).

6 Central T. Co. *v.* East Tennessee, etc. Co., 116 Fed. Rep. 743 (1902).

7 Brewster *v.* Hatch, 122 N. Y. 349 (1890). A suit by a stockholder against a promoter in behalf of the corporation, to require him to pay for his stock, and also to recover damages for false representations inducing the plaintiff to purchase stock, and also to enjoin a proposed sale of

A compromise and settlement of suits between promoters and the corporation will be upheld by the court.[1]

A provision in a contract of subscription to the stock of the company whereby the subscriber waives notice of all contracts between the promoters and the company is not binding on the stockholders, if such waiver is tricky and fraudulent.[2] A secretary is not liable as a promoter even though he accepts a gift from the promoter.[3]

§ 652. *Sales of property by corporate officers to the corporation.*— It is well said in the case of Michoud *v.* Girod [4] that a person cannot legally purchase on his own account that which his duty or trust requires him to sell on account of another, nor purchase on account of another that which he sells on his own account. He is not allowed to unite the two opposite characters of buyer and seller. Especially is this the rule with corporate directors.[5] If they make sales to the corporation they may be compelled to pay over to the corporation the profit realized by such sales,[6] or the corporation may

plaintiff's stock, in order to pay an assessment, is multifarious. Pietsch *v.* Krause, 116 Wis. 344 (1903).

1 Coburn *v.* Cedar Valley, etc. Co., 138 U. S. 196 (1891). Where a corporation brought suit against a promoter for fraud which suit failed, and a contract was then made by which all the stockholders were given an opportunity to sell their stock to the promoter, and the board of directors ratified the contract and agreed to stop all litigation, a dissenting stockholder cannot have the contract set aside for fraud, even though by the contract the president is paid for his services. Hallenborg *v.* Cobre, etc. Co., 200 U. S. 239 (1906).

2 Greenwood *v.* Leather, etc. Co. Ltd., [1900] 1 Ch. 421. A statement in a prospectus that there are various contracts of the ordinary trade character, and that subscribers are bound to take notice of them, is not a waiver of notice of such contracts on the part of subscribers, under the English statutes. Watts *v.* Bucknall, [1903] 1 Ch. 766. See also § 160, *supra*.

3 *Re* Sale, etc. Co., 78 L. T. Rep. 368 (1898).

4 4 How. 503 (1846).

5 Quoted and approved in Stanley *v.* Luse, 36 Oreg. 25, 32 (1899).

6 Where the directors buy property for $2,500 and sell it to the company for $8,000, they can collect only $2,500 from the corporation, although the corporation has sold the land for $17,000. Higgins *v.* Lansingh, 154 Ill. 301 (1895). Directors who purchase land in the name of one of them and then cause the corporation to purchase it at an advance, the real price being concealed, may be compelled to pay over their profit to the corporation. Spaulding *v.* North Milwaukee, etc. Co., 106 Wis. 481 (1900); Albion Steel, etc. Co. *v.* Martin, L. R. 1 Ch. D. 580 (1875), holding the directors liable to refund profits on contract made subsequent to incorporation, but not on those made previous to incorporation; Dunne *v.* English, L. R. 18 Eq. 524 (1874), where two brokers, having agreed to divide the profits on a mine to be bought by one and sold by the other the former compelled the latter to divide a secret profit which the latter had obtained; Benson *v.* Heathorn, 1 Y. & C. (Ch.) 326 (1842), § 650, *supra*, and other cases therein. Concerning the right of the corpora-

refuse altogether to complete the contract.[1] Where a director dominates the board and induces the board to purchase worthless securities of other companies in which he is interested, and he thereby makes a large individual profit, he may be compelled by a receiver of the corporation to account for his profits and it is immaterial whether he did or did not vote therefor as a director.[2] Where the company purchases at an excessive price real estate in which the

tion to confirm the sale and sue the director at law or in equity for the profit made by him, see "The remedial rights of corporations against their directors," by Judge Fenn, 3 Yale L. J. 111. See also § 660, *infra*. Where a director sells property to the corporation the presumption against him is that it is fraudulent, but there is not the same presumption against the other directors who voted for it. In a stockholder's suit to set the sale aside, the court cannot render a judgment against the directors for the difference between the value of the property and the price paid, unless fraud is proved. Polhemus *v.* Polhemus, 114 N. Y. App. Div. 781 (1906). Where the promoters are directors and cause the board to buy property from them at a large profit, which was not divulged, they may be held liable for such profit. Shawnee, etc. Co. *v.* Miller, Ohio Circuits (1903), p. 198.

1 Coleman *v.* Second Ave. R. R., 38 N. Y. 201 (1868). A contract by a corporation to buy land of a director is not enforceable by the latter where it was authorized by only three out of five directors, and two of those three were interested in the contract. Hill *v.* Rich Hill, etc. Co., 119 Mo. 9 (1893). *Cf. Re* Cape Breton Co., L. R. 26 Ch. D. 221 (1884); aff'd, 29 Ch. D. 795, where the court declined to hold a director responsible for profits made by a sale of property from himself to the company, and declined to rescind the sale, since the corporation could not restore the property. Where the corporation is insolvent, a director cannot turn in his property in payment of his debt due to the corporation. White, etc. Co. *v.* Pettes, etc. Co., 30 Fed. Rep. 864 (1887). A purchaser of corporate assets at a receiver's sale cannot claim a leasehold which the president holds to premises which were used by the corporation. Crooked Lake Nav. Co. *v.* Keuka Nav. Co., 37 Hun, 9 (1885). Directors cannot purchase machinery and then sell it to the company at an advance. Redmond *v.* Dickerson, 9 N. J. Eq. 507 (1853). In Great Luxembourg Ry. *v.* Magnay, 25 Beav. 586 (1858), where the director purchased for the corporation property secretly owned by himself, the court refused to interfere after the corporation had resold the property without loss. Under the above principle of law the court refused to enforce a contract by a director to furnish railway chairs to his corporation. Aberdeen Ry. *v.* Blakie, 1 Macq. 461 (1854). And in Flanagan *v.* Great Western Ry., L. R. 7 Eq. 116 (1868), the court refused to enforce a corporate agreement to lease property to a director. A stockholder's bill does not lie to enjoin an execution sale of the corporate franchise and property on a judgment obtained against the corporation by a director for property sold to it by him, there being no actual fraud, nor proof of directorship at the time of the sale. Ward *v.* Salem St. Ry., 108 Mass. 332 (1871). School directors may be enjoined from selling their property to the district. Witmer's Appeal, 15 Atl. Rep. 428 (Pa. 1888). See 117 N. W. Rep. 300.

2 Pepper *v.* Addicks, 153 Fed. Rep. 383 (1907).

directors are personally interested, they may be compelled to repay the excess with interest or take the property at cost; otherwise the property should be sold and they be held liable for the difference between the price and the price originally paid with interest.[1] Generally the director has purchased the property for the express purpose of selling it to the corporation. When such is the case the company may ratify and confirm the transaction, or it may keep the property and recover from the director the profit realized by him, or the company may repudiate the whole transaction, return the property, and recover back the purchase money.[2] But where the director already

1 Klein *v.* Independent, etc. Assoc., 83 N. E. Rep. 434 (Ill. 1907).

2 Parker *v.* Nickerson, 112 Mass. 195 (1873), where the directors were held liable for the profit on a price paid by the corporation for a boat purchased from another corporation, in which the directors were also the directors and sole stockholders. They were held liable to refund all profit above the cost of the boat to the vendor corporation. A receiver may cause to be set aside a purchase of land by the corporation from the wife of the president, which cost her $450 and which she sold to the corporation for $3,000 by means of the influence of her husband. Voorhees *v.* Nixon, 66 Atl. Rep. 192 (N. J. 1907). If the corporation has made improvements on land purchased from the director, it cannot compel him to take the land and pay it the price paid him and also the cost of the improvements. Paine *v.* Irwin, 16 Hun, 390 (1878). Where the corporation secretly agrees to give a subscriber extra stock if he will subscribe for a certain amount, and he subscribes and intends that his subscription shall be used to induce others to subscribe without knowledge of the secret gift, and they do subscribe, he cannot receive from the corporation such extra stock. The contract is void as against public policy. Nickerson *v.* English, 142 Mass. 267 (1886). A sale of mortgaged property, under a power to sell, by the mortgagee, to a newly-formed corporation in which he holds stock, does not invalidate the sale, though he could not sell to himself. Farrar *v.* Farrars, L. R. 40 Ch. D. 395 (1888). The president of a stock-yard company, who takes a lease of property in his own name, and then assigns the lease to the company on a guaranty of a large stockholder in the corporation that said president shall have one-fifth of the profits from the use of the property, cannot enforce that guaranty. Robinson *v.* Jewett, 14 N. Y. St. Rep. 223; aff'd, 116 N. Y. 40 (1889). A director cannot be a partner with the corporation in sharing profits. Rudd *v.* Robinson, 54 Hun, 339 (1889), rev'd on another point in 126 N. Y. 113. It is illegal for directors to buy from themselves lots for the corporation. Landis *v.* Sea Isle, etc. Co., 53 N. J. Eq. 654 (1895). Where a person obtains an option on land at $2,500 an acre, and then with other persons forms a corporation and sells it to the corporation at $2,700 an acre, payable partly in cash and partly by mortgage, the profit being concealed from the other subscribers to the stock and the promoter being a director at the time of the purchase, he and those who co-operated with him are liable to return to the corporation such profit, but such liability cannot be enforced in a suit against the sureties on his bond as treasurer. First, etc. Co. *v.* Hildebrand, 103 Wis. 530 (1899).

owns the property in good faith, the court, while it may set the sale aside, cannot compel the director to take a less price than that already agreed upon.[1] A corporation may purchase its own stock, and if it purchases such stock from a director the sale may be valid, but the price is not binding and the director will be allowed only what the stock is reasonably worth. Even though the stockholders for two years, with full knowledge of the facts, do not object, the corporation may defend against the agreed price, but may be obliged to pay what the stock was worth.[2] A person who sells property to a director to be paid for partly in the stock of a corporation cannot afterwards object that the director was disqualified from selling the property to the corporaton.[3] Where the president of a railroad corporation secretly owns land in the name of another person, and causes the corporation to purchase it and issue stock and bonds in payment, without disclosing his interest in the land, he is liable to the corporation for the difference between the actual market value of the stock and bonds and the actual value of the land.[4]

Where, however, the directors sell to the corporation at a profit to themselves, but with a full and fair disclosure thereof to the stockholders, and without participating in the acceptance of the property by the corporation, and no objection is made, the transaction cannot be impeached afterwards.[5] In most cases a disclosure

1 A director who owns the assets of a business, which is cognate to the business of his corporation, may sell the same to his corporation at an advanced price, and he need not disclose what he paid for it, and a stockholder cannot compel the director to pay to the corporation the profit he has made. The sale may be rescinded, but the court has no power to force the director to sell at a lower price. Burland, etc. *v.* Earle, etc. [1902] A. C. 83. *Cf.* Oliver *v.* Rahway, etc. Co., 64 N. J. Eq. 596 (1903).

2 Oliver *v.* Rahway, etc. Co., 64 N. J. Eq. 596 (1903). A going corporation may purchase stock owned by its president in order to terminate his contract of employment and obtain his resignation as president, where the contract is a fair one and another party had agreed to purchase such stock from the corporation at once and subscribe for further capital stock. Joseph *v.* Raff, 82 N. Y. App. Div. 47 (1903); aff'd, 176 N. Y. 611.

3 Mackey *v.* Burns, 16 Col. App. 6 (1901). It is not for the purchaser of land from a company to raise the objection that the company purchased it from one of its directors. Farnham Brewery Co. *v.* Hunt, 68 L. T. Rep. 440 (1893).

4 Danville, etc. R. R. *v.* Kase, 39 Atl. Rep. 301 (Pa. 1898). Where a director through his wife sells property to the corporation for an exorbitant price in stock and mortgage bonds, and the hotel built thereon fails, the court may reduce the mortgage by the amount of profit made by the director. Voorhees *v.* Malott, 69 Atl. Rep. 643 (N. J. 1908).

5 Where a director sells a plant to the corporation, and the sale is ratified unanimously at the stockholders' meeting, a stockholder cannot subsequently cause it to be set aside, espe-

to the board of directors alone is insufficient. Acquiescence or ratification by the stockholders is necessary.[1]

cially where a great majority of the stockholders still object to its being set aside. The terms of the sale were held by the court to be reasonable. Barr *v.* Pittsburgh Plate-Glass Co., 57 Fed. Rep. 86 (1893). A director may sell property to the corporation if the price is fair and the transaction is open. Figge *v.* Bergenthal, 130 Wis. 594 (1906), holding also that a corporation engaged in buying whisky may buy from one of its directors, the transaction being entirely fair, and the purchase is neither void nor voidable by the corporation. A stockholder cannot maintain a suit to set aside a sale of property by a director to the corporation, unless he proves that the price was excessive. Polhemus *v.* Polhemus, 43 N. Y. Misc. Rep. 141 (1904), holding also that no request is necessary for a suit to set aside a sale of property by a director to the corporation where the directors authorized the purchase. Even though a director sells property to the company and overvalues it, yet if the company caused an independent valuation to be made, and for three years acquiesced in the purchase, it cannot then complain. Stetson *v.* Northern Inv. Co., 104 Iowa, 593 (1898); Chesterfield, etc. Co. *v.* Black, 37 L. T. Rep. 740 (1877), where the court refused to hold liable for profits a director and a promoter where they had purchased a mine before incorporation and had sold it to the company at a profit, it being clearly stated to the company that a profit was being made, but the amount of that profit not being divulged; Battelle *v.* Northwestern, etc. Co., 37 Minn. 89 (1887). Even though directors sell property to the corporation in exchange for treasury stock which is issued to them at twelve and a half cents on a dollar, yet, if they offer to allow all the stockholders to purchase their proportion of the stock at that price, and they all take the stock excepting one director, the latter cannot object to the transaction where he had himself moved that the stock be so issued. Mackey *v.* Burns, 16 Col. App. 6 (1901). Even though all the directors of a corporation organize another company to buy out the first-named company, and they are directors in the second company also,

[1] A director who assigns a contract to the company at a profit of $40,000 to himself must refund his profit to the company, but will be allowed such sums as he paid out for commissions. It is immaterial that all of the original directors knew all of the facts and assented to the transaction. *Re* George Newman Co., [1895] 1 Ch. 674. The vice-president and manager may lease property to the corporation, and may execute the lease for the corporation, where the lease is fair and the other officers approve. Louisville, etc. Ry. *v.* Carson, 151 Ill. 444 (1894). The fact that the president of an iron manufacturing company purchases iron for the company through his firm, which takes a commission, does not render the contract invalid unless it was actually unfair and fraudulent, there being no concealment of the facts, and especially where there was evidence that the contract was reported to and discussed by the board of directors. Salem, etc. Co. *v.* Lake Superior, etc. Mines, 112 Fed. Rep. 239 (1901). A purchaser of property in which a director is interested is not necessarily illegal, although such director voted for the same, it being shown that all the other directors also voted for such purchase. Porter *v.* Lassen County, etc. Co., 127 Cal. 261 (1899). *Cf.* §§ 649, 662, and ch. XLIV.

However, it is within the power of the majority of the stockholders to ratify and confirm such a transaction where there is no *actual* fraud involved. The fraud is not an *actual* one if the director sold at a fair price and did not use his position to induce the corporation to purchase. Such a sale, however, is always a constructive fraud, and unless legally ratified is voidable at the option of any director or stockholder.[1] The proper rule is that such a transaction should be approved by a majority in interest of the stockholders, at a meeting called for that purpose, and that even then a court of equity has power to set the transaction aside, at the instance of a dissenting stockholder, if it is unfair, and if he is prompt, in his application to the court.

There is some difficulty in determining what will constitute a confirmation of such a transaction. If a majority of the directors and of the stockholders, without counting the votes controlled by the director who is interested, favor a confirmation of the transaction, a dissenting stockholder cannot bring suit to set it aside unless he can show the existence of some fraud other than the mere fact that the vendor was a director when he made the sale. If however, a majority of the stockholders, excluding the votes owned directly or indirectly by the guilty parties, are in favor of bringing the directors to an accounting, greater difficulty arises. The weight of authority holds that the votes of the director as a stock-

yet, if all the facts are fully stated, the sale is legal, and the new company cannot repudiate the sale on that ground. Even if the promoters stated that a certain part of the plant was in full operation, yet, if there was no fraud and that part of the plant was put in operation soon afterwards, the court, instead of setting aside the sale, may give damages for the delay. Misrepresentations, although not fraudulent, are sufficient ground for relief. The fact that the directors are not independent, but represent the vendor, is immaterial if that fact is made known to the parties. Lagunas, etc. Co. Ltd. *v.* Lagunas Syndicate, Ltd., [1899] 2 Ch. 392. It is no defense to a subscription that the insolvency of the company is due to debts incurred in buying land from the directors, such contract being voidable instead of void and being subject to the ratification of the majority of the stockholders. Urner *v.* Sollenberger, 89 Md. 316 (1899). In St. Louis, etc. R. R. *v.* Tiernan, 37 Kan. 606 (1887), it is held that a sale, by the directors, of a roadbed to the corporation is legal where all the facts are known to all except a few nominal holders of stock. But a partial disclosure is insufficient. Imperial, etc. Assoc. *v.* Coleman, L. R. 6 H. L. 189 (1873), rev'g L. R. 6 Ch. App. 558. Where the president, by fraudulent representations, induces the corporation to buy property from himself, a minority stockholder may cause the purchase to be set aside, even though all had consented to the purchase. Gerry *v.* Bismarck Bank, 19 Mont. 191 (1897). See also ch. XLIV, *infra.*

[1] Quoted and approved in Stanley *v.* Luse, 36 Or. 25, 33 (1899).

holder are to be counted. If, however, *actual* fraud is involved, this question is immaterial, since no majority, however large, can ratify actual fraud.[1] Even though a lessor railroad and a lessee railroad have directors in common and they compromise as to which company shall have the benefit of a saving in interest by the refunding of the bonds of the lessor, yet if a majority of the stockholders of the lessor ratify the agreement, the minority cannot complain, unless it is shown that the ratification was obtained by fraud or concealment.[2]

§ 653. *Sales of property by the corporation to corporate officers, and purchases by corporate officers at foreclosure and execution sales.*—One of the most frequent frauds perpetrated upon a corporation and its stockholders is where one or more of the directors purchase property from the corporation directly or indirectly, or participate in the profits of such a purchase. The law is well settled that a director's purchase of property from the corporation is voidable at the option of the corporation, even though the directors paid fully as much as the property is worth.[3] This principle of law was fully established by the cases of Cumberland Coal Company against Sherman [4] and Hoffman Steam Coal Company against Cumberland Coal and Iron Company.[5] There are exceptions, how-

1 See § 662, *infra.*

2 Continental Ins. Co. *v.* New York, etc. R. R., 187 N. Y. 225 (1907).

3 Quoted and approved in Morgan *v.* King, 27 Colo. 539, 555 (1900). Mosher *v.* Sinnott, 20 Colo. App. 454 (1905), and Miller *v.* Brown, 95 N. W. Rep. 797 (Neb. 1901).

4 30 Barb. 553 (1859). The court also held that the purchase by the directors could be ratified only by the unanimous vote of all the stockholders, and that a ratification by proxy would not bind the stockholder himself. See also Cumberland Coal Co. *v.* Sherman, 20 Md. 117 (1863).

5 16 Md. 456 (1860), where a minority of the directors purchased part of the corporate property at an undervaluation and then sold it to the Hoffman Company, in which they were large stockholders. The court held that the latter was chargeable with notice of the voidable act. This case and the preceding one grew out of the same transaction. Directors purchasing property from the corporation may be held liable for the difference between the cost of the property and the price of its sale to the directors plus a profit, which the court in this case made twenty-five per cent. of the cost, that being the full value of the property sold. Barry *v.* Moeller, 68 N. J. Eq. 483 (1904). A vendor's claim upon logs which are to be cut into lumber cannot be defeated by the president of a manufacturing company selling the same to himself. Frellsen *v.* Strader, etc. Co., 110 La. 877 (1903). A deed by a corporation to one of the directors, whose vote is necessary to carry the resolution is voidable, without proof of any actual fraud. Mobile, etc. Co. *v.* Gass, 142 Ala. 520 (1905). A sale of all the property to one director is not void, but will not be upheld unless fairly made at a full price and for the best interests of the company. Union T. Co., etc. *v.* Carter, 139 Fed. Rep. 717 (1905). A sale of all the

ever, to this rule, especially where the corporation is insolvent, or

assets to the managing director may be enjoined until the stockholders have passed upon it. Ellis *v.* Norwich, etc. Co., 8 Ont. W. R. (Can.) 25 (1906). See also Buell *v.* Buckingham, 16 Iowa, 284 (1864), holding that the purchase is voidable, but not void. It may be avoided, however, without proving any actual fraud on the part of the director or injury to the corporation. It is fraudulent *per se.* A sale of the corporate property to one of the directors is a constructive fraud, even if not an actual fraud, and may be set aside at the instance of a minority stockholder. Stanley *v.* Luse, 36 Or. 25 (1899). A sale of valuable mining stock by a bank to some of the directors is illegal, especially where the stock paid for itself within six years. Morgan *v.* King, 27 Colo. 539 (1900). Where the manager of a co-operative grain elevator company sells the grain to himself he must account for the profits, even though the fixed price of the company for handling the grain has been duly paid. Goodhue, etc. Co. *v.* Davis, 81 Minn. 210 (1900). Where trustees hold stock as security for various debts of various parties, the stock to be sold if the debts are not paid, it is illegal for one of the trustees to resign and for the remaining trustees to sell the stock in a way calculated not to bring its full value, and for the resigning trustee to purchase the same at a very low price for the benefit of himself and the other trustees. The sale will be set aside. Jenkins *v.* Hammerschlag, 38 N. Y. App. Div. 209 (1899). Where a director has been director for three years and then resigns and purchases property from the corporation and then is re-elected, the purchase is the same as though he had been director during the whole period, and he may be held liable for the difference between the price paid by him and the actual value of the property. Millsaps *v.* Chapman, 76 Miss. 942 (1899). Where the directors of a corporation sell out its assets in consideration of a person paying the debts, and the latter organizes a new corporation and gives to the old directors stock in the new corporation equal to their stock in the old, but does not give anything to the other stockholders of the old corporation, the directors and the persons so purchasing the assets are liable to the old corporation for the value of the stock so given to the directors. A pledgee of the stock of the old corporation may bring suit for that purpose. Smith *v.* Smith, etc. Co., 125 Mich. 234 (1900). A stockholder may file a bill to set aside a transfer of real estate of the corporation to a director without consideration. Mobile, etc. Co. *v.* Gass, 129 Ala. 214 (1901). Even though after dissolution two of the three directors convey corporate land to a third director, and he sells it at a profit, yet if he is responsible, he alone is liable to a stockholder for the latter's proportion of such profit. Noe *v.* Headley, 118 Mo. App. 722 (1906). Where without the knowledge of the board of directors the president purchases from a corporation notes which it owns and endorses the corporate name thereon, the corporation cannot be held liable on such endorsement. Smith *v.* Pacific, etc. Works, 145 Cal. 352 (1904). Where a corporation gives rebates to its customers the president may take a similar rebate on goods purchased by him from the corporation. Consolidated, etc. Co. *v.* Wisner, 103 N. Y. App. Div. 453 (1905).

A director may be the trustee in a trust deed executed by his corporation. Bassett *v.* Monte Christo, etc. Co., 15 Nev. 293 (1880). Although a company is insolvent, a lease of its property to a director on fair terms is legal, especially where for many years there is no complaint. Pneu-

the sale is a public sale.[1] Corporate creditors cannot cause to be set aside an old sale of land by the corporation to the directors through

matic Gas Co. *v.* Berry, 113 U. S. 322 (1885). A sale of the property of an insolvent foreign corporation, for an insufficient consideration, by the executive committee to two of the trustees, is voidable. Third Nat. Bank *v.* Elliott, 42 Hun, 121 (1886); aff'd, 114 N. Y. 622. See also Reilly *v.* Oglebay, 25 W. Va. 36 (1884). Where a sale of land is made by the corporation to a director, in order to raise funds to pay debts due to mismanagement, the corporation itself may subsequently cause the sale to be set aside. Crescent City, etc. Co. *v.* Flanner, 44 La. Ann. 22 (1892). Where a director buys land of the corporation at one-tenth of its value, a stockholder may cause the transaction to be set aside. Woodroof *v.* Howes, 88 Cal. 184 (1891). Where a contract is made by a corporation to sell coal to one of its directors, and the corporation does not fulfill, the director cannot recover damages where the money for the coal was to pay a personal debt of the president, and the director has relieved the corporation from liability. Main Jellico, etc. Co. *v.* Lotspeich, 20 S. W. Rep. 377 (Ky. 1892). A receiver may replevy corporate personalty fraudulently sold to a director. Mish *v.* Main, 81 Md. 36 (1895). Where a board of directors, consisting of six, sell corporate property to two of them, the sale being authorized at a meeting at which five were present, including the two, the remaining three do not constitute a quorum and the sale is illegal. Leary *v.* Interstate, etc. Bank, 63 S. W. Rep. 149 (Tex. 1901). As to whether the director of a bank who, with the consent of the other directors, takes a part of the profit realized by the purchaser of land from the bank, may be compelled by a stockholder to repay that amount to the bank, although the purchaser has not yet paid the amount to the director see Tenison *v.* Patton, 95 Tex. 284 (1901). A deed of the corporate assets to the directors personally will be set aside at the instance of a stockholder, even though the consideration was adequate and full and no actual injury was done to the corporation. Barnes *v.* Lynch, 9 Okl. 156 (1899).

1 A corporation having a leasehold with the privilege of purchasing the fee may sell the latter to a director where the company has neither the money nor credit to exercise such privilege. Hannerty *v.* Standard Theater Co., 109 Mo. 297 (1892). And a sale of an insolvent corporation's property to a director for its full value is upheld when *bona fide* and advantageous to all. Ashhurst's Appeal, 60 Pa. St. 290 (1869). A sale of corporate bonds to a syndicate of which three of the directors are members is valid, the price being fair. Du Pont *v.* Northern Pac. R. R., 18 Fed. Rep. 467 (1883). Where an insolvent corporation sells its assets for bonds and stock in another corporation, it may sell such bonds and stock to one of its directors at a fair price, no actual fraud being involved. Graham *v.* Carr, 130 N. C. 271 (1902). A solvent corporation may sell a note to its president. Blake *v.* Ray, 110 Ky. 705 (1901). Where the stockholders of an insolvent corporation have authorized the directors to sell the property and public sale is thereupon made, the court will not set the sale aside, although directors who were creditors of the corporation purchased at such sale at a low figure. Patterson *v.* Portland, etc. Works, 35 Or. 96 (1899). Where the trustee sells at public sale, a corporation which owns the debt may purchase, especially where the trust agreement allowed the holder of the debt to purchase. The purchase is not invalid, even though the trustees were stockholders and directors in the corporation which purchased.

"dummies," even though the sale was at an inadequate price.[1] Where, however, the director and treasurer of an insolvent corporation promises its creditors that he will pay its debts if he is allowed to acquire the property at a judicial sale for less than its real value, they may enforce such promise.[2]

Where all the stockholders and directors assent to a lease of corporate property to a director, a receiver appointed at the instance of a foreclosing mortgagee cannot have the lease declared void, it not being shown that he represents other creditors or is vested with equities to maintain the suit.[3] The proper rule is that such a

Herbert Kraft Co. *v.* Bryan, 140 Cal. 73 (1903). Even though a railroad which owns stock in another railroad sells such stock to a copartnership in which one of the directors is a partner, yet the court will not enjoin the sale if it is a fair one. Ryan *v.* Williams, 100 Fed. Rep. 172 (1900). A title is not bad merely because in the chain of title was a deed from a corporation to its president. Jones *v.* Hanna, 24 Tex. Civ. App. 550 (1900). A sale of property to a syndicate, of which a director is a member, will not be set aside when the full value was received by the corporation, and the sale was made in order to protect the parties who were sureties for the price to be paid by the corporation for the property. Hill *v.* Nisbet, 100 Ind. 341 (1884). Where all the assets of a corporation are transferred for stock of another corporation and such stock is sold by trustees of the former to pay its debts, the fact that one of the trustees subsequently buys a portion of the stock does not render him liable for such debts. Wing *v.* Charleroi, etc. Co., 112 Fed. Rep. 817 (1902).

Perry on Trusts (3d ed.), § 428, states the rule as follows: "A trustee, executor, or assignee cannot buy up a debt or incumbrance to which the trust estate is liable, for less than is actually due thereon, and make a profit to himself; but such purchase inures for the benefit of the trust estate, and the creditors, legatees, and *cestuis que trust* shall have all the advantage of such purchase. But if a trustee buys up an outstanding debt for the benefit of the *cestuis que trust*, and they refuse to take it or to pay the purchase-money, they cannot afterwards, when the purchase turns out to be beneficial, claim the benefit for themselves. Nor can the trustee make any contract with the *cestui que trust* for any benefit, or for the trust property, nor can he accept a gift from the *cestui que trust*. The better opinion, however, is, that a trustee may purchase of the *cestui que trust*, or accept a benefit from him, but the transaction must be beyond suspicion; and the burden is on the trustee to vindicate the bargain or gift from any shadow of suspicion, and to show that it was perfectly fair and reasonable in every respect, and courts will scrutinize the transaction with great severity. So, if a trustee buys the trust property at private sale or public auction, he takes it subject to the right of the *cestui que trust* to have the sale set aside, or to claim all the benefits and profits for the sale himself."

1 Graham *v.* Railroad Co., 102 U. S. 148 (1880). A deed from the corporation to the president's firm is not void. It is voidable by the corporation or its stockholders only. Fudickar *v.* East, etc. Dist., 109 Cal. 29 (1895).

2 Lilienthal *v.* Betz, 185 N. Y. 153 (1906).

3 Tyler *v.* Hamilton, 62 Fed. Rep. 187 (1894).

transaction should be approved by a majority in interest of the stockholders, at a meeting called for that purpose, and that even then a court of equity has power to set the transaction aside, at the instance of a dissenting stockholder, if it is unfair, and if he is prompt in his application to the court.[1] Leases to a director "will be sustained if they are fair, and have been entered into in good faith, and no advantage has been taken of the fiduciary relation."[2] More difficult questions arise in regard to a director's purchases of corporate property at foreclosure sale thereof. The old rule was that he could not be a purchaser, either directly or indirectly, at the foreclosure sale. This was the rule whether the foreclosure was instituted by those interested in the corporation or by third parties. If the director purchased at such a foreclosure sale he held the property as trustee for the benefit of the corporation and the stockholders. Upon being repaid the price he gave therefor, he was bound to make over the property to the corporation.[3] The supreme court of

1 Where a corporation sells all its property to its president at a price less than a minority stockholder is willing to pay, he may have the sale set aside, even though a majority in interest of the stockholders have approved it, the decree being that the sale shall be void only in case such higher price is paid. Wheeler *v.* Abilene, etc. Co., 159 Fed. Rep. 391 (1908).

2 Tyler *v.* Hamilton, 62 Fed. Rep. 187 (1894). Where the directors of an insolvent corporation lease the property to themselves, they must account to corporate creditors for the profits, but the creditors cannot claim material which the directors have purchased and manufactured by means of the property. Hutchinson *v.* Bidwell, 24 Oreg. 219 (1893). A corporation cannot hold the directors liable on stock which the corporation issued to them for services, being taken by the directors at five cents on the dollar in lieu of salary, where all the stockholders assented thereto, such stock so issued to them being treasury stock, that is, stock which was issued for property as full paid and then donated to the corporate treasury. The evidence showed that the stock represented a patent-right and was purely speculative and had no market value. Divine *v.* Universal, etc. Co., 38 S. W. Rep. 93 (Tenn. 1896). A lease to a director is not necessarily illegal, even though a stockholder objects thereto, where a majority of the stockholders have ratified the lease. The court refused, at the instance of a dissenting stockholder, to set aside such a lease, in the case of Nye *v.* Storer, 168 Mass. 53 (1897). Even though the board of directors have leased all the corporate property to a minority of the directors, yet the minority stockholders cannot have a receiver appointed unless it is shown that the lease was unfair, especially where one of the complaining stockholders has ratified the transaction. Farwell *v.* Babcock, 27 Tex. Civ. App. 162 (1901), a case involving a corporation owning 3,000,000 acres of land and 120,000 head of cattle valued at $10,000,000. See also §§ 649, 662, as to the effect of the transaction being fully stated to the stockholders and approved by a majority.

3 Harts *v.* Brown, 77 Ill. 226 (1875). To same effect, Hope *v.* Valley City Salt Co., 25 W. Va. 789 (1885), where the directors resold the property at

the United States, however, has held in regard to the president that if the foreclosure is not brought about by the president "in violation of his duties as an officer of the company, his official relations to the company prior to the foreclosure did not prevent him from bidding for the property or from being interested in its purchase," by another.[1]

three times its cost to himself. See also Jackson *v.* Ludeling, 21 Wall. 616, 625 (1874), where the directors were part of those who purchased at a foreclosure sale of the corporate property; also, Munson *v.* Syracuse, etc. Ry., 29 Hun, 76 (1883), where the directors purchased for the purpose of reorganizing the corporation; s. c., 103 N. Y. 58 (1886), where Munson was a director in an insolvent railroad corporation, and also a director in a corporation that wished to purchase said railroad, and in behalf of the latter company contracted to purchase the said railroad from the bondholders after the latter should purchase the same at a foreclosure sale. The court refused to enforce the contract; Raleigh *v.* Fitzpatrick, 43 N. J. Eq. 501 (1887), where the directors of a corporation owning the land subject to a mortgage allowed a foreclosure to be made, and then purchased at the sale. See Foster *v.* Oxford, etc. Ry., 13 C. B. 200 (1853). See also Allen *v.* Jackson, 122 Ill. 567 (1887), holding a director who had purchased corporate property at a foreclosure sale liable to former purchasers of that property from the corporation, subject to the mortgage. Where a director purchases property from an insolvent corporation, "it devolves on the directors to show that the transaction was made in good faith, and that the sale produced the full value of the property. If they fail to show these facts, creditors are entitled to compel them to account for the full value of the property." Wilkinson *v.* Bauerle, 41 N. J. Eq. 635 (1886); Jones, etc. Co. *v.* Arkansas, etc. Co., 38 Ark. 17 (1881), involving a scheme where a director purchased at a foreclosure sale and reorganized. A stockholder who did not come in caused the purchase to be set aside. See also Dennis *v.* Kennedy, 19 Barb. 517 (1854). Where the directors had purchased corporate property after its sale on a lien, and the purchase by them was held to be fraudulent, the passive connivance of a director renders him liable the same as though he participated. Weetjen *v.* Vibbard, 5 Hun, 265 (1875). A director who purchases the property at foreclosure sale is bound to turn the property over to the corporation on being repaid the price he paid therefor. Kroegher *v.* Calivada, etc. Co., 119 Fed. Rep. 641 (1902).

[1] McKittrick *v.* Arkansas Central Ry., 152 U. S. 473, 497 (1894). In Twin Lick Oil Co. *v.* Marbury, 91 U. S. 587 (1875), a director loaned money to the corporation, took bonds therefor, and had the bonds secured by a mortgage running to a third person as a trustee, and upon a sale by the trustee the director purchased for himself. Laches barred any remedy. Directors may purchase at a foreclosure sale, under some circumstances. Saltmarsh *v.* Spaulding, 147 Mass. 224 (1888). A director may own bonds and may purchase at the foreclosure sale. The sale is valid even though allowed by the directors from corrupt motives, and this was known to the purchasing trustee. At least the stockholders must offer to redeem before they can do anything. Harpending *v.* Munson, 91 N. Y. 650 (1883). The president of the company may purchase at the foreclosure sale. He does not thereby become a

Again, it has been held that where the directors find it necessary to extend the plant in order to meet competition, and the cost is greater than expected, and bonds are offered to the stockholders and not taken, and the directors loan money to the company on the bonds at par, and then on foreclosure buy in the property, their purchase will be upheld, there being no actual fraud in the transaction.[1] In Michigan it is held that as against a stockholder a director may purchase the property at foreclosure sale.[2] Judgment

trustee for the bondholders. Credit Co., etc. *v.* Arkansas Cent. R. R., 15 Fed. Rep. 46 (1882). Where all the capital stock is deposited with a bank as security for certain debts of the corporation and is sold under a decree of the court for the amount of such debts, the sale is valid, although the president of the bank purchased the stock at such sale, and although he had already purchased the debts so secured, it being shown that he had been one of the creditors from the beginning. Harrison *v.* Mulvane, 62 Kan. 454 (1901). A director in an insolvent corporation may purchase the property at the receiver's sale at public auction, but the court will carefully scrutinize the purchase. Janney *v.* Minneapolis, etc., 79 Minn. 488 (1900). A liquidating trustee of a national bank may purchase at the sale of the assets, notice of such sale having been given to all parties interested. Shappard *v.* Cage, 19 Tex. Civ. App. 206 (1898). A director who owns bonds may purchase the property at foreclosure sale. Rawlings *v.* New Memphis, etc. Co., 60 S. W. Rep. 206 (Tenn. 1900). Seven years' delay in complaining that the directors issued bonds to themselves for no consideration, and then foreclosed and bought the road in, is fatal. Burgess *v.* St. Louis County R. R., 99 Mo. 496 (1889). At a reorganization sale a director may purchase in behalf of a part of the stockholders, and the transaction will be upheld if the price is a fair one. Hayden *v.* Official, etc. Co., 42 Fed. Rep. 875 (1890). A director's purchase for the creditors and certain mortgage bondholders of the mortgaged property at a foreclosure sale cannot be set aside by a stockholder five years after the sale, where the road was sold for all it was worth, and was badly in debt, and required large expenditures, and there was no possible means of raising more money, and the stockholders knew of the condition of things, but made no effort to prevent a sale, and the director offered to allow the stockholders to come into a reorganization, and offered to resell the property for less than what he paid for it. This is the rule even though the property subsequently becomes very valuable. Osborne *v.* Monks, 21 S. W. Rep. 101 (Ky. 1893). An insurance company cannot refuse payment of a loss on the ground that the insurer was a director and had bought the corporate property at a foreclosure sale. Caraher *v.* Royal Ins. Co., 63 Hun, 82 (1892); aff'd, 136 N. Y. 645. As to the purchase of the property by the president and others on a foreclosure, with a view to reorganization, see also ch. LII, *infra*.

1 Foster *v.* Belcher's, etc. Co., 118 Mo. 238 (1893).

2 Lucas *v.* Friant, 111 Mich. 426 (1897). A director or a corporation in which a director is interested may purchase corporate property from trustees to whom an embarrassed corporation has conveyed the same to pay its debts, and return the remainder to such latter corporation, and especially is a stockholder estopped from complaining after four years' delay, with knowledge of the facts,

creditors cannot complain where, upon the foreclosure sale of the corporate property, the president purchases the property at its full value.[1] Where the directors are sureties on corporate notes secured by mortgage they may buy in the property at the foreclosure sale for their own protection.[2] There is a limit, however. Thus, where a director who practically controlled the board of directors caused all the earnings of the railroad to be used in improving the property, thereby preventing a payment of interest on the corporate indebtedness and bringing about a foreclosure of the mortgage, the director himself having purchased the bonds secured by the mortgage and having purchased the railroad at the foreclosure sale, the court held that the purchase at the foreclosure sale by the director was voidable. Upon repayment to him of the purchase price he was compelled to retransfer the property to the corporation, even though another foreclosure would be the result. Third persons who had purchased the road from him with notice stood in no other position than the director himself.[3] In Missouri it is held that where the

large improvements having been made and the value of the property having greatly increased. Kessler & Co. *v.* Ensley Co., 141 Fed. Rep. 130 (1905); aff'd 148 Fed. Rep. 1019.

1 Inglehart *v.* Thousand Island Hotel Co., 109 N. Y. 454 (1888). A corporate creditor cannot hold a director liable for a profit which he has made in purchasing a property at a foreclosure sale even though the corporation was the equitable mortgagor of such property. Ready *v.* Smith, 170 Mo. 163 (1902). A sale of property by an insolvent corporation to one of its directors is valid as against its creditors where a full consideration was paid therefor. Webb *v.* Rockefeller, 66 Kan. 160 (1903). A creditor of an insolvent corporation who causes its property to be sold under execution cannot complain that a director purchased at the sale at a low price. Potvin *v.* Denney Hotel Co., 26 Wash. 309 (1901). Where a director purchases the corporate assets at a mortgage sale for much less than their value, a creditor of the corporation may hold him liable for profits made by him. Fishel *v.* Goddard, 30 Col. 147 (1902). A creditor cannot complain that the corporation sold some of its property to two directors in consideration of their paying certain of the debts; neither can he claim that the transaction was not duly authorized by the board of directors or signed by the proper officers, where he has participated in the results of their action. Swentzel *v.* Franklin, etc. Co., 168 Mo. 272 (1902).

2 College, etc. Line *v.* Ide, 15 Tex. Civ. App. 273 (1897).

3 Covington, etc. R. R. *v.* Bowler, 9 Bush (Ky.), 468 (1872). In Kitchen *v.* St. Louis, etc. Ry., 69 Mo. 224 (1878), the court said: "Whatever is sufficient to put a person on inquiry is notice; that is, when a man has sufficient information to lead him to a fact, he shall be deemed cognizant of it." So also where a director agrees to redeem from an execution sale certain corporate property, on an understanding that he does it for the corporation, and his payment is to be a preferred corporate debt, the corporation may redeem long subsequently, even though the director had, after a time, treated the property as his own. Wasatch Min. Co. *v.* Jennings, 5 Utah, 243, 385 (1887). Where a cor-

wife of the president purchases property on the foreclosure of a mortgage, given by the corporation to secure a note which the president had endorsed and taken up, the sale is void and a purchaser at execution sale is entitled to the property.[1]

The same general rules apply to execution sales. A director is disqualified from purchasing corporate property sold under execution.[2] Where a director causes the property to be sold on an execution issued on his own debt, and buys in the property, he must allow other creditors to participate in the price paid at the execution sale.[3] A director, who is also secretary and treasurer and agent, and who purchases its property at sheriff's sale and pays the price by borrowing the money which he might have borrowed for

poration is liable to an officer on a debt, the officer may purchase at a foreclosure sale property upon which the corporation has a subsequent lien; may pay the prior lien out of the corporate funds; and may hold the title to secure the debt due him. Smith *v.* Lansing, 22 N. Y. 520 (1860).

1 Shields *v.* Hobart, 172 Mo. 521 (1903).

2 Hoyle *v.* Plattsburgh, etc. R. R., 54 N. Y. 314 (1873). Where the president and a director purchase the corporate property at an execution sale, and agree to convey it to the corporation upon repayment of the amount paid, the corporation may redeem it long subsequently upon payment and reimbursement for improvements made. Wasatch Min. Co. *v.* Jennings, 5 Utah, 243, 385 (1888). Where in a joint-stock company one member buys all the company's property at an execution sale, though he owes the company more than the price paid, the company is entitled to the property and an accounting lies. Bradbury *v.* Barnes, 19 Cal. 120 (1861). Where the director of an insolvent corporation buys its property at an execution sale to which he is not a party, he is liable to the corporation for the value of the property less the amount he paid for it. Tobin Canning Co. *v.* Fraser, 81 Tex. 407 (1891). The purchase of a boat at judicial sale, by the manager of the corporation owning such boat, for himself and other stockholders, may not cut off the maritime lien of another person. Crosby *v.* The Lillie, 42 Fed. Rep. 237 (1890). Where a director and treasurer buys corporate land at an execution sale brought about by himself, he cannot maintain an action of forcible entry and detainer against the company. Hoffman *v.* Reichert, 147 Ill. 274 (1893); aff'g, 31 Ill. App. 558. Where a director purchases for $8,400 property of the company sold on an execution on a judgment obtained by him against the company, and within a year sells the property for $23,000, he must pay over the profit to the company. *Re* Iron, etc. Mfg. Co., 19 Ont. Rep. (Can.) 113 (1889). Where the president turns over claims against the corporation to his wife, even for value, and the corporate property is sold out to her on judgments on the notes, although the corporation was doing a good business and in no danger, the court will set the transaction aside. Butler, etc. Co. *v.* Robbins, 151 Ill. 588 (1894). Minority stockholders may enjoin a sale of the property of the company under an execution levied on a judgment fraudulently obtained by the president against the company. Paxton *v.* Heron, 92 Pac. Rep. 15 (Col. 1907).

3 Kittel *v.* Augusta, etc. R. R., 78 Fed. Rep. 855 (1897).

the company, may be compelled to return the property on payment of what is justly due him.[1] A director cannot be interested in the purchase of corporate property sold for the non-payment of taxes.[2] The corporation may reclaim the property upon payment to the director of the amount he paid therefor.[3] A similar rule applies where a director allows or brings about a forfeiture of a lease which the company holds as lessee, and then takes a new lease of the same property in his own name.[4] But a corporate officer may purchase property at an execution sale where he does so in good faith and pays the full value of the property,[5] even though he is a director and the

1 Fricker *v.* Americus, etc. Co., 124 Ga. 165 (1905). Where the directors allow the property to be sold under an execution, and then they take part in redeeming the same for themselves personally and make a profit thereby, no effort having been made by them to borrow the money in behalf of the stockholders, they may be compelled to turn the property back to the corporation upon receiving the amount they have advanced. The transaction is a fraud in law, even though there was no fraudulent intent. Coombs *v.* Barker, 31 Mont. 526 (1905), 70 Atl. Rep. 375.

2 Smith *v.* Fagan, 17 Cal. 178 (1860). Where the president of the mortgagor corporation allows the property to be sold for non-payment of taxes and buys in the property himself, the mortgagee may recover such property from him. Appleton, etc. Co. *v.* Central Trust Co. etc. 93 Fed. Rep. 286 (1899).

3 Quoted and approved in McLeod *v.* Lincoln, etc. 69 Neb. 550 (1904). In redeeming land which a director fraudulently purchased at an execution sale the redemption is by the corporation and not by the stockholders who bring about such redemption. Bramblett *v.* Commonwealth, etc. Co., 86 S. W. Rep. 1114 (Ky. 1905).

4 Bengley *v.* Wheeler, 45 Mich. 493 (1881); Smith *v.* Bank of Victoria, 41 L. J. (P. C.) 34 (1872). In the latter case the director reorganized and allowed part of the old stockholders to come in. A dissenting stockholder caused the whole transaction to be set aside. Where the funds of a mining corporation are exhausted, and the stockholders refuse to advance money to continue work on a leasehold and it is forfeited and thereafter the president becomes interested in a new leasehold of the same mine, and it develops into a valuable mine, one of the stockholders who refused to advance further funds cannot complain. Hall *v.* Nash, 33 Colo. 500 (1905). Where personal property is leased to a corporation on partial payments to be made and title then to pass, this is a conditional sale. If the corporation becomes insolvent and the vendor, by collusion with the president, sells it to the president's brother, a receiver cannot claim the property unless he repays the price. Kidder *v.* Wittler, etc Co., 38 Wash. 179 (1905).

5 Horbach *v.* Marsh, 37 Neb. 22 (1893). Where directors are joint indorsers of corporate notes and one of them buys the property at public sale in good faith and pays the notes, he may sue the others for contribution and need not account for profits he made in such purchase. Weeks *v.* Parsons, 176 Mass. 570 (1900). In a stockholders' suit to set aside an execution sale of all the property for a debt due to the directors and a purchase at the sale by the directors, it is not necessary for the court to order an accounting, but the court may hear the entire case and decide it. Davis *v.* Hofer, 38 Or. 150 (1900).

judgment was obtained by himself.[1] The disability of directors to purchase property from the corporation may restrict their right to subscribe for unissued stock of the corporation.[2] There is some difficulty in determining whether this disqualification of a corporate officer to purchase property from the corporation extends to officers other than the president and directors. It has been held to affect the treasurer of the corporation[3] and also the cashier of a

1 Directors who have obtained a judgment against the corporation on claims against it which they have purchased, may purchase corporate property sold on execution to satisfy such judgment, the purchase being in good faith to protect their interest, and it appearing that the plaintiff refused to contribute his share towards redeeming from the sale. Snediker *v.* Ayers, 146 Cal. 407 (1905). A person to whom a corporate note is issued may take judgment thereon and cause the corporate real estate to be sold under execution, and may purchase the same even though such person became a director after the note was given and before the sale took place. Relender *v.* Riggs, 20 Colo. App. 423 (1905).

2 Where a director takes for himself the right of the corporation to subscribe for new stock he is liable in damages. Greenfield Sav. Bank *v.* Simons, 133 Mass. 415 (1882). Where the directors cause treasury stock to be sold to themselves at less than its real value, for the purpose of carrying an election, the court will set the transaction aside as fraudulent. Hilles *v.* Parrish, 14 N. J. Eq. 380 (1862). Where the four directors issue 58,220 shares of treasury stock to two of their number for $348.40, the court will set aside the issue at the instance of a stockholder, even though that was all the stock was reasonably worth. Mosher *v.* Sinnott, 20 Colo. App. 454 (1905). A sale of treasury stock to the president in payment of a debt may be set aside by the corporation. Camden Land Co. *v.* Lewis, 101 Me. 78 (1905). Where, long after the company has commenced business, it has disposed of its property and is ready to declare a five per cent. dividend, the directors' issuance to themselves at par of that part of the original capital stock which never had been issued is a fraud on the remaining stockholders. Arkansas, etc. Soc. *v.* Eichholtz, 45 Kan. 164 (1891). Where a director issues to himself at par stock belonging to the corporation, and which is worth more than par, the transaction is voidable; but if all the stockholders acquiesce therein for a long time, the acquiescence of the executors of a deceased stockholder binds the estate. St. Croix Lumber Co. *v.* Mittlestadt, 43 Minn. 91 (1890). But see Sims *v.* Street R. R., 37 Ohio St. 556 (1882). See also §§ 65, 70, 286, 614, *supra*. *Cf.* Charleston Ins. & T. Co. *v.* Sebring, 5 Rich. Eq. (S. C.) 342 (1853), where the directors purchased from the corporation stock which the corporation had previously issued and had purchased for itself. See also Parker *v.* McKenna, L. R. 10 Ch. App. 96 (1874), and York, etc. Ry. *v.* Hudson, 16 Beav. 485 (1853), holding that upon an increase of the capital stock the directors have no right to make a secret profit in its disposal.

3 McAllen *v.* Woodcock, 60 Mo. 174 (1875), holding that the treasurer's purchase of the corporate property at an execution sale thereof is a purchase for the benefit of the corporation. See also Parker *v.* Nickerson, 112 Mass. 195 (1873). Where the general manager sells goods to himself under another name, the corporation may compel him to pay over to it

bank.[1] It has also been intimated that a superintendent of the corporation is under the same disability.[2] A stockholder, however, even though he owns a majority of the stock of the corporation, may at a *public* sale of its property buy such property. "He has his own interests to protect, and is not charged with the care of the interests of the other stockholders. They act for themselves."[3] Where a reorganization committee purchase bonds at a price less than the amount finally realized on the bonds, and keep the profit, they are liable jointly and severally for the profit to the parties who have participated in the reorganization, and the fact that in organizing the new company they stated that profits made by them "from *interim* investments" were excluded is not a sufficient disclosure of their secret profit.[4] Even though a contractor taking stock and bonds in payment for work subcontracts the work for the stock, and then forecloses the mortgage and buys the property in, the subcontractor cannot hold him liable for the stock.[5] A commissioner, appointed by the court to sell the assets of a company, cannot sell to

the profit made by him, the board of directors having no knowledge of the character of such sales. Steward Mfg. Co. *v.* Steward, 109 Tenn. 288 (1902).

1 First Nat. Bank *v.* Drake, 29 Kan. 311 (1883); Torrey *v.* Bank of Orleans, 9 Paige, 649 (1842); aff'd, Bank of Orleans *v.* Torrey, 7 Hill, 260.

2 Cook *v.* Berlin Woolen Mill Co., 43 Wis. 433 (1877). In this case the superintendent's purchase was illegal, inasmuch as one of the directors was a secret partner in the purchase. A corporation may set aside an execution sale fraudulently concealed by its agent, who was interested in the judgment, which fact the purchaser knew. Lang Syne, etc. Co. *v.* Ross, 20 Nev. 127 (1888). The superintendent and surveyor of a rural cemetery association may purchase from it a large number of lots in the cemetery, although he intends to resell them. Palmer *v.* Cypress Hill Cemetery, 122 N. Y. 429 (1890).

3 Price *v.* Holcomb, 89 Iowa, 123 (1893); Mickles *v.* Rochester City Bank, 11 Paige, 118 (1844). Even though an officer of a mortgagor owns a majority of the stock, and is also a creditor, and promotes a suit for a receivership and sale of the corporate property, yet he may purchase at the foreclosure sale, even at a nominal figure, and a corporation to which he transfers it in exchange for the latter's capital stock may be a *bona fide* purchaser for value, even though it is chargeable with notice of all the facts, and may insure the property for its own benefit and not for the benefit of an underlying mortgage. Farmers', etc. Co. *v.* Penn. etc. Co., 103 Fed. Rep. 132, 157 (1900); aff'd, 186 U. S. 434. Even though the purchasers of an equity in land sell it to a corporation which they form at a price which pays them back their money, and more, and the corporation becomes insolvent and they purchase the land at execution sale, yet a stockholder cannot have the sale set aside unless he repays to them the amounts actually disbursed by them. Fleckenstein *v.* Waters, 160 Mo. 649 (1901). See also § 886, *infra*.

4 Gluckstein *v.* Barnes, [1900] A. C. 240, aff'g [1898] 2 Ch. 153.

5 McLane *v.* King, 144 U. S. 260 (1892).

a bank in which he is a stockholder and director, even though the sale and price were fair.[1]

An insurance company's secretary has no right to insure in the company his own property, unless other officers properly approve of it.[2] The secretary may sell property to the corporation and receive stock in payment therefor.[3] Where an agent of a mining company notifies it that its taxes were due and that he has no money to pay them, and the company pays no attention to it, and the property is sold, and the agent buys the tax title and offers to turn it over to the company on repayment of the cost, and for six years it does nothing, and the mine then turns out to be valuable, the company cannot make him give it up, even though he was a stockholder.[4] A judgment that a corporation has a right to have set aside a sale of certain of its property to its president is personal, and cannot be assigned.[5]

§ 654. *Reorganization of corporations.*—This subject is considered elsewhere.[6]

§ 655. *Issue of "watered" stock and of bonds at discount—Division of assets leaving creditors unpaid.*—The general subject of the legality of issues of stock[7] and bonds[8] at less than their par value is considered elsewhere. The fact that such issues are made to directors instead of to the public is immaterial, unless *actual* fraud is involved. As will be shown hereafter, bonds may legally be issued to directors,[9] and such issues may be at less than par.[10] A corporate creditor cannot complain that a company sold its bonds to some of the directors at a discount of twenty-five per cent.[11] Frequently the question of liability on an issue of watered stock and the bonds at a discount is still further complicated by the fact that the parties to whom they are issued are promoters and are subject to the disabilities and liabilities of promoters. The general principles applicable to promoters on this subject are considered elsewhere.[12] The

1 McCullough, etc. Co. *v.* Nat. Bank, etc. 111 Ga. 132 (1900).

2 Pratt *v.* Dwelling, etc. Ins. Co., 130 N. Y. 206 (1891). Where the secretary, who is also general manager, buys in the corporate property at an execution and tax sale, he must yield it up to the company upon payment of the amount for which it was sold, and his grantee, who is also in a fiduciary relation, must do the same. San Francisco Water Co. *v.* Pattee, 86 Cal. 623 (1890).

3 Garretson *v.* Pacific, etc. Co., 146 Cal. 184 (1905).

4 Steinbeck *v.* Homme, etc. Co., 152 Fed. Rep. 333 (1907).

5 Smith *v.* Pacific Bank, 137 Cal. 363 (1902).

6 See ch. LII, *infra.*

7 See ch. III, *supra.*

8 See ch. XLVI, *infra.*

9 See §§ 660, 661, 692, *infra.*

10 Du Pont *v.* Northern Pac. R. R., 18 Fed. Rep. 467 (1883). See also § 766, *infra.*

11 Bank of Toronto *v.* Cobourg, etc. Ry., 10 Ont. Rep. (Can.) 376 (1885).

12 See § 651, *supra.*

liabilities of promoters on watered stock and bonds issued at a discount depends largely in each case on the facts peculiar to that case. In England it is held that although none of the stockholders and creditors of a company which is in difficulties object to a new issue of bonds and stock for contract work, a part of the bonds and stock being given to the stockholders and bondholders as a bonus, yet where the intention is to have outside people invest in the bonds and stock of the company, the scheme is illegal and the directors are liable.[1] A somewhat similar conclusion was reached by the supreme court of Massachusetts in a celebrated litigation a few years ago,[2]

1 London Trust Co. *v.* Mackenzie, 68 L. T. Rep. 380 (1893). See also § 766, *infra.* Even though by arrangement between promoters and the owner of a business, the business is sold to a corporation for £22,000, in full-paid shares of stock and £3,000, cash, the latter to go to the vendor, and all the stock to go to the promoters, and thereafter the company is wound up and its assets sold for £480, yet the promoters are not liable to creditors, inasmuch as all the stockholders knew of the transaction and no stock was sold or intended to be sold to outsiders, and the creditors might have ascertained the facts from the public registry if they desired, and even though the promoters became directors. The court said: "It cannot be suggested that mere inadequacy of price was sufficient of itself to invalidate the contract. You must show that, these shares not having been paid for at all, the contract for purchase was a colorable transaction, and that in truth and in fact, *qua* value, these shares were not part of the consideration, but were a gift. . . . I see nothing in these affidavits or in anything else in the case to lead me to say that this transaction was not a real transaction, but a colorable transaction holding the real transaction behind it." *Re* Innes & Co. Ltd., [1903] 2 Ch. 254; rev'g 88 L. T. Rep. 123.

Where a person purchases property for the sole purpose of creating a corporation to take it over from him and to pay him therefor an excessive price in cash and stock, netting a large profit to him, the stock being offered to the public, and he causes the incorporation to be made and directors to be named who are his dummies, he is a promoter and can be held liable by such corporation for the profit he has made, unless he fully disclosed in a prospectus the fact that he had formed the corporation and that he had made such profit. Especially is this the rule where the prospectus gave a false impression. He occupies a fiduciary relation towards the purchasers of the stock. It is immaterial that the directors approved of the transaction with full knowledge. Non-disclosure in such a case is a misfeasance in the nature of a breach of trust. *Re* Leeds, etc. [1902] 2 Ch. 809.

2 The court held that where a person buys property for the purpose of forming a corporation to take it over, and this plan is carried out by the use of dummies as directors, who issue stock therefor, the par value of which is many times greater than the actual value of the property, the corporation itself may thereafter rescind the transaction and return the property and demand back the stock, even though all the stockholders, directors, and officers approved the transaction when it was carried out, it appearing, however, that the property received was worthless and that it was a part of the original plan to sell a large part of the stock to the public, which

but the federal courts took a different view of the matter.[1] And the New York courts also are not inclined to declare such promoting

plan was carried out, and it appearing also that the original stockholders and officers were merely representatives of the vendor, and that there was no independent judgment on the part of the board of directors. The court pointed out that this was a different case from one where it was not contemplated that the public should become interested, except by purchase from the original stockholders. Hence where a person buys all the stock of a corporation for about $613,000, and some real estate for about $175,000, and sells the former to a corporation formed by him for that purpose, for $2,500,000, par value of stock, having also an actual value of $2,500,000, and sells the real estate for $750,000, par value of stock, having also the same actual value, but it turns out that the real estate was worthless, the corporation so issuing the stock may maintain a separate suit for rescinding the sale and issue of stock for the real estate, or for damages, if the stock cannot be returned, it appearing that the promotor was a director at the time of the sales, and that the fair market value of the stock at the time of issue was par, and so continued to be for a long time thereafter; it further appearing that he made no disclosure of the facts to the corporation and did not see to it that the corporation had adequate independent advice. The court said: "That is an obligation resting upon every fiduciary who makes a sale of his own property to his beneficiary, no matter whether it is a case of trustee and *cestui que trust*, guardian and ward, solicitor and client, or promoter of a corporation and the corporation itself. There is no pretense that in the transaction in question the plaintiff corporation was represented by an independent board." It is no defense that every stockholder and director knew of and acquiesced in the transaction at the time, it appearing that the stock was afterwards sold to the public without any disclosure of the facts. Old Dominion, etc Co. *v.* Bigelow, 188 Mass. 315 (1906), the court refusing to follow Old Dominion, etc. Co. *v.* Lewisohn, 136 Fed. Rep. 915, involving the other issue of stock. The court pointed out that in cases to the contrary it was not contemplated that other parties should become interested in the stock, except by purchase from the original stockholders. If there are two such promoters it seems that in a suit against one, he is liable for the whole stock so issued. Where promoters pay out less than $30,000 to secure options on land and then sell the options to a corporation for $700,000 of stock of the latter, the corporation assuming the purchase price of the land, and then issue a prospectus which is misleading and does not state the facts about the issue of stock, and the corporation becomes insolvent, they are liable to the corporation for the fair market value of the stock at the time the stock was issued, or as soon thereafter as it had a market value. The liability is not for unpaid stock, but for fraud as promoters in making a secret profit for services and not making a full disclosure to the stockholders. The promoters owe a duty to future stockholders. The land need not be tendered back. The promoters are to be credited with their actual disbursements and to be charged with the fair market value of the stock, with interest, and also with dividends. The suit should be brought by the corporation itself and not by its receiver, according to the Massachusetts decisions. Hayward *v.* Leeson, 176 Mass. 310 (1900).

1 Even though the owners of mining claims organize a corporation in New Jersey, and they themselves as directors, together with dummy di-

plans illegal,[1] and the New York rule is generally followed in other states, even where constitutional and statutory prohibition exist.[2] As

rectors, cause the corporation to purchase the claims for $750,000, par value of stock, although the mining claims were worth but $5,000, and even though thereafter additional capital stock is sold by the corporation to the public for cash at par, yet the corporation cannot rescind the transaction, inasmuch as there were no other stockholders at the time of the transaction, and hence no one was deceived. Old Dominion, etc. Co. *v.* Lewisohn, 136 Fed. Rep. 915 (1905); aff'd, 148 Fed. Rep. 1020 and 210 U. S. 206. A promoter's possible liability and the liability of stockholders on unpaid stock will not be adjusted and offset in the distribution among bondholders after foreclosure sale, even though the bondholders were promoters and stockholders. Independent suits must be instituted for that purpose especially as general creditors are interested. Land, etc. Co. *v.* Tatnall, 132 Fed. Rep. 305 (1904). The corporation itself, all of whose stock has been issued in payment for a mine, cannot hold a vendor liable for misrepresentations as to the value of the property. Stratton's, etc. *v.* Dines, 126 Fed. Rep. 968 (1904). A consolidation under a statute which provides that the consolidated corporation shall thereupon "form one consolidated corporation" is a dissolution of the constituent companies, and hence a stockholder in one of the constituent companies cannot maintain a suit to have the consolidation declared illegal and the value of his stock ascertained and paid, even though he alleges that the terms of the consolidation were unfair and that the other constituent company had been grossly overcapitalized. Jones *v.* Missouri, etc. Co., 135 Fed. Rep. 153 (1905). Neither a corporation nor a receiver suing in its name and behalf can maintain a suit to set aside a contract made between the corporation and all its stockholders. Such a contract can only be attacked by or on behalf of creditors who are shown to have been defrauded thereby. Great Western Min. & Mfg. Co. *v.* Harris, 128 Fed. Rep. 321 (1903), aff'd 198 U. S. 561.

1 Stockholders in a holding corporation cannot maintain a suit in behalf of the corporation on the ground that its promoters made large, unlawful and secret profits by being interested in the constituent company whose

2 See §§ 46, 47, *supra.* A person holding an option to purchase lands for $120,000 may agree with a promoter that a company shall be formed to take over the same for $150,000 where all the parties interested knew the facts and his profit was represented by common stock. Selover *v.* Isle, etc. Co., 91 Minn. 451 (1904). Where promoters buy property with a view to organizing a corporation to take it over, and it is taken over with a purchase-money mortgage nearly equal to the price paid, together with a large bonus of stock, yet even though they are the only stockholders, if thereafter the balance of the capital stock was sold to outsiders to whom misrepresentations were made as to the cost of the land, the promoters are liable to the corporation for their profits. The suit must be at law and is barred by the six years' statute of limitations. Pietsch *v.* Milbrath, 123 Wis. 647 (1904). The owner of a single share of stock in a street railway company may file a bill to enjoin the company from issuing stock and bonds to a construction company, where the par value of the stock and bonds is greater than the value of the construction work, and the construction company already controls the railway company and its board of directors. Montgomery Traction Co. *v.* Harmon, 140 Ala. 505 (1904).

between the directors and the stockholders the rule invalidating con-

stock was turned in to the holding company in exchange for the stock of the latter, it appearing that when the stock was so turned in the promoters were the only parties interested. If any of the original parties were defrauded their remedy is a suit at law for damages against the guilty parties. The court said: "We have here nothing more than the ordinary transaction of parties coming together and agreeing in writing to form a corporation that shall take over from them certain definitely understood properties and cash, for which is to be issued its entire capital stock. It is doubtless true that in many instances there is great overcapitalization, and that the general public is frequently misled by the large amounts of preferred and common stock issued by corporations. The rights of the public are not involved in this litigation. . . . The stockholders of the constituent companies and the individual defendants were the organizers of the corporation and became its first stockholders; they dealt wholly between themselves as sellers and buyers, organizers and corporation; no other persons had any interest in this initial transaction; if fraud had been practiced by any one of the organizers upon those associated with him, the cause of action would have vested in the party injured." Blum *v.* Whitney, 185 N. Y. 232 (1906). Even though two of the directors sell to the corporation certain patents for $3,000,000 full-paid stock, being the entire capital stock, and give to the corporation $750,000 of the same as treasury stock, and even though the patents are worth but $10,000, neither the corporation nor a purchaser of treasury stock at fifty cents on the dollar can compel them to return the stock nor hold them liable thereon, but the remedy, if any, is to rescind the transaction and return the patents and demand a return of the stock or the value of such part of the stock as they have sold. Such is the rule, even though the statutes of the state prohibit the issue of stock at less than par. The court said (p. 477): "Whether they knew that the value of the patents did or did not exceed $10,000 was entirely immaterial. They had a right to hold the letters patent until they were offered the price at which they were willing to sell. They sold them to this company for its whole capital stock, agreeing with the company that that was the value of the patents. I know of no principle which would justify a court of equity in compelling the owners of these patents to accept any consideration for their transfer to the corporation except that agreed on, and, upon the ground that the patents are not worth the sum agreed on as a consideration for the transfer, decree that the vendors must pay back to the company the consideration they had received, less the real value." A purchaser of the treasury stock has of course a remedy at law if there were false representations. Insurance Press *v.* Montauk, etc. Co., 103 N. Y. App. Div. 472 (1905). Even though promoters obtain options on a large number of malting plants, and take subscriptions to stock in a corporation to be organized for the purpose of taking over the plants, and use the proceeds of the subscriptions to pay for the plants and furnish a working capital for the company, and receive from the corporation, in payment for the plants, stock sufficient to fill the subscriptions and also to leave with the promoters $500,000 as a profit preferred stock and $7,740,000 common stock, yet neither the corporation nor its stockholders can hold them liable for such profit in stock, there being no proof that the plants were not worth the amount of the stock issued for them, nor that the sale had been rescinded, and there being no com-

tracts between the corporation and its directors [1] would apply to the sale of bonds at a price which is unfair. The stockholders may sue the directors for gross mismanagement, and for damages, where fraudulent mortgages have been placed by them on the corporate property.[2] A division of the assets of a corporation leaving its creditors unpaid is considered elsewhere.[3] A stockholder cannot secure a transfer from the corporation to himself of the property of the corporation so as to deprive a corporate creditor of the payment of his debt. Where he does so through legal proceedings fraudulently and by conspiracy, the property may be reached.[4] The receiver of an insolvent corporation which has been rendered insolvent by reason of its assets having been absorbed by another corporation may hold its directors liable for the loss, and his suit may be at law or in equity.[5] Although one company owns a majority of the stock of another company, and the property of the latter company is leased to

plaint made by the original subscribers to the stock and the original subscription having recited that such stock would be so issued for the properties. Hutchinson *v.* Simpson, 92 N. Y. App. Div. 382 (1904). In Brewster *v.* Hatch, 122 N. Y. 349 (1890), the plan adopted was as follows: The promoters took an option for which they gave $5,000 and by which they had the privilege of purchasing certain mines at any time within four months for $135,000. This agreement is set forth in the case. They then issued a prospectus to the public, soliciting subscriptions to a corporation thereafter to be formed to purchase the mines for all its capital stock, which was to be $1,500,000. The stock was offered to the public at forty cents on the dollar. Subscriptions for $610,000 par value were received, netting $244,000. The corporation was then formed, the promoters making themselves directors, and the above plan carried out. A subscriber then sued the promoters for damages. The court held that the plaintiff could recover. The defendants were not mere vendors of the stock. The fatal defect seems to have been in the fact that the promoters did not buy the property before offering the stock. On the contrary, they merely obtained options, and would have abandoned them if the stock had not been taken. Moreover they placed the stock before the corporation was organized. All this made them fiduciary agents of the subscribers. If they had been intrinsically vendors of the stock, it was admitted that they would not have been liable. A consolidated company may maintain a suit against a director of one of the constituent companies for fraudulently, at the time of consolidation, causing an issue of a large amount of stock to him out of the treasury stock for past services, which stock was thereupon exchanged for stock in the constituent company, especially where such director as trustee of the treasury stock of both companies controlled them and voted such stock for the consolidation, and also voted proxies obtained on a notice of the meeting, which did not state that his compensation was to be voted upon. United, etc. Co. *v.* Smith, 44 N. Y. Misc. Rep. 567 (1904).

1 See §§ 649, 652, *supra.*

2 Landis *v.* Sea Isle, etc. Co., 53 N. J. Eq. 654 (1895).

3 See ch. XL, *infra.*

4 Angle *v.* Chicago, etc. Ry., 151 U. S. 1 (1894).

5 Mason *v.* Henry, 152 N. Y. 529 (1897).

the former at a fixed rental, the rent to be paid to bondholders of the latter, a judgment creditor of the latter cannot have the lease set aside unless he can show that the income of the latter company is more than sufficient to pay the rental, there being no proof that the rental was unfair, and there being proof that the rental is more than the company earned. The principle that the owner of a majority of the stock will not be permitted to defraud stockholders or creditors does not apply.[1] As against corporate creditors the company cannot trade off all its assets for other property, where the latter property is not of a character to be used to pay debts, even though ultimately it will probably be very valuable, such trade being with the general manager of the company.[2]

§ 656. *Stockholders' actions against persons other than directors for frauds, etc., against the corporation.*—Ordinarily, where third persons have defrauded a corporation, and have defrauded it by collusion with the corporate officers, the stockholder's action is against both the officers and the third persons, all being joined as parties defendant. When such is the case the third parties may be held liable, even though the corporation itself is in no position to complain.[3] Where the directors have turned over the property to

1 Sidell *v.* Missouri Pac. Ry., 78 Fed. Rep. 724 (1897).

2 Levins *v.* Peeples, etc. Co., 38 S. W. Rep. 733 (Tenn. 1896).

3 See the cases in the notes to §§ 649–655. Thus, where a railroad has been leased to another railroad company under a certain agreement of the latter guaranteeing a fixed sum to the former, and the lessee railroad company refuses to fulfill its contract and has control of the lessor railroad, a stockholder of the latter may bring suit to remedy the wrong. March *v.* Eastern R. R., 40 N. H. 548 (1860); s. c., 43 N. H. 515. And the case of Lewis *v.* St. Albans, etc. Works, 50 Vt. 477 (1878), very properly says "that whenever the trustee has been guilty of a breach of trust, and has transferred the trust property by sale or otherwise to any third party, the *cestui que trust* has a full right to follow such property into the hands of such third party, unless he stands in the situation of a *bona fide* purchaser for value without notice." See also Imperial, etc. Assoc. *v.* Coleman, L. R. 6 H. L. 189 (1873). A person receiving corporate money in compromise of his suit against guilty directors may be compelled to pay it back to the corporation. Erie Ry. *v.* Vanderbilt, 5 Hun, 123 (1875). The fact that an officer of the company took part in a swindling scheme does not deprive the company of its right to recover back moneys of which it was wrongfully deprived by such scheme. Farrow *v.* Holland Trust Co., 74 Hun, 585 (1893). Where a person buys goods from an insolvent corporation and pays for them by delivering goods to the president for his own use, an assignee for the benefit of creditors of the corporation may hold such party liable for the value. Mott *v.* Edwards, 98 N. Y. App. Div. 511 (1904); aff'd, 184 N. Y. 541. Where trust deeds to a trust company run to the president as trustee, the court will compel him to administer the trusts for the benefit of the company. Tulleys *v.* Keller, 45 Neb. 220 (1895).

an assignee to pay illegal debts, the stockholders may file a bill to set the transaction aside.[1] A director of an assessment life insurance company who receives money for causing a person and his friends to be elected directors, thereby giving them the control of the company, together with its property, may be held liable by the receiver of the company for the money so received.[2] Where the officers and directors, in a conspiracy, resign their offices and substitute other officers who are irresponsible and untrustworthy, in consideration of unlawful payments made to the former directors, and the assets of the corporation are thereby lost, the first-named directors are personally responsible for their action, and a receiver of the corporation may hold them liable.[3] An attorney who receives money from a company for a specific purpose cannot retain it and set it off against his fees.[4] A stockholder in a trust company may file a bill in equity to enjoin the company from paying an illegal income tax to the federal government.[5]

Another class of cases arises when third persons commit frauds against the corporation without the collusion of the corporate officers, but the latter neglect or refuse to institute a suit to rectify the wrong. The right of the stockholder is then not so clear. It is ordinarily within the discretion of the corporate officers to enforce, compromise, or abandon claims which the corporation may have against third persons. Generally this exercise of discretion cannot be questioned or remedied by the stockholders, except by electing at a subsequent election directors more in accord with the stockholders' views. It is possible, however, that cases may occur where the judgment of the directors is so palpably and injuriously wrong that the courts will sustain a stockholder's action herein. This subject is treated elsewhere.[6]

§ 657. *Salaries or compensation to corporate officers.*—A frequent fraud upon corporations and stockholders is perpetrated by the corpo-

1 People's Sav. Bank *v.* Colorado, etc. Co., 8 Colo. App. 354 (1896). Where an investment company in a receiver's hands has paid all its debts, but by fraud its remaining assets have been transferred to various parties, a suit lies at the instance of a stockholder to set aside the transfer; but the complaint is multifarious where it joins parties not having a common interest and unites distinct and disconnected causes of action. 63 Kan. 429 (1901).

2 McClure *v.* Law, 161 N. Y. 78 (1899).

3 Bosworth *v.* Allen, 168 N. Y. 157 (1901).

4 *Re* Mid-Kent Fruit Factory, [1896] 1 Ch. 567. Where bonds are issued by a corporation to a director or officer for a certain purpose, he cannot retain them on the ground that the company owes him money. Greenville Gas Co. *v.* Reis, 54 Ohio St. 549 (1896).

5 Pollock *v.* Farmers' L. & T. Co., 157 U. S. 429 (1895).

6 See § 750, *infra.*

rate funds being used to pay illegal salaries and compensation to corporate officers and assistants. It is a general rule that a director is not entitled to any pay for his services to the corporation, *as a director,* where there has been no agreement in advance that he shall have such pay.[1] Hence a salary or back pay voted to a director after

[1] Grafner *v.* Pittsburg, etc. Ry., 207 Pa. St. 217 (1903). American Cent. Ry. *v.* Miles, 52 Ill. 174 (1869); Illinois Linen Co. *v.* Hough, 91 Ill. 63 (1878); Citizens' Nat. Bank *v.* Elliott, 55 Iowa, 104 (1880); Smith *v.* Putnam, 61 N. H. 632 (1882). A director is not entitled to pay for his services unless there was an express contract of employment before the services were performed, even though he acted as a member of the executive committee. Brophy *v.* American, etc. Co., 211 Pa. St. 596 (1905). In a suit by a stockholder to hold a president liable for an illegal salary paid to him the validity of his election may be contested and an injunction asked against his continuing to act as president. Chicago, etc. Co. *v.* Boggiano, 202 Ill. 312 (1903). A corporation is not liable for services performed by a director unless they are outside the scope of his regular duties and it was understood that they were to be paid for. Henry *v.* Michigan, etc. Assoc., 147 Mich. 142 (1907). The president of a bank is not entitled to pay for past services unless there was an agreement to pay or unless there were extraordinary services rendered, or unless he was not a director or stockholder. Lowe *v.* Ring, 123 Wis. 370 (1904). The president cannot recover for past services where there was nothing in the charter or by-laws or resolutions of the board of directors providing for such payment. Home, etc. Co. *v.* Tillman, 125 Ga. 172 (1906). A stockholder whose stock is about to be forfeited to pay an illegal assessment, may, in a suit to enjoin such forfeiture, join a cause of action against the directors for illegal salaries and other illegal acts. McConnell *v.* Combination, etc. Co., 30 Mont. 239 (1904). The president cannot claim a salary for services after dissolution. Mason *v.* Pewabic Min. Co., 66 Fed. Rep. 391 (1894). A president who is a large stockholder, and who of his own accord renders services to advance its interests, cannot afterwards recover a salary or even his personal expenses, the claim of the president in this case being $1,000,000. McMullen *v.* Ritchie, 64 Fed. Rep. 253 (1894). The vice-president of a bank is not entitled to a salary where none had been agreed upon. Blue *v.* Capital Nat. Bank, 145 Ind. 518 (1896). In a suit by a director for reasonable compensation the company may show its practice in regard to salaries; also the holdings of the director as a stockholder, and also any agreement between the original incorporators that no salaries be paid. McCarthy *v.* Mt. Tecarte, etc. Co., 111 Cal. 328 (1896). Where one company sells out to another, and the president of the former goes into the employ of the latter, the presumption is that his salary as president ceases. Simonson *v.* New York City Ins. Co., 141 N. Y. 12 (1894). Where, by agreement between the corporation and its creditors, the corporate affairs are managed by a committee of the creditors, the committee may collect for their services. The committee may sue jointly. Dallas *v.* Columbia, etc. Co., 158 Pa. St. 444 (1893). In Danville, etc. R. R. *v.* Kase, 39 Atl. Rep. 301 (Pa. 1898), where the court compelled the president of the company to refund a back salary which had been voted and paid to him, the court nevertheless said: "Kase for years, from the inception of the enterprise to its close, performed most arduous duties and rendered the most drudg-

the services have been rendered cannot be enforced so far as such pay is for his services as director only, and not for special services performed by him. It is invalid and voidable. It is the same as giving away the assets of the corporation.[1]

ing service to the company. He was, in one sense, the company, and without him there would have been no railroad. Some of his acts were reckless, and perhaps improvident. He was strong, energetic, and domineering. The only one who seemed to exercise any restraint upon him was Mr. Wolverton, the treasurer, and he often failed in holding him to anything like business methods. But immense work, whether good or ill, Kase performed; and if this work had been preceded by a contract for reasonable compensation, he would be entitled to a credit for the contract price." A director who receives a salary for certain services cannot recover a further sum for other services, where he was not expressly employed to render the latter services and there was no promise to pay. Acceptance of the service is immaterial. Gill *v.* New York Cab Co., 48 Hun, 524 (1888), holding also that a vice-president cannot recover for extra services where there was no agreement to pay him. An allegation that the plaintiff had demanded that the president repay an illegal salary, and that he refused to do so, and that he controlled the board of directors and that they refused to take action, is sufficient even in Massachusetts. Blair *v.* Telegram News Co., 172 Mass. 201 (1898). The secretary of a director is not entitled to pay. West, etc. Co. *v.* Rose, 76 Miss. 61 (1898).

1 Bennett *v.* St. Louis, etc. Co., 19 Mo. App. 349 (1885); Ogden *v.* Murray, 39 N. Y. 202 (1868); Blatchford *v.* Ross, 54 Barb. 42 (1869); Jones *v.* Morrison, 31 Minn. 140 (1883); Maux Ferry, etc. Co. *v.* Branegan, 40 Ind. 361 (1872); Loan Assoc. *v.* Stonemetz, 29 Pa. St. 534 (1858); Holder *v.* Lafayette, etc. Ry., 71 Ill. 106 (1873), where the director even acted as treasurer; Gridley *v.* Lafayette, etc. Ry., 71 Ill. 200 (1873), where the director was a member of the executive committee. The salaries of the officers cannot be increased to operate retroactively. Klein *v.* Independent, etc. Assoc., 83 N. E. Rep. 434 (Ill. 1907). Directors are not liable to account for extra pay voted to a director for his services as an agent. Godbold *v.* Mobile Branch Bank, 11 Ala. (N. S.) 191 (1847). The majority of the stockholders cannot, on the winding up, vote back pay to directors. Hutton *v.* West Cork Ry., L. R. 23 Ch. D. 654 (1883); Northeastern Ry. *v.* Jackson, 19 W. R. 198 (1870), holding a director liable for back salary paid him by vote of the directors when the statute required such vote to be by the stockholders. In Hall *v.* Vermont, etc. R. R., 28 Vt. 401 (1856), compensation for taking subscriptions had been voted by the stockholders. After the rescinding of that vote no compensation was allowed, and none was allowed for lobbying the charter through the legislature. A vote by the stockholders of free passes over the road to a director in consideration of his efforts as a promoter before incorporation may be repudiated at any time by the corporation. New York, etc. R. R. *v.* Ketchum, 27 Conn. 170 (1858). But see St. Louis, etc. R. R. *v.* Tiernan, 37 Kan. 606 (1887), where back pay to directors for services in promoting and launching the enterprise was voted and upheld. A director cannot collect pay from the company for his services on the executive committee and for his expenses in travel where there has been no resolution passed previous to the services entitling him to the pay. Lafayette, etc. Ry. *v.* Cheeney, 87 Ill. 446 (1877). Directors

Where an illegal salary has been paid, with the consent of a majority of the stockholders, but a minority stockholder files a bill to compel repayment, the court may order the repayment to dissenting stockholders of such part of the salary as they would get if the whole salary was repaid to the corporation and a dividend made.[1] The president cannot claim a salary for his services as president where none was voted to him before the services were rendered.[2]

cannot vote compensation to themselves after the services have been performed. Pfeiffer *v.* Lansberg Brake Co., 44 Mo. App. 59 (1891), reviewing at length the cases; Burns *v.* Commencement Bay, etc. Co., 4 Wash. St. 558 (1892). A director cannot recover pay for past services, even though he devoted considerable time to the affairs of the company and traveled on several occasions in its behalf, his expenses on such occasions having been paid by the company. The court held that the rule that the director was entitled to pay for services rendered clearly outside of his duties as director is subject to the condition "that they were performed under circumstances sufficient to show that it was well understood by the proper corporate officers as well as himself that the services were to be paid for by the corporation." Brown *v.* Republican, etc. Mines, 17 Colo. 421 (1892). Where no salary is attached to the office none can be recovered. Field *v.* Union Box Co., 2 W. N. Cas. 426 (1876). Nor, when the salary is fixed, will extra compensation be allowed for extra services. Carr *v.* Chartiers Coal Co., 25 Pa. St. 337 (1855). And a resolution remunerating officers who have been elected to serve without compensation is merely voluntary and revocable. Loan Assoc. *v.* Stonemetz, 29 Pa. St. 534 (1858). An officer cannot claim a past-due salary when it was never voted to him and he had on several occasions acted as though nothing was due him. Pyper *v.* Salt Lake, etc. Assoc., 20 Utah, 9 (1899).

1 Brown *v.* De Young, 167 Ill. 549 (1897). In Eaton *v.* Robinson, 19 R. I. 146 (1895), where illegal salaries had been paid, the court ordered the guilty parties to pay to each stockholder his proportionate part of the money. Where a trustee holding stock votes himself into office and illegally votes to himself a large salary, the *cestuis que trust* may in a suit for his removal ask also that he account to such *cestuis que trust* for such salary. Elias *v.* Schweyer, 27 N. Y. App. Div. 69 (1898). A receiver will not be appointed at the instance of a stockholder to recover back illegal salaries, inasmuch as such a suit may be carried on by the stockholder himself. Marcuse *v.* Gullett, etc. Co., 52 La. Ann. 1383 (1900). In holding the president liable for an illegal salary the court should not order repayment direct to the stockholders. Chicago, etc. Co. *v.* Boggiano, 202 Ill. 312 (1903).

2 The president is not entitled to a salary unless the same is fixed by resolution or by-law of the board of directors. St. Louis, etc. R. R. *v.* O'Hara, 177 Ill. 525 (1898). The president cannot recover for his services as president, even though an officer and stockholder of the corporation promised that he would be paid, it not being shown that the other directors knew of the promise and the by-laws not providing for his salary and no salary having been voted by the directors. Henry, etc. Co. *v.* Schaefer, 173 Mass. 443 (1899). The president and directors who vote back pay to him and cause corporate notes to be issued therefor are liable to the company therefor, but directors not taking part in the issue of the notes are not liable. Metropolitan Elev. Ry. *v.*

There is authority to the effect that directors cannot vote a salary to themselves even in advance of their services as directors.[1]

Kneeland, 120 N. Y. 134 (1890); Merrick *v.* Peru Coal Co., 61 Ill. 472 (1871); Holland *v.* Lewiston Falls Bank, 52 Me. 564 (1864); Barril *v.* Calendar, etc. Co., 50 Hun, 257 (1888); Commonwealth Ins. Co. *v.* Crane, 47 Mass. 64 (1843), where it was even proved that the former president had a salary. Kilpatrick *v.* Penrose, etc. Co., 49 Pa. St. 118 (1865), where both the president and treasurer sued. The salary of the president ceases upon the discontinuance of the corporate business by a sale of all its property. Long Island Ferry Co. *v.* Terbell, 48 N. Y. 427 (1872). The president is not entitled to a preference in payment under a statute giving to "laborers" of an insolvent corporation such a preference. England *v.* Beatty, etc. Co., 41 N. J. Eq. 470 (1886). A note is not collectible by a principal whose agent made the note as president of a corporation, where the consideration therefor was unpaid salary of the president, and the the note was ratified by the corporation only by the casting vote of the president. Chamberlain *v.* Pacific, etc. Co., 54 Cal. 103 (1880). Under a peculiar charter provision it was held in Grundy *v.* Pine Hill Coal Co., 9 S. W. Rep. 414 (Ky. 1888), that there was an implied obligation of the corporation to pay its president a salary. A salary as fixed for a preceding year gives no right to a salary for prior years. Smith *v.* Woodville, etc. Co., 66 Cal. 398 (1885). Stock may be issued to the president in payment of past salary and debts. Reed *v.* Hayt, 51 N. Y. Super. Ct. 121 (1884); aff'd, 109 N. Y. 659, holding also that though the president himself was one of the three directors voting for the same, yet that long acquiescence cures any right to object. A meeting of four legally-elected and three illegally-elected directors of a corporation is not such a meeting as sustains an action for salary by the president who was elected by them. Waterman *v.* Chicago, etc. R. R., 139 Ill. 658 (1892). In Bowen *v.* Carolina, etc. Ry., 34 S. C. 217 (1891), the president of a railroad company was allowed to recover from the company what the jury believed his services to have been worth. A president is not entitled to pay for his services unless an agreement in advance to that effect is made. Martindale *v.* Wilson-Cass Co., 134 Pa. St. 348 (1890); Barril *v.* Calendar, etc. Co., 50 Hun, 257 (1888). The president may be entitled to compensation for extra services performed with the knowledge of the directors, although a former resolution, of which he had no knowledge, prohibited pay, unless voted in advance. Bartlett *v.* Mystic River Corp., 151 Mass. 433 (1890). A mutual life insurance company having no capital stock cannot make a contract to pay its retiring president a future salary for life. Beers *v.* New York L. Ins. Co., 66 Hun, 75 (1892). The president cannot enforce the payment of a salary out of the assets of the insolvent corporation, even though the by-laws provided therefor and the salary had been voted to him, such vote having been after the services were rendered. Wood *v.* Lost Lake, etc. Co., 23 Oreg. 20 (1890). A salary voted to the president after the services were performed and the company has become insolvent is not collectible. McAvity *v.* Lincoln Pulp, etc. Co., 82 Me. 504 (1890).

1 A resolution that directors shall receive pay for attendance in the future does not sustain an action therefor. It is a promise to give a gratuity, and is not enforceable compulsorily. Dunston *v.* Imperial Gas Light Co., 3 B. & Ad. 125 (1832). Directors voting stock to themselves in compen-

In an English case Judge Lindley said: "Directors have no right to be paid for their services, and cannot pay themselves or each other, or make presents to themselves, out of the company's assets, unless authorized so to do by the instrument which regulates the company, or by the shareholders at a properly convened meeting." [1] Where by the charter the directors' fees are limited, they cannot by appointing one of their number managing director increase his fees, and any increased fees of any of the directors may be recovered back, even though the stockholders in a general meeting had ratified the payment.[2] And there is strong authority in America to the effect that compensation to directors for serving as directors merely must be voted by the stockholders or provided for in the by-laws.[3]

sation for selling corporate stock are liable for the value of the stock upon corporate insolvency. Freeman *v.* Stine, 15 Phila. 37 (1881). Stock issued to directors, on a vote of themselves, in payment for extra services will be ordered canceled by the court. Jones *v.* Johnson, 86 Ky. 530 (1888); Collins *v.* Godefroy, 1 B. & Ad. 956 (1831), where a director was not allowed to receive a reward offered for the recovery of stolen property; Kelsey *v.* Sargent, 40 Hun, 150 (1886), denying the right of the directors to vote salaries to themselves. See also cases in the following note.

1 *Re* George Newman Co., [1895] 1 Ch. 674, 686. The court said: "The shareholders, at a meeting duly convened for the purpose, can, if they think proper, remunerate directors for their trouble or make presents to them for their services out of assets properly divisible amongst the shareholders themselves. Further, if the company is a going concern, the majority can bind the minority in such a matter as this. But to make presents out of profits is one thing, and to make them out of capital or out of money borrowed by the company is a very different matter." The court held that even the fact that all the stockholders knew of the transaction and acquiesced therein was not sufficient. *Cf. Re* Woods, etc. Co., 62 L. T. Rep. 760 (1890). Where directors are allowed a salary by the charter, it may be paid out of the capital if no profits are made. *Re* Lundy Granite Co., 26 L. T. Rep. 673 (1872). A resolution relative to directors' pay passed at a special stockhloders' meeting may differ from the resolution specified in the notice of the meeting, but if the meeting adjourns and such resolution is confirmed at the adjourned meeting, it must not differ from the resolution as first passed. Torbock *v.* Lord Westbury, [1902] 2 Ch. 871. A director and stockholder who, by contract with the company, is entitled to a certain salary, may, upon the insolvency of the company, prove his claim the same as other creditors. *Re* Dale L. R. 43 Ch. D. 255 (1889).

2 Boschoek, etc. Co. Ltd. *v.* Fuke, [1906] 1 Ch. 148.

3 Directors cannot vote salaries to themselves. Camden Land Co. *v.* Lewis, 101 Me. 78 (1905). Directors have no power to vote a salary to one of their number unless the charter or by-laws authorize such vote, and especially they have no power to vote back pay. McConnell *v.* Combination, etc. Co., 30 Mont. 239 (1904). In West Virginia by statute, neither the president nor any director is entitled to pay unless it has been allowed by the stockholders. Maxon's Admx. *v.* Maxon-Miller Co., 53 W. Va. 150 (1903). The Virginia statute requir-

A stockholder cannot enjoin an agreement authorized by the directors that their pay be increased, inasmuch as such agreement will be legal

ing the stockholders to pass on compensation to the president or the directors was applied in Triplett *v.* Fauver, 103 Va. 123 (1904). Where a by-law provides that salaries of officers shall be fixed by the stockholders at the end of each year's service, and authorizes the treasurer to pay in the meantime certain sums, and the stockholders fail to fix the amount, it may be left to the jury as to what is a reasonable amount to be paid. Metropolitan, etc. Co. *v.* Place, 147 Fed. Rep. 90 (1906). Where the stockholders unanimously vote to pay a certain salary to an officer, he may collect the same. Caho *v.* Norfolk, etc. Ry., 60 S. E. Rep. 640 (N. C. 1908). In a vote by stockholders fixing the salaries of directors, the directors may vote stock held by themselves. Green *v.* Felton, 84 N. E. Rep. 166 (Ind. 1908). A stockholder may file a bill to compel the president to repay a salary which the president had paid to himself from the corporate funds, without being authorized so to do, even though the board of directors, which was controlled by the president, afterwards ratified such payment. Blair *v.* Telegram News Co., 172 Mass. 201 (1898). Where a person who, with his friends, controlling a majority of the stock, takes control of the board of directors, and causes the board to vote him a salary as president and to vote one of his employees a salary as director, which salary he himself takes, dissenting stockholders may compel him to repay such salaries. Strouse *v.* Sylvester, 66 Pac. Rep. 660 (Cal. 1901). Where by the by-laws each director is to be paid so much a year, he can collect nothing for services for less than a year. Inman *v.* Ackroyd, etc., [1901] 1 K. B. 613, aff'g 82 L. T. Rep. 621 (1900). A by-law authorizing the directors to fix the salaries of the officers does not authorize them to vote a salary to themselves, and they may be compelled to pay it back. Schoening *v.* Schwenk, 112 Iowa, 733 (1901). Where by the by-laws salaries are to be fixed by the board of directors, and the salary of the president is not fixed until a year has expired, and is then reduced from $25,000 for the prior year to $10,500 on account of personal hostility to him, the execution of the by-law was unreasonable and the court fixed the amount at $17,500. Banigan *v.* United States, etc. Co., 22 R. I. 452 (1901). A resolution that the president shall receive $5,000 a year, which has been acted on for fifteen years, may be relied upon by a new president, even though he does not collect it for two and a half years. Farmers' L. & T. Co. *v.* Housatonic R. R., 152 N. Y. 251 (1897), aff'g Starbuck *v.* Housatonic R. R., 83 Hun, 534 (1895). Where the salary of the president has been fixed for a year by resolution of the board of directors, the board cannot rescind the resolution. It is a contract. Kimball *v.* New England, etc. Co., 168 Mass. 32 (1897). In *Re* New British Iron Co., [1898] 1 Ch. 324, the by-laws provided that £1,000 annually should be paid to the board of directors for fees, to be divided as the board might direct. The contract to pay the president may be oral and informal, and may consist of conversations. Bagley *v.* Carthage, etc. R. R., 25 N. Y. App. Div. 475 (1898); aff'd, 165 N. Y. 179. Where the board consists of the president, his son, and his clerk, and they vote five years' back pay to the president, the act is illegal, and notes issued therefor are illegal. Doe *v.* Northwestern, etc. Co., 78 Fed. Rep. 62 (1896), the court saying: "The directors of a corporation have not the power to fix their own salaries, nor to bind the corporation by a resolution

if ratified by a majority in interest of the stockholders.[1] The directors may vote a salary to the president even though he is one of their number.[2] Where the board of directors pays salaries to the president and vice-president without any work being done by them, they being insolvent and the salaries being applied on debts which they owe to another corporation, the board of directors may be held personally liable for such salaries.[3] It is legal for a corporation to distribute its profits by the payment of salaries, provided all the stockholders assent thereto.[4]

to pay for services which have been rendered in their official capacity under by-laws which contain no express provision for such compensation." The principle of law that back pay cannot be voted to officers of a corporation who are also directors does not apply to a case where the stockholders had assented to the officers receiving reasonable compensation for their work and by the by-laws the board of directors were authorized to fix such compensation. A note given to the president under such circumstances for past work is legal. National, etc. Co. *v.* Rockland Co., 94 Fed. Rep. 335 (1899). A salary duly voted to the president is payable although he by reason of disability is absent part of the time. Such salary is not payable to the vice-president, although he acts as president in the meantime. Brown *v.* Galveston, etc. Co., 92 Tex. 520 (1899). A contract to pay a salary to the president will be closely scrutinized, but where every stockholder assents to it directly or by agents the court will not set the contract aside if reasonable. Church *v.* Church, etc. Co., 75 Minn. 85 (1898). Unpaid salaries voted to its officers by an insolvent corporation which has never made any profits cannot be offset as against the stockholders' liability to creditors. Burns *v.* Beck, etc. Co., 83 Ga. 471 (1889). "The rule that trustees can make no profit out of the estate is carried so far in England that they can receive no compensation for their services. In the United States, trustees are entitled to a reasonable compensation." Perry on Trusts (3d ed.), § 432. Even though a trustee of stock who has been an officer and stockholder in the corporation is voted a salary, this is no ground for removing him as trustee, there being no proof that he voted in favor of the salary. Neither is the fact that the company did not pay as large dividends as it formerly did any ground for the removal of the trustee. Dailey *v.* Wight, 94 Md. 269 (1902). Where directors vote salaries to themselves for services to be performed, the court will pass upon the reasonableness thereof, and in this case reduced salaries of $5,000 each of the president, vice-president, and secretary to $2,000 each. Davis *v.* Thomas A. Davis Co., 63 N. J. Eq. 572 (1902). The Virginia statute requiring stockholders to authorize salaries to the directors before such salaries are paid is satisfied if the salaries are ratified by the stockholders. Shickell *v.* Berryville, etc. Co., 99 Va. 88 (1901). Under the West Virginia statutes the directors cannot vote compensation to the president or directors. Such vote must be of the stockholders. Ravenswood, etc. Ry. *v.* Woodyard, 46 W. Va. 558 (1899).

1 Normandy *v.* Ind. etc. Co. Ltd., 97 L. T. Rep. 872 (1907).

2 Fillebrown *v.* Haywood, 190 Mass. 472 (1906).

3 Harrison *v.* Thomas, 112 Fed. Rep. 22 (1901).

4 Fitchett *v.* Murphy, 46 N. Y. App. Div. 181 (1899). Where all the stock-

Notwithstanding the above rules a director is entitled to pay for extra services which he has performed as general manager or otherwise with the consent of the board.[1] And where a reasonable salary

holders are officers, and, instead of dividends, the corporation distributes its profits by large salaries, there is danger that upon the death of one of them others may continue the payment of such salaries to themselves, even though they are executors of the deceased officer's estate. Matter of Schaefer, 65 N. Y. App. Div. 378 (1901); aff'd, 171 N. Y. 686.

1 A director who is also treasurer and manager may recover compensation for his services although none has been agreed upon. It is for the jury to decide what is reasonable. Fitzgerald, etc. Co. *v.* Fitzgerald, 137 U. S. 98, 111 (1890), citing with approval Pew *v.* First Nat. Bank, 130 Mass. 391 (1881); Eales *v.* Cumberland, etc. Co., 6 H. & N. 481 (1861). Where a corporation brought suit against a promoter for fraud and the suit failed, and a contract was then made by which all the stockholders were given an opportunity to sell their stock to the promoter, and the board of directors ratified the contract and agreed to stop all litigation, a dissenting stockholder cannot have the contract set aside for fraud, even though by the contract the president is paid for his services. Hallenborg *v.* Cobre, etc. Co., 200 U. S. 239 (1906). A director may maintain a suit in the form of *quantum meruit* against the company for services performed in good faith for the corporation. Shively *v.* Eureka, etc. Co., 89 Pac. Rep. 1073 (Cal. 1907). A director who winds up a corporation after dissolution may be entitled to the same pay he received as an officer before the winding up. Lindemann *v.* Rusk, 125 Wis. 210 (1905). The president who is authorized by the by-laws to employ persons may agree to pay a director for special work to be done by him. Hooke *v.* Financier Co., 99 N. Y. App. Div. 186 (1904); rev'd on another point in 184 N. Y. 541. The agreed salary of the president does not continue as against a receiver beyond the year, where the statute fixes his term of office at one year. Conklin *v.* United States, etc. Co., 143 Fed. Rep. 631 (1906). Reasonable salaries paid to the officers for services rendered cannot be recovered back, although no formal resolution was passed in regard thereto. McCourt *v.* Singers-Bigger, 145 Fed. Rep. 103 (1906). A director may be given back pay for his services as manager. Where his presence at the meeting of the directors so voting is necessary to form a quorum, the action of the directors is illegal. He may be present and vote at the stockholders' meeting ratifying such payment, his vote not being necessary to carry the resolution. Bassett *v.* Fairchild, 132 Cal. 637 (1901). A salary voted to a director by the directors for services as manager is not legal where the charter requires a vote of the stockholders on contracts in which a director is interested. *Re* State F. Ins. Co., 36 L. J. (Ch.) 634 (1867). In Benson *v.* Heathorn, 1 Y. & C. (Ch.) 326 (1842), the court compelled a director to pay back a salary which he had received for acting as "ship's husband" for the company, whose business was the working of vessels. The president cannot bind the corporation by an agreement to pay a director extra compensation. Bailey *v.* Buffalo, etc. Ry., 14 Hun, 483 (1878); Hodges *v.* Rutland, etc. R. R., 29 Vt. 220 (1857). A salary voted by a board of three directors to one of their number as general manager is valid, at least so far as concerns a person who purchases the stock after the salary has been paid. Clark *v.* American Coal Co., 86 Iowa, 436 (1892). A di-

was drawn by a managing director without the authority of any resolution, and without any specific notice to the stockholders, but the item appeared in the accounts, and every stockholder either knew or had the means of knowing the fact, it was held that the director was not liable to account to the company for the money.[1] It has been held also that a director may recover reasonable compensation for his services as superintendent,[2] or attorney in a

rector who performs services as general manager may recover therefor. Kryger *v.* Railway, etc. Mfg. Co., 46 Minn. 500 (1891). A director may recover on a *quantum meruit* for services rendered outside of his duties as director. Ruby, etc. Co. *v.* Prentice, 25 Colo. 4 (1898). It is legal for a corporation to issue stock as full paid to a person in consideration of his leaving an employment in which he is engaged, and of assuming the presidency of the corporation. Shannon *v.* Stevenson, 173 Pa. St. 419 (1896). A resolution of the stockholders that a managing director should receive a certain salary up to a certain date does not entitle him to a salary beyond that date, and he may be compelled to repay it. *Re* Bolt and Iron Co., 14 Ont. Rep. (Can.) 211 (1887); aff'd, 16 App. Rep. 397. While an officer cannot recover for services performed as an officer unless there is a resolution or by-law to that effect, yet for services performed outside of his official duties he may recover compensation. Baines *v.* Coos Bay, etc. Co., 68 Pac. Rep. 397 (Oreg. 1902). An officer is not entitled to pay for performing the ordinary duties of his office, but is entitled to pay for duties outside of those imposed upon him by virtue of his office. Chicago, etc. Co. *v.* Boggiano, 202 Ill. 312 (1903). A corporation may legally agree to pay its president a salary for his services as general manager. Bevier, etc. Co. *v.* Watson, 107 Mo. App. 451 (1904). Where a director, who is also general manager, presents a claim for his services to the board of directors, he is not to be counted in making up the quorum or in taking the vote. Paxton *v.* Heron, 92 Pac. Rep. 15 (Colo. 1907). The board of directors may vote compensation to the president who has acted as superintendent, his vote not being necessary to pass the resolution. Gumaer *v.* Cripple Creek, etc. Co., 90 Pac. Rep. 81 (Colo. 1907), 111 S. W. Rep. 1002.

1 Felix, etc. Ltd. *v.* Hadley, 77 L. T. Rep. 131 (1897). A director who objects to an increase in the salaries of the officers, but participates in their re-election from year to year, cannot maintain a suit to hold them liable. Klein *v.* Independent, etc. Assoc., 83 N. E. Rep. 434 (Ill. 1907).

2 The president is entitled to pay for services rendered outside of his duties as president where they are rendered at the request or with the knowledge and acquiesence of the company. Chicago, etc. Co. *v.* Boggiano, 202 Ill. 312 (1903). A financier who brings about a settlement between a corporation and its creditors, may be paid for his services in stock, even though he was a director part of the time and even though there was no previous agreement to pay him. Rosehill Cemetery Co. *v.* Dempster, 223 Ill. 567 (1906). A director who, at the request of the president, superintends the construction of the road, may recover pay therefor. Henry *v.* Rutland, etc. R. R., 27 Vt. 435 (1855); Chandler *v.* Monmouth Bank, 13 N. J. L. 255 (1832), where there was even a charter prohibition. A director may recover for services rendered as superintendent. Severson *v.* Bimetallic, etc. Co., 18 Mont. 13 (1896). The president of the club

suit;[1] or secretary and agent;[2] or cashier;[3] but not for services as a promoter;[4] nor for acting as president and master-builder;[5] but may recover for acting as agent of the company.[6] Where directors are

may recover for his services in acting as janitor and collecting debts. Flynn *v.* Columbus Club, 21 R. I. 534 (1900).

1 Where the president of a railroad renders services in litigations and obtaining loans on the agreement of the board of directors to pay him therefor, he may recover payment for the same, even though there was no formal resolution of the directors, and even though the by-laws were silent as to the duties of the president and as to his salary. Bagley *v.* Carthage, etc. R. R., 165 N. Y. 179 (1900), aff'g 25 N. Y. App. Div. 475. A director may recover compensation for services rendered by him as an attorney. Taussig *v.* St. Louis, etc. R. R., 186 Mo. 269 (1905). Even though an attorney is one of the directors, yet if he performs services at the request of the directors and managing officers he may recover therefor. Taussig *v.* St. Louis, etc. Ry., 166 Mo. 28 (1901). A lawyer may recover for his services to a corporation, even though he is president and a director thereof. Kenner *v.* Whitelock, 152 Ind. 635 (1899). On this point see also § 707, *infra*, and Jackson *v.* New York Cent. R. R., 2 Thomp. & C. (N. Y.) 653 (1874); aff'd, 58 N. Y. 623. Santa Clara Min. Assoc. *v.* Meredith, 49 Md. 389 (1878); Ten Eyck *v.* Pontiac, etc. R. R., 74 Mich. 226 (1889). An attorney may recover for services, even though he is a director, it being agreed that he should be paid as soon as the company was able, and an agreement prior to incorporation having been ratified. Arapahoe Inv. Co. *v.* Platt, 5 Colo. App. 515 (1895). A director who acts as attorney for the company cannot collect fees therefor unless there was an express contract to that effect. *Re* Mimico, etc. Co., 26 Ont. Rep. 289 (1895). A lawyer having a contract with the corporation that he should receive five per cent. of its net earnings may enforce the agreement by a suit in equity where net earnings exist and the directors ignore the contract. Dupignac *v.* Bernstrom, 76 N. Y. App. Div. 105 (1902).

2 Rogers *v.* Hastings, etc. Ry., 22 Minn. 25 (1875). As to secretary, Talcott *v.* Olcott Mfg. Co., 11 N. Y. Week. Dig. 141 (1880). *Contra*, Fraylor *v.* Sonora Min. Co., 17 Cal. 594 (1861). Neither the president, treasurer, nor secretary can recover the value of their services, where they are also dirctors, unless there was an express contract to pay them or the by-laws so provide. The decisions in Pennsylvania to this effect control services there rendered, though suit is brought elsewhere. Crumlish *v.* Central Imp. Co., 38 W. Va. 390 (1893). A secretary may recover for real services, even though he is also a director. Chamberlain *v.* Detroit Stove Works, 103 Mich. 124 (1894), *cf.* 96 Pac. Rep. 975.

3 First Nat. Bank *v.* Drake, 29 Kan. 311 (1883).

4 Rockford, etc. R. R. *v.* Sage, 65 Ill. 328 (1872). See Eakins *v.* American, etc. Co., 75 Mich. 568 (1889).

5 Levisee *v.* Shreveport City R. R., 27 La. Ann. 641 (1875).

6 In the case of Taussig *v.* St. Louis, etc. Ry., 166 Mo. 28 (1901), the court said: "The rule applicable to such a case, to be deduced from the modern and best considered cases, is, we think, that a party, although a director or other officer of a corporation, may recover the reasonable value of necessary services rendered to a corporation entirely outside of the line and scope of his duties as such director or officer, performed at the instance of its officers, whose powers are of a general character,

paid an annual sum as remuneration, they cannot collect for traveling expense in going to and from meetings, but one director is not liable to the company for amounts paid to other directors for such traveling expenses unless he signed the check.[1] Where a director of a holding company serves as a director in a subsidiary company,

upon an implied promise to pay for such services, when they were rendered under such circumstances as to raise a fair presumption that the parties intended and understood they were to be paid for, or ought to have so intended and understood." Where the vice-president performs services which are not incumbent on him by reason of his office, he may recover pay for the same on a *quantum meruit*, even though there was no contract to pay him. Brown *v.* Creston Ice Co., 113 Iowa, 615 (1901). Services rendered by a director after he had subscribed for stock are a good consideration in payment therefor, in accordance with an agreement to that effect. Doak *v.* Stahlman, 58 S. W. Rep. 741 (Tenn. 1899). Even though the president of a corporation brings about a sale of all its stock, under a contract by which the corporation is to pay him a certain sum, nevertheless he cannot collect that sum from the corporation itself. Wood *v.* Manchester, etc. Co., 54 N. Y. App. Div. 522 (1900). Where a company is in financial trouble and a committee of the directors is authorized to sell the property, their expenses to be paid by the company, and the committee abandon the effort, and certain directors then take up the work and complete the sale, and a majority of the stockholders vote that their expenses shall be paid, a dissenting stockholder cannot prevent such payment. Huffaker *v.* Krieger's Assignee, 107 Ky. 200 (1899). A director may collect a reasonable compensation for services and materials given to his company. Greensboro, etc. Co. *v.* Stratton, 120 Ind. 294 (1889). A *bona fide* holder of a street railway company's note is protected, even though it was given to a director in payment for services in procuring the franchise. Kneeland *v.* Braintree Street Ry., 167 Mass. 161 (1896). A director who performs extra services is entitled to pay therefor. Zellerbach *v.* Allenberg, 99 Cal. 57 (1893). The president may collect a salary legally voted to him, even though he failed to fulfill his promise to make the business a success. Paducah, etc. Co. *v.* Hays, 24 S. W. Rep. 237 (Ky. 1893). The president may collect pay for his services if they were outside of his official duties, and he was actually employed by the corporation, and the services were rendered with the knowledge and consent of the corporation. Outterson *v.* Fonda Lake Paper Co., 20 N. Y. Supp. 980 (1892). A director may recover for services rendered. McDowall *v.* Sheehan, 13 N. Y. Supp. 386 (1891); rev'd on another point, in 129 N. Y. 200. A salary payable when bonds are sold is collectible in cash if they are not sold within a reasonable time. Indianapolis, etc. R. R. *v.* Hyde, 122 Ind. 188 (1890). In general, see also Cheeney *v.* Lafayette, etc. Ry., 68 Ill. 570 (1873); Shackelford *v.* New Orleans, etc. R. R., 37 Miss. 202 (1859); Santa Clara Min. Assoc. *v.* Meredith, 49 Md. 389 (1878), where a director obtained patents and negotiated their sale.

A director may be paid eight per cent. interest for his services and advances in purchasing claims against the corporation, such rate not being usurious. Kroegher *v.* Calivada, etc. Co., 119 Fed. Rep. 641 (1902).

[1] Young *v.* Naval, etc. Soc., Ltd., 92 L. T. Rep. 458 (1905), [1905] 1 K. B. 687.

his fees therefor do not belong to the holding company, even though the holding company provided him with qualification shares.[1] The directors are entitled to reasonable pay for winding up the affairs of the corporation.[2] The directors of a trading company may pension a retiring officer or servant.[3]

A salary which takes all the profits and part of the capital stock is unreasonable.[4] The voting of a salary or compensation must be entirely free from fraud, actual or constructive. The vote is illegal if it is carried only by including the vote of the director who receives the salary or pay.[5] A salary paid to a director for nominal

1 *Re* Dover, etc. Ltd., 98 L. T. Rep. 31 (1907).

2 Gund *v.* Ballard, 114 N. W. Rep. 420 (Neb. 1907).

3 Normandy *v.* Ind., etc. Co. Ltd., 97 L. T. Rep. 872 (1907).

4 Decatur, etc. Co. *v.* Palm, 113 Ala. 531 (1896).

5 Butts *v.* Wood, 37 N. Y. 317 (1867), where the vote was set aside, although the salary was for services by the director as secretary and treasurer; Ward *v.* Davidson, 89 Mo. 445 (1886), where increased pay was voted to the president of the corporation. Where a board of directors of three vote salaries to two of themselves, the vote is illegal, and they can recover nothing on a *quantum meruit* where they did nothing outside of the ordinary duties of their office. Steele *v.* Gold, etc. Co., 95 Pac. Rep. 349 (Colo. 1908). Gardner *v.* Butler, 30 N. J. Eq. 702 (1879); Jones *v.* Morrison, 31 Minn. 140 (1883); Kelsey *v.* Sargent, 40 Hun, 150 (1886). Where there are only five stockholders and all of them are directors, three of them cannot, either at a stockholders' or directors' meeting, vote to themselves exorbitant salaries nor the entire profits made by the company on articles manufactured under patents owned by them. In this case the court decreed that one-third of the profits from articles manufactured under such patents should belong to the company. The minority stockholders in a suit to compel the declaration of a dividend may bring into the fund moneys so illegally paid out. Crichton *v.* Webb Press Co., 113 La. 167 (1904). An officer while acting as a director cannot fix his own salary if it is objected to. Figge *v.* Bergenthal, 130 Wis. 594 (1907). An increase of salary to the president is not legal when his own vote is necessary to pass the resolution. Shaffhauser *v.* Arnholt & Schaefer, etc. Co., 67 Atl. Rep. 417 (Pa. 1907). The president, secretary, and treasurer cannot vote salaries to themselves, the company being in bad financial condition. Hardee *v.* Sunset Oil Co., 56 Fed. Rep. 51 (1893). Where the directors vote a salary to themselves, partly for services, but largely in fraud, the court will compel them to refund the whole salary. Eaton *v.* Robinson, 19 R. I. 146 (1895). In McNulta *v.* Corn Belt Bank, 164 Ill. 427 (1897), the president sued to recover a two and a half per cent. commission which had been voted by the directors to him on unissued stock for services. The suit failed on several grounds of illegality, particularly that his vote was necessary to carry the same. A ratification by the same directors as stockholders does not cure the defect. A salary voted to the president by a quorum of three directors, the two other directors being absent, and the president being one of the three, is not enforceable. Copeland *v.* Johnson Mfg. Co., 47 Hun, 235 (1888). MacNaughton *v.* Osgood, 41 Hun, 109 (1886), holds that

services when the corporation was insolvent may be recovered back.[1]

Where the board of directors vote large pay to themselves, evidently in bad faith, and with a view to depriving the corporation of

a stockholder cannot cause the vote of salary to be set aside and repayment made merely by proving that the officers voted it to themselves. He must prove actual fraud. This decision, however, may well be doubted. It was reversed on another point in 114 N. Y. 574. Where the president presides over a meeting which votes a future salary to himself for life, the salary is illegal, although he did not vote. Beers *v.* New York L. Ins. Co., 66 Hun, 75 (1892). Stock voted to the president as a salary at a meeting where his presence is necessary to form a quorum may be recovered back, but acquiescence for five years is fatal. U. S. Ice, etc. Co. *v.* Reed, 2 How. Pr. (N. S.) 253 (1885). A stockholder may compel the president to refund a salary voted to himself at an illegal meeting of a part of the directors. Back pay is illegal. Where the president takes part in the proceeding, or his vote is essential, the vote of salary to him is illegal. Wickersham *v.* Crittenden, 93 Cal. 17 (1892). A salary to the president, his own vote being necessary, is illegal. Wickersham *v.* Crittenden, 106 Cal. 327 (1895). A salary voted by the aid of the vote of an officer receiving the same may be validated by subsequent vote of the board. Wickersham *v.* Crittenden, 110 Cal. 332 (1895). A salary voted to the president at a meeting at which he presides, the minutes showing no dissenting vote, is illegal where he had performed no substantial service, even though he swears that he did not vote. Ashley *v.* Kinnan, 2 N. Y. Supp. 574 (1888). A director cannot collect a salary voted to him as general manager, even in advance of the services, where there were only three directors, and the other two were voted salaries, one as vice-president and the other as assistant treasurer. Delay in objecting thereto for some months is no bar to this defense. Mallory *v.* Mallory-Wheeler Co., 61 Conn. 131 (1891). Where a company is prosperous, the directors may vote increased salaries to themselves, each one refraining from voting when the resolution affecting himself is voted upon. McNab *v.* McNab, etc. Co., 62 Hun, 18 (1891); aff'd, 133 N. Y. 687. In Bagaley *v.* Pittsburgh, etc. Iron Co., 146 Pa. St. 478 (1892), a salary to the president, fixed by the president and another director, was upheld where the company was a close corporation. Where two directors, forming a majority of the board, vote themselves very large salaries, and refuse information to another director who is the only other stockholder, and refuse to declare dividends, and proceed to convey the property of the company to another company controlled by themselves, a court of equity will set aside the illegal conveyance and the resolutions authorizing the salaries, and will order the books to be opened to the other director, and will order dividends to be declared. The court, however, will not appoint a receiver and enjoin the continuance of the business, and will not order a distribution of the assets of the company. Laurel Springs Land Co. *v.* Fougeray, 50 N. J. Eq. 756 (1893), rev'g Fougeray *v.* Cord, 50 N. J. Eq. 185; rev'd on another point

[1] Putnam *v.* Gunning, 162 Mass. 552 (1895). A salary paid to an officer after corporate insolvency may be retained by him if received in good faith. Mills *v.* Hendershot, 70 N. J. Eq. 258 (1905), 85 N. E. Rep. 530.

more than a reasonable proportion of its net earnings, a dissenting stockholder may file a bill in equity to have the amount recovered back.[1] And where the chief stockholder, who is president, induces the directors, his "dummies," to vote a large salary to him, the corporation may defeat the officer's action at law to recover it.[2] It

in 57 N. J. Eq. 318. Where three out of five directors are present at a board meeting and vote one of themselves a salary as secretary, it is illegal. The action of the full board subsequently in increasing the salary does not validate the first vote. Martin *v.* Santa Cruz, etc. Co., 36 Pac. Rep. 36 (Ariz. 1894). Where three persons, being the owners of a majority of the stock, agree that they will vote their stock to elect as directors three persons to be named by one of them and two persons to be named by the others, and that one of them who had received a salary of $2,500 should receive a salary of $5,000, and that two of such directors should receive a salary of $500 each, the agreement is illegal. Snow *v.* Church, 13 N. Y. App. Div. 108 (1897). A trustee holding stock and electing himself the president of a company and receiving a salary must not allow his personal interest in the salary to conflict with his duty as a stockholder to favor the sale of the corporate property at a high price. Elias *v.* Schweyer, 13 N. Y. App. Div. 336 (1897); s. c., 27 N. Y. App. Div. 69. Where the president is the chief stockholder, and causes the directors to vote him a large salary, it is illegal, especially where he votes for it and his vote is necessary. Adams *v.* Burke, 102 Ill. App. 148 (1902); s. c., 201 Ill. 395, *cf.* 70 Atl. Rep. 95.

1 Quoted and approved in Bixler *v.* Summerfield, 195 Ill. 147 (1902). In this case a minority stockholder maintained a bill in equity for an accounting against the president, who owned a majority of the stock and who had voted himself and wife exorbitant salaries. In the case Von Arnim *v.* American Tubeworks, 188 Mass. 515 (1905), directors were held liable for unlawfully taking corporate funds in excess of their salaries or the value of their services. Where during eight years all the profits of a turnpike company, amounting to $20,000, are used to pay exorbitant salaries to the treasurer and secretary, the court will order a repayment of the same with interest. Wayne Pike Co. *v.* Hammons, 129 Ind. 368 (1891); Blatchford *v.* Ross, 54 Barb. 42 (1869); Ziegler *v.* Hoagland, 52 Hun, 385 (1889), where $86,000 in salaries was voted to three persons. A stockholder may cause to be set aside a resolution whereby the board of directors vote large salaries to themselves, thereby depriving him of his share of the profits. Miller *v.* Crown, etc. Co., 57 N. Y. Misc. Rep. 383 (1908). In Hedges *v.* Paquett, 3 Oreg. 77 (1869), the court refused to interfere, though fraud was charged, in that the directors credited large bills to themselves, and paid themselves large sums for services, had destroyed the business and had wasted the funds and property. This case, however, has met with universal disapproval, and must be considered as contrary to law.

2 Quoted and approved in Adams *v.* Burke, 201 Ill. 395 (1903). Davis *v.* Memphis City Ry., 22 Fed. Rep. 883 (1885). In Hubbard *v.* New York, etc. Co., 14 Fed. Rep. 675 (1882); aff'd, 119 U. S. 696, wherein a person contracted in advance to become a director and superintendent at a remuneration of one-third of the profits of the business, the court refused to uphold the agreement, and said the contract is to be "construed in the same manner as if he was actually a director at the time of its inception, and as if it was made with him

has been held also, where the majority of the stock of a corporation was held by one family, who voted away the corporate profits for salaries, that the minority might call upon a court of equity to remedy the fraud.[1] Unreasonable salaries voted by a majority of the directors to themselves as officers are not legal, even though the officers own a majority of the stock, and even though the prosperity of the corporation and the value of its stock have increased.[2] Where an insurance company has re-insured all its risks and is doing no business, but the officers are drawing large salaries, a stockholder may have a receiver appointed.[3] It is illegal for trustees owning stock in a corporation to use the stock to obtain large salaries for themselves.[4]

In another case, where for seven years a stockholder who owned a majority of the stock elected himself and two of his dummies as directors of the company and caused the board to vote a large salary to himself as president and manager, and leased to the company his property at a large rental, the salary and rental were held to be illegal and voidable.[5]

Again, where persons buying a majority of the stock thereupon take control and vote to the retiring president a large salary for past services, he being one of the persons selling the stock to them, and such salary so paid is credited to the vendees on the purchase price of the stock, the vendees are liable to restore the money so paid.[6]

while he was a director." The court will scrutinize carefully a salary voted by the board of directors to one of their number as superintendent, where such vote is by those representing him in the board, but if the salary is reasonable the court will sustain it. Harris *v.* Lemming, etc. Works, 43 S. W. Rep. 869 (Tenn. 1896).

1 Quoted and approved in Greathouse *v.* Martin, 91 S. W. Rep. 385 (Tex. 1906). Sellers *v.* Phœnix Iron Co., 13 Fed. Rep. 20 (1881). "Where a salary or compensation is voted to an officer, the resolution is illegal if it is carried by his vote or produced by his influence, where he has a controlling interest." Adams *v.* Burke, 201 Ill. 395 (1903).

2 Jacobson *v.* Brooklyn, etc. Co., 184 N. Y. 152 (1906). A majority of the stockholders in interest cannot ratify the officers unlawfully taking for their own use its moneys in excess of their salaries or the value of their services. Von Arnim *v.* American Tubeworks, 188 Mass. 515 (1905).

3 Treat *v.* Pennsylvania, etc. Co., 203 Pa. St. 21 (1902).

4 See § 612, *supra*.

5 Where the company had failed to pay its dividends by reason of such acts, a court of equity, upon the suit of another stockholder, ordered the president to account, and appointed a receiver of the company and directed that its affairs be wound up. Miner *v.* Belle Isle Ice Co., 93 Mich. 97 (1892). Where a director and his dummies vote an unreasonable salary to the treasurer to be elected and he then is elected treasurer and is paid the money, it may be recovered back. Greathouse *v.* Martin, 94 S. W. Rep. 322 (Tex. 1906).

6 Ellis *v.* Ward, 137 Ill. 509 (1890); s. c., 20 N. E. Rep. 671, holding the

Even though the salaries paid to directors are excessive, yet they may be entitled to a reasonable salary.[1] The court may reduce unreasonable salaries of the directors.[2] A creditor cannot complain of salaries paid prior to his becoming a creditor.[3] Excessive salaries may be recovered back by the receiver to apply to the debts.[4] A receiver may hold directors liable for excessive salaries, even though paid when the corporation was solvent, and may also hold them liable for collusion by which another corporation, which they control, obtained judgment and absorbed the assets of the former corporation. The receiver represents the stockholders as well as creditors, and may also maintain the suit to pay the costs of the receivership.[5] Questions relative to the compensation of trustees, receivers, stockholders and bondholders and their counsel are considered elsewhere.[6]

A person who is appointed and acts as secretary, and is neither a director nor a stockholder, is entitled to pay although the corporation never agreed to pay him.[7]

president not liable where he knew nothing of it. Where the directors have been paid for their services, majority stockholders on the winding up cannot vote the sum of £7,800 to them as a gratuity as against the dissent of a minority stockholder. Stroud *v.* Royal, etc., 89 L. T. Rep. 243 (1903). See also § 681, *infra.*

1 Miller *v.* Doyle, 211 Pa. St. 59 (1905).

2 Raynolds *v.* Diamond, etc. Co., 69 N. J. Eq. 299 (1905). A court of equity has power to reduce salaries paid to corporate officers, especially when paid to a majority stockholder. Lillard *v.* Oil, etc. Co., 56 Atl. Rep. 254 (N. J. 1903).

3 Commercial, etc. *v.* Warthen, 119 Ga. 990 (1904).

4 Mills *v.* Hendershot, 70 N. J. Eq. 258 (1905).

5 Hays *v.* Pierson, 65 N. J. Eq. 353 (1904). See 85 N. E. Rep. 530.

6 See § 879, *infra.*

7 Smith *v.* Long Island R. R., 102 N. Y. 190 (1886); Edwards *v.* Fargo, etc. Ry., 4 Dak. 549 (1887); Greenleaf *v.* Norfolk Southern R. R., 91 N. C. 33 (1884); Missouri River R. R. *v.* Richards, 8 Kan. 101 (1871). The secretary and president cannot, by their own votes, cause the board to vote them a salary for past services. Graves *v.* Mono Lake, etc. Co., 81 Cal. 303 (1889). The secretary is generally entitled to pay, but if he takes part in a sale of the property subject to the debts and he does not assert any claim for past services he cannot collect. Dodge *v.* Lansing, etc. Co., 115 N. W. Rep. 1004 (Mich. 1908). An understanding between the president and secretary, who is also a director, by which the latter was to have a commission on the sale of land, the business of the corporation being that of buying land and selling it in lots, is not binding on the corporation, but the secretary is entitled to reasonable pay for what work he did. Louisville, etc. Assoc. *v.* Hegan, 49 S. W. Rep. 796 (Ky. 1899). A secretary, after he ceases to be such, cannot claim pay where he has been receiving pay during all the time as general manager. Fowler *v.* Great, etc. Co., 104 La. 751 (1901). Where by oral agreement between the president and secretary the secretary was to receive a certain monthly salary, and at the end of the year the directors approved the accounts, including the payment of such

Even though a large stockholder of a corporation renders valuable services to it for several years, yet he is not entitled to pay therefor from the corporation unless there is a contract to that effect, especially where the circumstances showed that he expected his pay from the increased value of his investment.[1]

Although a treasurer is presumed to be entitled to compensation, yet if he is a stockholder and his firm have the banking business of the company, and nothing has ever been said about compensation, he cannot afterwards claim or obtain it.[2]

salary, and the secretary holds over, he may recover the same salary for the entire time. Mobile, etc. R. R. *v.* Owen, 121 Ala. 505 (1899). A secretary is not entitled to pay for his services as secretary unless there is an express contract to that effect; but where he gives up his whole time to the company's business, one-half as secretary and one-half in doing engineering work, he is entitled to pay. Tälcott *v.* Olcott, etc. Co., 11 N. Y. Week. Dig. 141 (1880). In England the law "is settled by a series of decisions that it is impossible for a company to ratify anything that is done or any contract that is made before it comes into existence." Hence a contract, before incorporation, as to the secretary's salary, is unenforceable. He can recover only on a *quantum meruit*. *Re* Dale, 61 L. T. Rep. 206 (1889). The salary of a secretary, where it consists of a fixed sum and also dividends on certain stock not owned by him, continues as to both until stopped on notice. Crane, etc. Co. *v.* Adams, 142 Ill. 125 (1892). A sale of all the corporate property stops the salary of the secretary where he was subject to removal at any time by the directors. Union Compress Co. *v.* Douglass, 60 Ark. 591 (1895). A secretary and treasurer elected for a year cannot be arbitrarily removed and his salary stopped, if the salary is by the year. Even if he takes part in selling out the company, yet if it is understood that the new company was to continue him he may collect the salary. Daspit *v.* Holmes Co., 44 S. Rep. 993 (La. 1907).

1 Ritchie *v.* McMullen, 79 Fed. Rep. 522 (1897). The cashier of a bank cannot collect money for his services while collecting the dividends and coupons of a depositor and stockholder in a bank, where there was no agreement to pay. Wright *v.* Sheldon, 24 R. I. 336 (1902).

2 Mather *v.* Eureka, etc. Co., 118 N. Y. 629 (1890), 44 Hun, 333 (1887). The question may be one for the jury. Pendleton *v.* Empire, etc. Co., 19 N. Y. 13 (1859). A treasurer may recover for services actually rendered by him, even though he was a director and there was no agreement as to his pay for services as treasurer. Reeve *v.* Harris, 50 S. W. Rep. 658 (Tenn. 1897). The secretary and treasurer and curator of a scientific institute is not entitled to back salary where the facts show that no such salary was contemplated. Whittemore *v.* Kent Scientific Institute, 128 Mich. 518 (1901). "No duties, no pay." A treasurer's salary ceases upon the sale of all of its assets even though there is no dissolution; but if substantial duties continue, the salary continues. Rodney *v.* Southern R. R. Assoc., 3 N. Y. St. Rep. 564 (1886), distinguishing Long Island Ferry Co. *v.* Terbell, 48 N. Y. 427 (1872). A salary to a treasurer does not continue while he is sick, it appearing that during that time he sold his stock and never performed any

A contract of a director, officer, or president that he will not ask any compensation for his services cannot be insisted upon by the company if it was not a party to the contract.[1] The treasurer and general manager cannot recover for past services where he was appointed on an agreement that he would not be paid therefor, he being largely interested in the company.[2]

Various decisions in regard to other officers of the company are given in the notes below.[3] An executive committee has no power to

further services. Raley *v.* Victor Co., 86 Minn. 438 (1902).

1 An agreement among the officers to reduce their salaries cannot be in-insisted upon by the corporation. It was not a party to the agreement. Thompson Co. *v.* Brook, 14 N. Y. Supp. 370 (1891). An agreement of the president with certain creditors that he would not take a salary until other claims were paid cannot be enforced by the receiver. The president may come in as a creditor. Snow *v.* Russel Coe, etc. Co., 58 Hun, 134 (1890). Lambert *v.* Northern Ry., 18 W. R. 180 (1869), holds that a promise by directors to perform their duties gratuitously is *nudum pactum*, and does not prevent them from recovering upon a previous binding agreement for salaries. Where the vendor of property agrees by contract with the vendee and accepted by the company that he, the vendor, will for five years give his personal supervision to the business of the company, he, the vendor, cannot recover compensation from the company for such services. Wetmore *v.* Wetmore Co., 113 Cal. 321 (1896). The conduct of an officer may be such as to preclude the idea that he was to have a salary. Simonson *v.* New York City Ins. Co., 25 N. Y. Week. Dig. 90 (1886).

2 Harvard, etc. Co. *v.* Pratt, 185 Mass. 406 (1904). A stockholder who renders services to his corporation and states that he does not intend to charge therefor, cannot afterwards claim pay therefor. Sidway *v.* Missouri, etc. Co., 187 Mo. 649 (1905). A director and vice-president is not entitled to pay for extra services where it was understood that he should not receive any pay, even though the services were rendered under a resolution passed by the board of directors. Stout *v.* Security, etc. Co., 82 N. Y. App. Div., 129 (1903). Where the treasurer who is also a director serves for a year at an agreed price, and then states that he cannot serve further for the same pay, and no arrangement is made, he may recover what his services are worth thereafter. Stacy *v.* Cherokee, etc. Works, 70 S. C. 178 (1904). Where promoters agree that they will not charge the corporation anything for their services, they cannot afterwards collect from the corporation. Powell *v.* Georgia, etc. Ry., 121 Ga. 803 (1905).

3 It may be shown by parol that a resolution gave the vice-president a certain salary, where such resolution was not entered on the record and he performed services other than those pertaining to his office. Selley *v.* American, etc. Co., 119 Iowa, 591 (1903). A receiver need not turn his fees over to the trust company that caused him to be appointed, even though he is president of the trust company and received a salary. Citizens', etc. Co. *v.* Tompkins, 97 Md. 182 (1903). A corporate contract to give an attorney "permanent employment" is satisfied by a year's employment. Sullivan *v.* Detroit, etc. Ry., 135 Mich. 661 (1904). The president may employ the vice-president, his brother, to do work for which the company will pay him. McDowell *v.*

make a contract appointing a sole selling agent for five years and giving him six per cent. on all goods sold by him or any one else. Moreover such a contract is unilateral and not binding when the agent does not agree to sell any goods.[1]

§ 658. ***Contracts between corporations having one or more directors in common.***—It has been difficult to determine whether a stockholder in one corporation could cause to be set aside a contract or agreement between two corporations having one or more directors in common. As a rule, even though the boards of directors of two corporations are the same, and one buys the property of the other, yet the transaction is not void, and will not be set aside at the instance of a stockholder unless he shows damage.[2] A contract between two corporations will not be declared invalid because the corporations have common directors, where its fairness is manifest.[3] But a contract between corporations having directors in common must be "open and free from any suspicion of secret dealing in favor of one principal while acting as the representative of the other."[4] A mortgage

New York, etc. R. R. 12 N. Y. St. Rep. 877 (1887). When it is understood by the directors that the officers are to be paid for their services, and at the end of the year a note is given for services to the superintendent, who is also a director, he may collect it. Stewart *v.* St. Louis, etc. R. R., 41 Fed. Rep. 736 (1887). Where the vice-president sues for services as general manager, he must prove services clearly outside of his duties as an officer, and that there was no contrary agreement (citing many cases). Toponce *v.* Corinne, etc. Co., 6 Utah, 439 (1890). A contract with directors for their services ceases upon the winding up of the company. Frames *v.* Bulfontein Min. Co., [1891] 1 Ch. 140. *Cf.* Rodney *v.* Southern R. R. Assoc., 3 N. Y. St. Rep. 564 (1886). For the services of ordinary clerks, etc., the corporation is of course liable. Legrand *v.* Manhattan, etc. Assoc., 80 N. Y. 638 (1880); Pollok *v.* Shultze, 1 Hun, 320 (1874); Bard *v.* Banigan, 39 Fed. Rep. 13 (1889); aff'd, 134 U. S. 291; Gowen Marble Co. *v.* Tarrant, 73 Ill. 608 (1874). Where an excessive salary is paid to an employee in order to induce him to subscribe for stock, he may be liable for the excess upon the corporation becoming insolvent. Deppen *v.* German-American, etc. Co., 70 S. W. Rep. 868 (Ky. 1902); s. c., 72 S. W. Rep. 768. An express agreement as to the salary to be paid to a general manager for past services does not entitle him to the same salary for the future, even though there is no further express agreement. Bell *v.* Peper, etc. Co., 103 S. W. Rep. 1014 (Mo. 1907).

1 Commercial, etc. Co. *v.* Northampton, etc. Co., 115 N. Y. App. Div. 388 (1906); aff'd, 190 N. Y. 1. The treasurer and general manager has no power to agree to give to the vice-president a commission on purchases and sales by the corporation, but this does not prevent his recovering reasonable compensation therefor. Waters *v.* American, etc. Co., 102 Md. 212 (1905). See also § 534, *supra.*

2 Smith *v.* Ferries, etc. Ry., 51 Pac. Rep. 710 (Cal. 1897).

3 Evansville, etc. Co. *v.* Bank of Commerce, 144 Ind. 34 (1896).

4 Mercantile, etc. Co. *v.* Pittsburgh, etc. Assoc., 173 Pa. St. 30 (1896).

by an insolvent corporation to a creditor corporation, the two corporations having a majority of their directors in common, has been declared to be illegal.[1] A guaranty where there are directors in common may be voidable.[2] Such contracts as these, however, are not void, and they may be validated by a unanimous vote of the stockholders,[3] or by long delay in objecting.[4] Moreover, if the minority

Where the managing officers of a corporation secretly form a new corporation for a similar business and control it, and cause the two corporations to enter into a contract, such contract cannot be enforced by the latter corporation. Attalia, etc. Co. *v.* Virginia, etc. Co., 111 Tenn. 527 (1903). A stockholder may cause to be set aside a sale of all the property of the corporation at an inadequate price to another corporation having the same officers and directors. Hinds *v.* Fishkill, etc. Co., 96 N. Y. App. Div. 14 (1904). A manager of one oil company cannot turn over its property to another oil company of which he is president and thus enable the latter to claim adverse title. McCullough *v.* Ford, etc. Co., 213 Pa. St. 110 (1905).

1 Sutton Mfg. Co. *v.* Hutchinson, 63 Fed. Rep. 496 (1894). In Barrie *v.* United Rys. Co., 102 S. W. Rep. 1078 (Mo. 1907), it is held that a contract between two corporations having practically the same directors and officers would be presumed to be fraudulent, especially where it involved a transfer of the property of one to the other, without the creditors of the former being paid.

2 Barr *v.* New York, etc. R. R., 125 N. Y. 263 (1891); Metropolitan Elev.

3 If the stockholders unanimously ratify a contract between two corporations having directors in common, the contract is legal. Coe *v.* East, etc. R. R., 52 Fed. Rep. 531 (1892). A sale of property by one corporation to another all of the directors except one being in common, is legal where such sale is subsequently ratified by a meeting of the stockholders. Grant *v.* United, etc. Ry., L. R. 40 Ch. D. 135 (1888). A sale of property by one corporation to another is not fraudulent merely because there was one director common to both, where the directors and stockholders assented thereto. Leathers *v.* Janney, 41 La. Ann. 1120 (1889). A lease of one railroad to another, ratified by the stockholders as required by the statute, is legal, even though the same persons were directors in both companies. Jones *v.* Concord, etc. R. R., 67 N. H. 119 (1891); s. c., 67 N. H. 234. Where a land company agreed to pay a railroad company a certain sum in instalments, if the railroad company would extend its road to the land company's land, it is immaterial that four of the five directors of the land company were also directors of the railroad company, it being shown that all acts of the directors were expressly ratified at a stockholders' meeting, and it being also shown that the railroad had been constructed and a part of the instalments paid. San Diego, etc. R. R. *v.* Pacific Beach Co., 112 Cal. 53 (1896).

4 Even though a bridge company, which has made a long-time contract with a railroad company, and which has the same officers and directors and majority stockholders as the railroad company, modifies the contract so as to reduce the income of the bridge company, yet if for nineteen years the minority stockholders of the bridge company acquiesce therein, such modification is legal. Pittsburg, etc. Ry. *v.* Dodd, 115 Ky. 176 (1903).

stockholders object to the contract, the court will consider it, and will sustain it if fair, and set it aside if unfair.[1]

Ry. *v.* Manhattan Ry., 15 Am. & Eng. R. R. Cas. 1 (1884). A contrary conclusion was reached by the federal court on the same facts. Flagg *v.* Manhattan Ry., 10 Fed. Rep. 413 (1881). For other cases connected with this litigation, see Metropolitan Elev. Ry. *v.* Manhattan Ry., 14 Abb. N. Cas. 152, n. (1884); Manhattan Ry. *v.* New York Elev. Ry., 29 Hun, 309 (1883), rev'g N. Y. D. Reg., Dec. 2, 1882; People *v.* Metropolitan Elev. Ry., 26 Hun, 82 (1881); Harkness *v.* Manhattan Ry., 54 N. Y. Super. Ct. 174 (1886). See also St. James' Church *v.* Church of Redeemer, 45 Barb. 356 (1865), where one religious corporation gratuitously conveyed property to another, the directors being common. A consolidation of two religious corporations having a director in common is illegal and may be set aside. Stokes *v.* Phelps Mission, 47 Hun, 570 (1888). "It is undoubtedly a well settled rule of law that executory contracts entered into by corporations having common directors are voidable at the instance of either corporation, and the court will not inquire into the question whether or not it is beneficial to the corporation seeking to avoid it." But this right is vested in the corporation and not in any stockholder, and a stockholder cannot obtain an injunction against such contract being carried out, unless actual fraud is shown. Burden *v.* Burden, 159 N. Y. 287, 307 (1899).

1 Even though a lessor railroad and a lessee railroad have directors in common and they compromise as to which company shall have the benefit of a saving in interest by the refunding of the bonds of the lessor, yet if a majority of the stockholders of the lessor ratify the agreement, the minority cannot complain, unless it is shown that the ratification was obtained by fraud or concealment. Continental Ins. Co. *v.* New York, etc. R. R. 187 N. Y. 225 (1907). Even though a railroad lease is perpetual and provides that the lessee shall pay certain interest and dividends, yet, any saving by reason of a refunding of the bonds of the lessor belongs to the stockholders of the lessor and they may recover such saving as has been made within the time of the statute of limitations, especially where it has directors in common, and the fact that the guaranty of dividends was endorsed on the stock certificates is immaterial. Ætna Ins. Co. *v.* Albany, etc. Co., 156 Fed. Rep. 132 (1907). If a contract between two corporations is a fair one the courts will sustain it, even though there was a director in common. Hiles *v.* Hiles & Co., 120 Ill. App. Rep. 617 (1905). A contract between companies having a majority of directors in common is not void, but may be set aside for unfairness. City Nat. Bank *v.* Merchants', etc. Bank, 105 S. W. Rep. 338 (Tex. 1907). A deed from one unincorporated association to another association in payment of a debt is not invalid merely because they had one director in common. Stradley *v.* Cargill, etc. Co., 135 Mich. 367 (1904). A corporation organized to work and deal in mines may by a majority vote of its officers sell its mines, even though that is all the property it has and the price may be stock of another corporation to be received in exchange *pro rata*. The transaction cannot be set aside by one who buys stock which was not voted. Moreover, a holder of $25 worth of stock cannot enjoin a sale by those owning ninety-three per cent. of the entire capital stock. Such a sale is valid, although there were directors in common. Pitcher *v.* Lone, etc. Co., 39 Wash. 608 (1905). A

§ 659. *Foreclosure of mortgage on corporate property, and collusion with directors, whereby no defense is made to the foreclosure.—*

stockholder cannot cause to be set aside a contract between two corporations having a majority of directors in common, unless he shows damage. Lyman *v.* Kansas City, etc. R. R., 101 Fed. Rep. 636 (1900). A debt from one corporation to another is not invalid, although they have directors in common. Salina, etc. Bank *v.* Prescott, 60 Kan. 490 (1899). The fact that two of the directors in a vendor corporation are also directors in a vendee does not render the sale fraudulent *per se.* Hagerstown, etc. Co. *v.* Keedy, 91 Md. 430 (1900). A pledge of bonds by one corporation to another is not invalid, even though there is one director in common. Rawlings *v.* New Memphis, etc. Co., 60 S. W. Rep. 206 (Tenn. 1900). Even though all the directors of a corporation organize another company to buy out the first named company, and they are directors in the second company also, yet, if all the facts are fully stated, the sale is legal and the new company cannot repudiate the sale on that ground. The fact that the directors are not independent, but represent the vendor, is immaterial if that fact is made known to the parties. Lagunas, etc. Co. Ltd. *v.* Lagunas Syndicate, Ltd., [1899] 2 Ch. 392. In the case of Robotham *v.* Prudential Ins. Co., 64 N. J. Eq. 673 (1903), the court said: "I incline strongly to believe that the safe rule in most cases, in the end, will be found to be that the presence of a director or directors on both sides of the transaction under investigation does not give the dissenting stockholder an arbitrary right to an injunction, but may give him a most ample right to subject the transaction to the scrutiny of the court, and may cast upon the corporations or directors concerned the burden of disclosing and justifying the transaction. To give the dissenting stockholder the arbitrary right to an injunction in this class of cases often will put a deadly weapon in the hands of the blackmailer and the corporation 'striker.' Such a rule tends to drive the actual wrong-doers to cover,—to induce them to seek concealment while the corporate action is accomplished through apparently impartial directors, who are in fact only agents or 'dummies.'" The court in this case held that where all the directors are personally interested in the matter, aside from their interest as stockholders, the court at the instance of a minority stockholder may compel the directors to prove that the proposed action is advantageous to the corporation, inasmuch as it has not received the approval of an impartial board of directors. Where a rolling-stock company by its board of five directors makes a contract with a railroad company having thirteen directors, five of whom are the same as the directors of the rolling-stock company, and the railroad company makes the contract at a meeting of eight directors, two of whom are of the five, and for two years the railroad company lives up to the contract, it cannot then repudiate. The majority of its directors were not in common, and it should have objected before. U. S. Rolling-Stock Co. *v.* Atlantic, etc. R. R., 34 Ohio St. 450 (1878). *Cf.* Bill *v.* Western Union Tel. Co., 16 Fed. Rep. 14 (1883), where the illegality was clear, since the directors common to both corporations constituted a majority of the directors of one of them. In Fitzgerald *v.* Fitzgerald, etc. Co., 41 Neb. 374 (1894), where the same persons formed a majority of the boards of directors of a construction company and also of a railroad company, to which latter company the construc-

This subject is considered elsewhere.[1] Where the directors of a corporation have misappropriated the funds of the company, created

tion company had agreed to turn over the stock of another railroad company; and where, by the contract between the two companies having a majority of the board of directors in common, the railroad company was to transport freight at a certain price, and to deliver to the construction company its bonds to a certain amount; and where subsequently this contract was changed so as to reduce the amount going to the construction company by upwards of $700,000,—it was held that the minority stockholders and directors of the construction company might file a bill on behalf of the construction company and compel the railroad company to pay to the construction company the amount mentioned above. It was also held that where these directors controlled both boards, and sold a part of the bonds going to the construction company to themselves at ninety cents on the dollar, when the bonds were worth par, the construction company could hold the railroad company liable for the loss. The decision was modified in 44 Neb. 463 (1895), reducing the decree to $300,906.33. An appeal to the supreme court of the United States was dismissed in Missouri Pac. Ry. *v.* Fitzgerald, 160 U. S. 556 (1896). The fact that a minority of the directors are directors in another contracting company does not render a contract voidable at the instance of one of the companies or of a dissenting stockholder. Ziegler *v.* Lake Street El. R. R., 69 Fed. Rep. 176, 182 (1895). A receiver of an insolvent bank may file a bill in equity to compel its president and another bank to pay back the price of stock in the insolvent bank which the latter, through the instrumentality of its president, who was also cashier of the other bank, had purchased of the other bank on the eve of the insolvency of the former. Bridgens *v.* Dollar Sav. Bank, 66 Fed. Rep. 9 (1895). The fact that a railroad company and a construction company have mainly, though not entirely, the same officers and stockholders, does not render them legally identical, but merely requires a more careful scrutiny of their dealings with each other where the interests of outside parties are affected. Hence a contract by which the construction company takes stock and bonds and agrees to do certain work will be upheld if it is a reasonable and fair contract, and the construction company may enforce claims against the railroad company. Davidson *v.* Mexican Nat. R. R., 58 Fed. Rep. 653 (1893). A mortgage by one corporation to another is not void because they have the same president. Roy *v.* Scott, etc. Co., 11 Wash. 399 (1895). An insurance policy issued by an agent to a corporation in which he is an officer is not enforceable. Greenwood, etc. Co. *v.* Georgia, etc. Ins. Co., 72 Miss. 46 (1895). A sale of iron by one corporation to another which is fair is not illegal simply because the company has directors in common. Burden *v.* Burden, 8 N. Y. App. Div. 160 (1896); aff'd, 159 N. Y. 287 (1899). In Hart *v.* Ogdensburg, etc. R. R., 89 Hun, 316 (1895), where two railroads having directors in common were consolidated, the court held that the minority stockholders could not object, inasmuch as the act was not so clearly against the interest of the minority as to be a wanton and fraudulent destruction of their rights, nor a clear, substantial, flagrant violation thereof. Moreover the court held that six years' delay in suing was fatal.

[1] See § 848, ch. XLIX, *infra*.

fraudulent debts, levied assessments upon the stock, caused the stock to be forfeited for non-payment, and judgment to be entered

A city is liable on a gas contract although the same man is mayor and is also president of the gas company. Capital, etc. Co. *v.* Young, 109 Cal. 140 (1895). A sale of all the assets to another corporation may be set aside at the instance of minority stockholders, especially where both corporations have directors in common. McLeod *v.* Lincoln, etc., 69 Neb. 550 (1904). In Santa Fé Electric Co. *v.* Hitchcock, 9 N. Mex. 156 (1897), the court held a lease to be void between two companies having the same directors, there being actual fraud. A note by one corporation to another is valid although the same person is president of both. St. Joe, etc. Co. *v.* First Nat. Bank, 10 Colo. App. 339 (1897). Where a town board of three are authorized to make a grant to a railroad, and two of them, one being a director of the railroad, made the grant the court will set it aside. San Diego *v.* San Diego, etc. R. R., 44 Cal. 106 (1872). The fact that two directors out of eight of one packet company are also directors out of six directors of a competing packet company does not render them liable for fraud, although the former company loans the latter company much money and takes a chattel mortgage and closes out its property. Booth *v.* Robinson, 55 Md. 419 (1880). In England contracts between companies having directors in common are void by statute, unless they are ratified by vote of the stockholders, and may be so ratified, although the by-laws prohibit the directors from making contracts in which they are interested. Grant *v.* United, etc. Ry., L. R. 40 Ch. D. 135 (1888); Ernest *v.* Nicholls, 6 H. L. Cas. 401 (1857). *Cf.* Griffin *v.* Inman, 57 Ga. 370 (1876), where the town officers merely executed bonds to a railroad company of which they were directors. The bonds were held to be valid. In Wallace *v.* Long Island R. R., 12 Hun, 460 (1877), *held*, that a dissenting stockholder could not sue to set aside a lease made between two railroads having directors in common, but that a majority of the stockholders might have objected. A conveyance of all the property of an insolvent corporation to one of its creditors, a corporation having two directors in common with the insolvent corporation, such conveyance being to secure the latter corporation's debt, is *prima facie* fraudulent and voidable. If free from actual fraud, and if reasonable, it is sustained. Sweeny *v.* Sugar Ref. Co., 30 W. Va. 443 (1887). The fact of having stockholders in common is immaterial. Warfield *v.* Marshall, etc. Co., 72 Iowa, 666 (1887). The fact that a construction contract is assigned by the contractor to a corporation having directors in common with the railroad does not render the contract fraudulent *per se.* Union Pac. R. R. *v.* Credit Mobilier, 135 Mass. 367 (1883). A contract between two corporations having directors in common is voidable, but equity will cause such payments to be made for work done as are just, irrespective of the written contract. Thomas *v.* Peoria, etc. Ry., 36 Fed. Rep. 808 (1888). Where one director is a director also in another company with which a contract is being made, he cannot be counted in making up a quorum. Metropolitan, etc. Co. *v.* Domestic, etc. Co., 44 N. J. Eq. 568 (1888). A contract between corporations having common directors is voidable, not void. If it is fair it will not be disturbed. Manufacturers' Sav. Bank *v.* Big Muddy Iron Co., 97 Mo. 38 (1889); Alexander *v.* Williams, 14 Mo. App. 13 (1888). A lease of one railroad to another by directors who are di-

on said debts and the property to be sold out, a stockholder may file a bill to set aside all the transactions and to compel the directors to account and to wind up the company.[1] A fraudulent decree of foreclosure may subsequently be attacked by the corporation itself after it has passed into other hands, even though the officers, directors and stockholders who were such at the time of the foreclosure acquiesced therein.[2] Where the officers of a corporation fraudulently cause mortgages on its property to be foreclosed and then buy it in and form a new corporation to take over the assets, all for the purpose of eliminating preferred stockholders and certain creditors in the old corporation, a preferred stockholder may hold the new corporation liable for the value of an equal amount of preferred stock in the new corporation, including dividends already paid.[3]

§ 660. *Directors' purchases of property needed by the corporation, and purchases of outstanding debts or claims against the corporation.*—It is an abuse of trust for a corporate director to purchase property which he knows the corporation will need, and then to sell the same to the corporation at an advanced price. This generally occurs where the director purchases in his own name land which the corporation must purchase for its enterprise, or over which it will need a right of way.[4] Where, however, the director

rectors in both companies is invalid. Thouron *v.* East, etc. Ry., 5 Ry. & Corp. L. J. 77 (Tenn. 1888). In Pearson *v.* Concord R. R., 62 N. H. 537 (1883), the court, in setting aside a contract made by corporations having common directors, said: "Stockholders and creditors are entitled not only to the vote of a director in the board, but to his influence and argument in discussion."

1 Jellenik *v.* Huron, etc. Co., 177 U. S. 1. (1899).

2 Pacific R. R. of Mo. *v.* Missouri, etc. Ry., 111 U. S. 505 (1884). A corporation may file a bill in equity to enjoin the foreclosure of a mortgage securing bonds which have been issued to the stockholders as a dividend illegally, and to compel the surrender of the bonds for cancellation, it appearing that no other rights have intervened. Gunnison, etc. Co. *v.* Whitaker, 91 Fed. Rep. 191 (1898). Where the chief stockholders put the corporation into bankruptcy in order to defraud the creditors by a compromise and succeed in doing so by settling with the creditors at fifty cents on the dollar and then the bankruptcy proceedings are dismissed and they are about to take the property themselves, a minority stockholder may bring suit against them in behalf of the corporation. Weber *v.* Wallerstein, 111 N. Y. App. Div. 693 (1906).

3 Sparrow *v.* Bement & Sons, 142 Mich. 441 (1905).

4 Blake *v.* Buffalo Creek R. R., 56 N. Y. 485 (1874). See Buffalo, etc. R. R. *v.* Lampson, 47 Barb. 533 (1867); Blair, etc. Co. *v.* Walker, 50 Iowa, 376 (1879); Taylor *v.* Salmon, 4 Myl. & C. 134 (1838), where the corporate agent took in his own name a lease which the company desired and had instructed him to obtain for itself. See also Mitchell *v.* Reed, 61 N. Y. 123 (1874). Where a director, who afterwards became a contractor for the construction of the railroad,

offers the land to the corporation at the price which he paid for it, and the corporation refuses it, he cannot long subsequently be compelled to accept that price.[1] A director may construct works to

purchased land for a right of way and also lots for terminals, he may be compelled to turn over to the company such lots upon repayment to him of the price therefor. Seacoast R. R. *v.* Wood, 65 N. J. Eq. 530 (1903). A promoter is not bound to turn over to the company a property which he tried to purchase for the corporation before it was organized, but was unable to do so on account of certain conditions, but which he thereafter purchased for himself. Tompkins *v.* Sperry, etc. Co., 96 Md. 560 (1903). The corporate treasurer cannot purchase stock at a discount and sell to the corporation at par, where such stock is needed by the corporation to fulfill its contracts. East New York, etc. R. R. *v.* Elmore, 5 Hun, 214 (1875). Where the business of a corporation requires the construction of a railroad and steamship line, and the company has no power to construct them, and consequently the officers with others take out a separate charter and own the stock of the new company and construct the line, and then propose to consolidate the companies on a plan which will give to the new stock an interest in the consolidated company which will represent a large profit, a stockholder of the old company may enjoin the consolidation upon proving that the new franchises were necessary to the old company and were intended for the benefit of the old company, the same officers being in control of the two companies. Miller *v.* Consolidated, etc. Co., 110 Fed. Rep. 480 (1901). Where a corporation has a lease of and option to purchase land, and the officers purchase the land for themselves in violation thereof, the corporation is entitled to the property at the price paid by the officers, but as to land which the company merely wished to purchase, but had made no contract in respect thereto, the company is not entitled to the benefit of purchase of such land by an officer. Lagarde *v.* Anniston, etc. Co., 126 Ala. 496 (1900). Where the president is directed to buy the boats of a rival company, and does so by buying them for another corporation which he controls, and credits himself with an advance, he may be made to refund. Ward *v.* Davidson, 89 Mo. 445 (1886). A director cannot take a contract in his own name for himself where such contract really should belong to the corporation. The president of a packet company may take a contract for carrying mails, and may have the service performed by the packet company, he paying it therefor. He is not liable to it for his profits, he having endeavored first to get the contract for the company. Keokuk, etc. Co. *v.* Davidson, 95 Mo. 467 (1881). A treasurer is not liable for profits in coal sold by himself to the corporation, where he purchased the coal with no intent of selling to the company. Parker *v.* Nickerson, 137 Mass. 487 (1884). A director who takes to himself an assignment of a patent that ought to have been assigned to his corporation must account for all profits that he has received. Averill *v.* Barber, 6 N. Y. Supp. 255 (1889). A corporate creditor cannot complain that a director has purchased property needed by the corporation. Cornell *v.* Clark, 104 N. Y. 451 (1887). See also § 652, *supra*, on sales by directors to the corporation.

1 Sandy River R. R. *v.* Stubbs, 77 Me. 594 (1885). A president and treasurer who purchase land as agents for a railroad company, and allow it to pay part of the purchase price, and obey its direction to sell

compete with the works of the corporation in which he is a director. He is not disqualified from so doing.[1] Directors, who are also officers, of a manufacturing corporation, if acting in positive good faith towards the corporation and their co-stockholders, are not precluded from engaging in the building and operation of other distinct works in the same general business; and they do not stand, in respect to said works, in any trust relation to the corporation.[2] But where the president takes a renewal of a corporate lease in his own name, and admits that he takes it for his company, he cannot claim any of the profits arising from it, even though, in order to get the lease from him, a contract is made that he have a part of the profits.[3] A director cannot take a contract in his own name for himself, where such contract really should belong to the corporation.[4]

part, whereby the purchase price is repaid, are liable to convey to the company the remainder, the title to which is in their names. Church *v.* Sterling, 16 Conn. 388 (1844).

1 Barr *v.* Pittsburgh, etc. Co., 51 Fed. Rep. 33 (1892). See also Ward *v.* Davidson, 89 Mo. 445 (1886). *Cf.* Keokuk, etc. Co. *v.* Davidson, 95 Mo. 467 (1888). A director in a corporation may engage in a similar business on his own account or as a director in a competing corporation. New York, etc. Co. *v.* Franklin, 49 N. Y. Misc. Rep. 8 (1905). The president of a water irrigation company cannot acquire an interest in the property hostile to the interest of the stockholders. Center, etc. Co. *v.* Lindsay, 21 Utah, 192 (1900).

2 Barr *v.* Pittsburgh, etc. Co., 57 Fed. Rep. 86 (1893), aff'g 51 Fed. Rep. 33.

3 Robinson *v.* Jewett, 116 N. Y. 40 (1889). A managing director of a grocery company cannot legally take a renewal in his own name of a lease which the company has, in order to go into the business for himself. Acker, etc. Co. *v.* McGaw, 68 Atl. Rep. 17 (Md. 1907). Even though a director takes a renewal of a lease for himself when it should be for the corporation, yet if the lease provides against assignment and the lessor had refused to make a lease to the corporation and the lessor was not made a party, the court will not put the corporation in possession. Jacksonville Cigar Co. *v.* Dozier, 43 S. Rep. 523 (Fla. 1907). Even though a corporation has applied for the renewal of a lease, and afterwards a director applies and the lease is given to the director, the corporation cannot compel the director to turn over the lease where the lease contains a provision against sub-letting. Crittenden, etc. Co. *v.* Cowles, 66 N. Y. App. Div. 95 (1901). Where there are but two stockholders in a corporation which conducts two theatres on leases, and one of them trusts the other as president to conduct the business, and the latter on the expiration of the leases forms a new corporation and takes the leases in the name of such new corporation, the other stockholder may compel an assignment of the leases to the first corporation and have an accounting for profits. McCourt *v.* Singers-Bigger, 145 Fed. Rep. 103 (1906).

4 Richardson *v.* Green, 133 U. S. 30 (1890). Where a corporation has forfeited its right to buy a mining claim, a director may subsequently buy it in good faith from a person who has relocated it. McDermott, etc. Co. *v.* McDermott, 27 Mont. 143 (1902).

It is a fraud on the corporation and on corporate creditors for the directors to buy up at a discount the outstanding general debts of the corporation, and compel it to pay them the full face value thereof. In such a case the directors may be compelled to turn over to the corporation the evidences of indebtedness upon being paid the money which they gave for the same.[1]

Where the president of a mining company prospects land at the expense of the company, and receives a salary, and takes leases of the land in his own name, he may be compelled to assign them to the corporation on the corporation's paying the rent. De Bardeleben *v.* Bessemer, etc. Co., 140 Ala. 621 (1904).

1 Quoted and approved in Bonney *v.* Tilley, 109 Cal. 346 (1895). A stockholder who is also a director cannot buy up claims against the insolvent company and offset them at their face value. Bulkley *v.* Whitcomb, 121 N. Y. 107 (1890); Duncomb *v.* New York, etc. R. R., 84 N. Y. 190, 202 (1881); *Re* Imperial Land Co., L. R. 4 Ch. D. 566 (1877). See also Davis *v.* Rock Creek, etc. Co., 55 Cal. 359 (1880), where a mortgage given to a director to secure debts purchased by him at a discount was defeated in foreclosure. If the corporate managers buy up corporate debts with corporate funds, a corporate creditor may compel them to give up the claims so purchased. Thomas *v.* Sweet, 37 Kan. 183 (1887). Where the president purchases corporate debts at a discount he cannot enforce them at full value. Bramblet *v.* Commonwealth, etc. Co., 83 S. W. Rep. 599 (Ky. 1904). It is illegal for the president to buy a debt of the corporation at a discount. Bramblet *v.* Commonwealth, etc. Co., 84 S. W. Rep. 545 (Ky. 1905). Where the treasurer buys a claim against the corporation and secretly pays it out of the corporate funds, he is liable to the corporation for the profit he made. The Telegraph *v.* Lee, 125 Iowa, 17 (1904). While an ordinary corporate debtor may offset claims against the corporation which he has purchased, yet officers, stockholders, or persons occupying a trust relationship cannot do so. Nix *v.* Ellis, 118 Ga. 345 (1903). Directors who authorize acts by the corporation infringing on a patent cannot afterwards buy the patent and enforce the right to damages. New York, etc. Co. *v.* Buffalo, etc. Co., 24 Fed. Rep. 604 (1885). A corporate creditor cannot complain that a director has purchased property needed by the corporation. Cornell *v.* Clark, 104 N. Y. 451 (1887). Where an insurance company absorbs another company *ultra vires* and gives notes therefor, and the president acquires and collects the notes, he may be compelled to refund. McClure *v.* Levy, 147 N. Y. 215 (1895). Where a company has assigned, and its directors have bought claims at a discount, a suit to compel them to turn in the claims at cost should be instituted by the assignee. Moulton *v.* Connell, etc. Co., 93 Tenn. 377 (1894). Payment of corporate notes by a director may entitle him to preference in the distribution of the assets. Atkinson's Appeal, 11 Atl. Rep. 239 (Pa. 1887). English debentures may be issued to directors at a discount. Campbell's Case, L. R. 4 Ch. D. 470 (1876). Where a corporation is without funds, its president may purchase for himself its overdue bond, and may agree with the corporation that the rate of interest of the bond shall be increased. There was no proof that he purchased at a discount. Bradly *v.* Marine, etc. Co., 3 Hughes, 26 (1879); s. c., 3 Fed. Cas. 1172; aff'd, 105 U. S. 175. As to the rule that where a director or officer of an insolvent corporation obtains a prefer-

But a director may buy corporate bonds from third parties at a discount and enforce them at par, where there are no special equities against such a purchase, and no present duty in regard to them from him as a director. Moreover, the corporation must claim the benefit at once, if at all.[1]

ence in the payment of his debt it is illegal, see § 692, *infra.* Officers occupy a quasi-fiduciary relation to the corporation and cannot profit by purchasing claims against it. Hill *v.* Frazier, 22 Pa. St. 320 (1853). Also Lingle *v.* National Ins. Co., 45 Mo. 109 (1869); Holland *v.* Heyman, 60 Ga. 174 (1878), holding that the purchased claims are good only for the amount paid.

Where a corporation is a going concern, although embarrassed for ready money, it is legal for the president to purchase its outstanding notes at a discount, and the corporation cannot maintain a bill in equity to pay such notes at such discount. Glenwood, etc. Co. *v.* Syme, 109 Wis. 355 (1901).

Perry on Trusts (3d ed.), § 428, lays down the rule as follows: "A trustee, executor, or assignee cannot buy up a debt or incumbrance to which the trust estate is liable, for less than is actually due thereon, and make a profit to himself; but such purchase inures for the benefit of the trust estate, and the creditors, legatees, and *cestuis que trust* shall have all the advantage of such purchase. But if a trustee buys up an outstanding debt for the benefit of the *cestuis que trust*, and they refuse to take it or to pay the purchase-money, they cannot afterwards, when the purchase turns out to be beneficial, claim the benefit for themselves. Nor can the trustee make any contract with the *cestui que trust* for any benefit, or for the trust property, nor can he accept a gift from the *cestui que trust.* The better opinion, however, is that a trustee may purchase of the *cestui que trust*, or accept a benefit from him, but the transaction must be beyond suspicion; and the burden is on the trustee to vindicate the bargain or gift from any shadow of suspicion, and to show that it was perfectly fair and reasonable in every respect, and courts will scrutinize the transaction with great severity. So, if a trustee buys the trust property at private sale or public auction, he takes it subject to the right of the *cestui que trust* to have the sale set aside, or to claim all the benefits and profits for the sale himself."

Where a director is one of the committee appointed by the board of directors to settle claims against the corporation, and he buys some of the claims, he must turn them in at the price he paid, and even though the stockholders and directors intended to allow him the profit, yet this does not estop the corporation from objecting. Kroegher *v.* Calivada, etc. Co., 119 Fed. Rep. 641 (1902). Directors who have obtained a judgment against the corporation on claims against it, which they have purchased, may purchase corporate property sold on execution to satisfy such judgment, the purchase being in good faith to protect their interest, and it appearing that the plaintiff refused to contribute his share towards redeeming from the sale. Snediker *v.* Ayers, 146 Cal. 407 (1905). After a corporation has ceased business a director may purchase its obligations and enforce them. Stanton *v.* Gilpin, 38 Wash. 191 (1905). A director may buy a claim against the corporation if other creditors are not injured. McIntyre *v.* Ajax, etc. Co., 28 Utah, 162 (1904).

1 Seymour *v.* Spring Forest Cem. Assoc., 144 N. Y. 333 (1895); s. c., 157 N. Y. 697. See also § 655, *supra.* A director of a corporation may pur-

An attachment and execution sale of railroad bonds on a judgment obtained by a director was disregarded and declared void, where the director himself purchased at the sale, and the whole transaction was tainted with a fraudulent control exercised by the director over the company.[1]

§ 661. *Loans by directors to the corporation; mortgages by the corporation to the directors, and the right of an insolvent corporation to give a mortgage or assignment of its property to a director in order to prefer the payment of his debt.*—These questions are considered elsewhere.[2]

chase its mortgage bonds at their market value, and enforce them at their full value. Camden, etc. Co. *v.* Citizens', etc. Co., 69 N. J. Eq. 718 (1905). In Higgins *v.* Lansingh, 154 Ill. 301 (1895), the court said that if a director acts fairly and for the interest of the corporation, he may buy up at a discount a debt of the corporation and enforce such debt at its full face value, provided the corporation was given an opportunity itself to become the purchaser and could not or would not purchase. The court held, however, in the case before it that the purchase on the part of the director was fraudulent, and that the director could collect only the amount he paid. The fact that a director buys up the securities of an insolvent corporation for the purpose of using them in reorganization is not fraudulent or a breach of his duty, he having paid all that the securities were worth. Powell *v.* Willamette Valley R. R., 15 Oreg. 393 (1887). In Inglehart *v.* Thousand Island Hotel Co., 109 N. Y. 454 (1888), 32 Hun, 377, the assignee of a judgment from a director who purchased it at a discount was allowed to enforce it for the full amount. After the corporation has assigned for the benefit of creditors, and all its property has been sold, a director may buy up claims against it, and participate in the distribution of assets. Hammond's Appeal, 123 Pa. St. 503 (1889); Craig's Appeal, 92 Pa. St. 396 (1880). The case of St. Louis, etc. R. R. *v.* Chenault, 36 Kan. 51 (1886), holds that a corporate treasurer may buy up outstanding notes against the corporation, and may then pay such notes out of the corporate funds in his possession. Where the directors issued bonds as collateral to the company's note, and, upon the sale of the bonds by the pledgee for non-payment of the note, purchased the bonds at five cents on the dollar, a foreclosure based chiefly on such bonds will be set aside. James *v.* Railroad Co., 6 Wall. 752 (1867). The complicated principles of law growing out of directors owning corporate debts are considered in §§ 692, 693, *infra*. As to the issue by the corporation of its bonds to directors at less than par, see § 766, *infra*.

1 Richardson *v.* Green, 133 U. S. 30 (1890). Where the president of a coal company contracts in his own name to supply coal to parties, and the board of directors, a majority of whom are his relatives, contract to furnish the company's coal to him on a royalty, a stockholder may compel him to turn into the corporation the profits of his contract. An assignee of his interest who took with notice is not protected. Davis *v.* Gemmell, 70 Md. 356 (1889). See Davis *v.* Gemmell, 73 Md 530.

2 See §§ 692, 693, *infra*.

§ 662. *Frauds by a majority of the stockholders on the minority — Directors owning stock in another corporation with which a contract is made — Stockholders' ratification of the voidable acts of directors — One corporation voting stock in another competing corporation.*—It often happens that a consolidation, lease, sale, or contract between two corporations is made where, first, the directors of one of the corporations are largely interested in the stock of the other, or, second, one corporation owns a majority of the stock of the other, or, third, the same person or persons own a majority of the stock of both corporations. There then is likely to arise a conflict between interest and duty. Such contracts as these are investigated very closely by the courts. They are not necessarily void, and are not constructively fraudulent. But if there is actual fraud, or if there has been an undue advantage taken or an unconscionable bargain made, the court will set it aside. If the transaction is fair the court will sustain it; if it is unfair the court will undo it.[1]

First, where the directors of one corporation are stockholders in another corporation, and a lease sale, consolidation, or contract is made between the two. Such transactions are of constant occurrence. They are not fraudulent in law unless they are unfair. The court has power to set them aside, however, at the instance of a dissenting stockholder, if in the conflict between interest and duty interest has prevailed.[2]

1 Quoted and approved in Hill *v.* Gould, 129 Mo. 106 (1895), where a sale of coal was upheld, although at about cost, and a majority of the directors were elected by and represented the railroad company that bought the coal.

2 Where a majority of the directors of an irrigation company are members of an association which desires to obtain water from such corporation, a contract to that effect which is solely for the benefit of the association is illegal and may be repudiated by the corporation, even though such contract was openly made, and even though the directors were guilty of laches in not causing the contract to be set aside, and in the meantime the association has spent its money in installing its plant. Goodell *v.* Verdugo, etc. Co., 138 Cal. 308 (1903), the court saying: "The publicity alone of an illegal and unauthorized act of the directors of the corporation does not make it legal or valid."

Where the officers and owners of a majority of the stock of a company vote as stockholders and officers to lease its property to another corporation, all of whose stock they own, the minority stockholders in the first corporation may cause it to be set aside. Meeker *v.* Winthrop Iron Co., 17 Fed. Rep. 48 (1883). See also Brewer *v.* Boston Theater, 104 Mass. 378 (1870); Fitzgerald *v.* Fitzgerald, etc. Co., 41 Neb. 374 (1894).

A lease made by a majority of the board of directors, of which majority one is interested in another corporation taking the lease, and his vote being necessary to authorize the lease, is voidable at the instance of a stockholder of the lessor. Parsons *v.* Tacoma, etc. Co., 25 Wash. 492 (1901). A minority stockholder cannot enjoin

Nevertheless a court of equity will not, at the instance of minority stockholders in a corporation, enjoin that corporation from tak-

the company from issuing its stock in payment for the stock of other similar companies on the ground that the price to be paid is excessive and that three of the directors are interested as stockholders in the other companies, where he does not prove that the price is excessive, and it appears that the stockholders will have to approve the transaction before the directors can issue the stock, and it appears also that the plaintiff owns but a very small amount of the stock. Geer *v.* Amalgamated, etc. Co., 61 N. J. Eq. 364 (1901). Where the business of a corporation requires the construction of a railroad and steamship line and the company has no power to construct them, and consequently the officers with others take out a separate charter and own the stock of the new company and construct the line, and then propose to consolidate the companies on a plan which will give to the new stock an interest in the consolidated company which will represent a large profit, a stockholder of the old company may enjoin the consolidation upon proving that the new franchises were necessary to the old company and were intended for the benefit of the old company, the same officers being in control of the two companies. Miller *v.* Consolidated, etc. Co., 110 Fed. Rep. 480 (1901). Even though an officer of a mortgagor owns a majority of the stock, and is also a creditor, and promotes a suit for a receivership and sale of the corporate property, yet he may purchase at the foreclosure sale, even at a nominal figure, and a corporation to which he transfers it in exchange for the latter's capital stock may be a *bona fide* purchaser for value, even though it is chargeable with notice of all the facts, and may insure the property for its own benefit and not for the benefit of an underlying mortgage. Farmers', etc. Co. *v.* Penn, etc. Co., 103 Fed. Rep. 132, 157 (1900); aff'd, 186 U. S. 434. A lease will not be set aside even though a majority of the directors of the lessor are interested in the lessee, and even though after the lease was made they became stockholders and directors of the lessee, it being shown that the lessor had a floating and bonded debt and no funds, and had never paid a dividend, and that as a result of the lease the stock advanced fifty per cent. in value, and the complaint is not made until eighteen months after the lease was made. Dickinson *v.* Consolidated, etc. Co., 114 Fed. Rep. 232 (1902); aff'd, 119 id. 871. The fact that directors loaned money to the corporation on its purchase of property from another corporation in which they are interested does not postpone their claims to the claims of other creditors. *In re* Estate, etc., 202 Pa. St. 589 (1902). Even though the general manager is a stockholder in another company which is selling articles to his company, yet where the board of directors of his company knew the facts and monthly statements were made, and no actual fraud is shown, the sales cannot be set aside after they have been completed. Aldine Mfg. Co. *v.* Phillips, 129 Mich. 240 (1902). Where a director dominates the board and induces the board to purchase worthless securities of other companies in which he is interested, and he thereby makes a large individual profit, he may be compelled by a receiver of the corporation to account for his profits and it is immaterial whether he did or did not vote therefor as a director. Pepper *v.* Addicks, 153 Fed. Rep. 383 (1907). Where the president of one company is general manager of another, and the former

ing a lease of another railroad, even though the same persons are the officers and majority stockholders in both companies, unless act-

defrauds the latter through him, the latter may have an accounting. Candelaria Min. Co. *v.* Juarez Co., 157 Fed. Rep. 315 (1907). Where the by-laws expressly provide that a director shall not be liable for the profits received by him as a stockholder in another corporation by reason of a contract between the two corporations, he cannot be held liable. Costa Rica Ry. *v.* Forwood, [1900] 1 Ch. 756; aff'd, [1901] 1 Ch. 746.

Where the directors let a contract, and then the contractor assigns his rights to a corporation the majority of whose stock is owned by the directors, the court will not aid the contractor as a stockholder in the second corporation. Wardell *v.* Union Pac. R. R., 103 U. S. 651 (1880). See § 649, *supra.* Where the directors of a railway company enter into a contract with third persons, whereby a new company is organized, franchises secured, and a road built and leased to the old company, and the profits realized from the transaction are equally divided between the directors and the third persons, the latter are not liable for their profits, even though exorbitant, on a suit by the stockholders of the old company, unless the contract of lease is rescinded and the road restored to the new company. Hitchcock *v.* Barrett, 50 Fed. Rep. 653 (1892). Although a lessee railroad company has directors, a minority of whom are largely interested in the stock and bonds of the lessor railroad, and such bonds and stock are largely "water," yet this does not necessarily vitiate the lease. The court will not set the lease aside if no undue advantage was taken and no actual fraud involved. Jesup *v.* Ill. Cent. R. R. 43 Fed. Rep. 483 (1890). Where a gas company is under contract to furnish gas to several concerns, and its business is so managed as to favor a concern in which the officers are interested, there being an insufficient supply of gas, a minority stockholder may complain. Clark *v.* Pittsburgh, etc. Co., 184 Pa. St. 188 (1898). Although certain persons, being directors and owners and in control of a railroad company, cause it to make a construction contract with a company which they also control, yet, if all stockholders assent, subsequent consolidated bondholders cannot object that a part of the old issue of bonds was issued below par and was fraudulently and illegally issued. Coe *v.* East, etc. R. R., 52 Fed. Rep. 531 (1892). An agreement of persons holding a majority of the stock, they being directors also, that a person purchasing stock from them shall be general manager, and may at the end of two years sell the stock back to them at a stated price, is contrary to public policy and void. The vendors need not repurchase. The arrangement is unfair to the corporation. Wilbur *v.* Stoepel, 82 Mich. 344 (1890). It is illegal for directors to be stockholders in a construction company to which a construction contract is let. Gilman, etc. R. R. *v.* Kelly, 77 Ill. 426 (1875).

In England it seems that under the statutory power of one company to sell out to another, the sale may be for cash, and the minority are bound, even though the majority own the purchasing company. But all the cash must be paid, and not merely the part that goes to the minority. Holst *v.* Sydney, etc. Ry., 69 L. T. Rep. 132 (1893). A contract of a corporation that a patentee shall have forty-eight per cent. of an increase of stock does not apply to the capital stock of a consolidated company, although the former corporation is one of those entering into the consolidation. Ein-

ual unfairness and injustice are proven. Moreover, the court cannot prescribe the terms of a lease. It can merely enjoin or set aside a fraudulent or *ultra vires* one.[1] Again, where one corporation buys out another, a stockholder of the former cannot complain, even though a large amount of watered stock was issued in payment, and even though the directors of the purchasing company were personally interested in the selling company and had made large profits in the construction of the work, it appearing that the purchasing company had no property at all at the time of the purchase. In such a case no damage is done to the stockholder, and hence suit by him does not lie.[2] But where a lease is made, and the directors of the lessee rail-

stein *v.* Rochester, etc. Co., 146 N. Y. 46 (1895).

Sometimes an underwriting syndicate is brought into the deal. The following decision may then be applicable: Where unissued shares of the par value of £1 each are worth about £4 each and a portion thereof are offered to the stockholders at £2 10*s.* each and an option on the balance is given to underwriters at the same price in consideration of the underwriters agreeing to take such of the stock as is offered to the stockholders and is not taken by the latter, a minority stockholder may enjoin the carrying out of such option to the underwriters, it being in violation of the English statute prohibiting the payment of a commission for underwriting subscriptions. Burrows *v.* Matabele, etc. Co., [1901] 2 Ch. 23. The fact that one of the trustees of a voting trust is an officer in a certain railroad does not render illegal the voting of the stock in favor of consolidating with that railroad, there being no proof of wrong-doing or unfair terms. Dady *v.* Georgia, etc. Ry., 112 Fed. Rep. 838 (1900). The fact that a minority of the directors own stock in a corporation, which latter owns stock in a corporation with which the first corporation is about to contract, does not invalidate such contract. Pierce *v.* Old Dominion, etc. Co., 67 N. J. Eq. 399 (1904). A contract between a corporation and a municipality, where one of the commissioners of the latter making the contract is a stockholder in the former, will be set aside. Brown *v.* Street, etc., 71 N. J. L. 79 (1904). The fact that a school district trustee is a stockholder in a lumber corporation does not render illegal a purchase of lumber from such corporation by a contractor to build the schoolhouse. Escondido, etc. Co. *v.* Baldwin, 2 Cal. App. 606 (1906).

1 Shaw *v.* Davis, 78 Md. 308 (1894). The court held that no actual fraud was proven in this case. A stockholder may have a preliminary injunction against a sale of all the property to a new corporation for cash and the right to subscribe for stock in the new company, the new company being controlled by the directors of the old company. Mitchell *v.* United, etc. Co., 66 Atl. Rep. 938 (N. J. 1907).

2 Smith *v.* Ferries, etc. Ry., 51 Pac. Rep. 710 (Cal. 1897). A contract by which one railroad company guarantees the bonds of another railroad company in consideration of a majority of the capital stock of the latter is not necessarily illegal, although ten directors of the former are interested in the minority stock of the latter, it being shown that the transaction was a fair one and was desirable and that there was no concealment. Teller *v.* Tonopah, etc. R. R., 155 Fed. Rep. 482 (1907).

road company are also directors of the lessor company, and own a majority of the stock of both companies, a stockholder of the lessee company alleging that the lease is at an exorbitant rent and unlawfully depletes the funds and earnings of the lessee company, and injures him as a stockholder, and alleging also that the directors have unlawfully paid large sums to themselves on account of alleged loans, may by a bill in equity compel them to account.[1]

Where the officers of a lessee corporation, which has leased the property of the lessor corporation, control a majority of the stock of the latter, and conspire to compel the minority to sell their stock by refusing to pay the rent due on the lease, a court of equity, on the application of the minority, will compel a payment of the rent.[2] The question as to the liability of a director who is interested as a stockholder in a contracting construction company is considered elsewhere.[3]

A lease to a director is not necessarily illegal, even though a stockholder objects thereto, where a majority of the stockholders have ratified the lease.[4] Where a corporation sells all its property to its president at a price less than a minority stockholder is willing to pay, he may have the sale set aside, even though a majority in interest of the stockholders have approved it, the decree being that the sale shall be void only in case such higher price is paid.[5] It is in fact the proper rule that all such transactions should be approved by a majority in interest of the stockholders, at a meeting called for that purpose, and that even then a court of equity has power to set the transaction aside, at the instance of a dissenting stockholder, if it is unfair and if he is prompt in his application to the court.[6] If a director acquires knowledge of a secret process and then enters the

1 Sage *v.* Culver, 147 N. Y. 241 (1895).

2 Barr *v.* New York, etc. R. R., 96 N. Y. 444 (1884). Where directors in a corporation cancel without consideration a mortgage from a corporation in which they are interested, a stockholder in the former company may hold them liable for any loss. Brinckerhoff *v.* Roosevelt, 131 Fed. Rep. 955 (1904); aff'd, 143 Fed. Rep. 478. Where a lessee railroad is insolvent and in the hands of a receiver, and the rent is not paid, and it controls the board of directors of the lessor railroad, a stockholder of the latter may have a receiver appointed of such of the lessor's property as is not already in the hands of a receiver, and such second receiver may be authorized to sue for the rent due, and the court may also authorize him to issue receiver's certificates to pay the expense of prosecuting such suit. Town of Vandalia *v.* St. Louis, etc. R. R., 209 Ill. 73 (1904).

3 See § 649, *supra*.

4 The court refused, at the instance of a dissenting stockholder, to set aside such a lease, in the case of Nye *v.* Storer, 168 Mass. 53 (1897). See also § 649, *supra*.

5 Wheeler *v.* Abilene, etc. Co., 159 Fed. Rep. 391 (1908).

6 See note 1, p. 1958, *infra*.

employ of another company and uses it for the latter company he may be enjoined.[1]

Where a director has sold his property to the corporation, or has committed some other act which is voidable and not void, and where a majority of the stock can ratify and validate that act, it being not actually fraudulent, but merely voidable at the option of the stockholders, the important question arises whether, in taking the vote of the stockholders on such a question, the stock held by the director himself is to be counted. The well-settled rule is that his stock is to be counted, even though the vote would have failed if his stock had not been voted.[2] It is to be borne in mind, however,

1 Vulcan Detinning Co. *v.* American Can Co., 67 Atl. Rep. 339 (N. J. 1907).

2 A director may sell property to the corporation where the purchase is adopted at a meeting of the stockholders. Such director may vote in favor of such purchase all the stock that he owns; but if the result is "so detrimental to the interests of the corporation itself as to lead to the necessary inference that the interests of the majority of the shareholders lie wholly outside of and in opposition to the interests of the corporation and of the minority of the shareholders, and that their action is a wanton or fraudulent destruction of the rights of such minority," then a court of equity will set the act aside. Gamble *v.* Queen's, etc. Co., 123 N. Y. 91 (1890). The court said: "In such cases it may be stated that the action of the majority of the shareholders may be subjected to the scrutiny of a court of equity at the suit of the minority shareholders." Even though the directors are to receive a commission on bonds which they sell for the corporation, yet if the stockholders are notified of the same and ratify the transaction in meeting assembled, the minority stockholders cannot complain, the transaction itself being a fair one. The directors may vote their own stock at such meeting and the ratification is legal, even though their stock was necessary in order to carry the resolutions. Hodge *v.* United States Steel Corp., 64 N. J. Eq. 807 (1903). The court said: "Like other stockholders, they had a right to be influenced by what they conceived to be for their own interest, and they cannot lawfully be denied the right, nor can it be limited or circumscribed by the fact that they occupied the position of directors in the company." The court further said: "In Leavenworth *v.* Chicago Railway Co., 134 U. S. 688, it was held that the action of the stockholders validated the contract where nine out of thirteen directors were personally interested. In the case of Nye *v.* Storer, 168 Mass. 53, and Bjorngaard *v.* Goodhue County Bank, 49 Minn. 483, a like infirmity in contracts was held to be eliminated by the vote of a majority of stockholders." A purchase of a steamboat from one who is a director and owns a majority of the stock is valid where ratified by a majority vote at a stockholders' meeting. The director may vote his stock. Northwest Transp. Co. *v.* Beatty, L. R. 12 App. Cas. 589 (1887). It was said, in effect, that in such case the ratification must not be brought about by unfair or improper means, nor be illegal or fraudulent or oppressive toward those shareholders who oppose it. A rule excluding stockholders from the right to vote, merely because they might be personally interested to vote in a particular way, contrary to the interests of the other

that the majority cannot bind the minority by ratifying a contract which is actually fraudulent or so unfair as to amount to fraud.[1]

stockholders, would be likely to lead to great confusion. Beatty *v.* Northwest Transp. Co., 5 Can. L. T. 277 (1885) (rev'g s. c., 4 Can. L. T. 85), holding that a purchase by the directors of a vessel from one of the directors could not be set aside by a dissenting stockholder where a majority of the stock had ratified the purchase, even though the director himself held and voted that majority. A stockholder may vote on a question in which he has a personal interest other than his interest as a stockholder. Middleton *v.* Arastraville, etc. Co., 146 Cal. 219 (1905). Even if stock has been issued for services, it may be voted on a question as to whether it is legally issued. Blinn *v.* Riggs, 110 Ill. App. Rep. 37 (1903). Where the board of directors have purchased at an excessive price real estate in which the dominating directors are personally interested, the latter may be held liable at the instance of a stockholder. Ratification of the transaction at a stockholders' meeting, which the dominating directors control, does not validate the transaction. Klein *v.* Independent, etc. Assoc., 83 N. E. Rep. 434 (Ill. 1907).

A stockholder may vote to ratify a purchase of property from a corporation by the directors, although such stockholder is a director himself. The court said: "The fact that he may have a personal interest separate from the others or from that of the corporation in the matter to be voted upon does not affect his right to vote. It is not to be understood that the majority stockholders may use their power of voting for the purpose of defrauding the minority." Bjorngaard *v.* Goodhue County Bank, 49 Minn. 483 (1892); Foss *v.* Harbottle, 2 Hare, 461 (1843), where the directors sold their property to the corporation. Inasmuch as the majority of stockholders could ratify the purchase, the court refused to entertain a stockholder's suit until they had voted. Where a person fraudulently misrepresented a mine in its sale to the company for shares of stock, a suit by the company against him does not lie where a majority of the stock votes against the suit, although the shares obtained by the vendee were voted by him and were necessary to make the majority, and although he was a director of the company at the time. East, etc. Co. *v.* Merryweather, 2 Hem. & M. 254 (1854). This case goes much farther than the modern rule would uphold. See Mason *v.* Harris, L. R. 11 Ch. D. 97 (1879), holding explicitly that where a director is guilty of fraud as a promoter, a dissenting stockholder may bring

1 See § 649, *supra.* Unreasonable salaries voted by a majority of the directors to themselves as officers are not legal, even though the officers own a majority of the stock, and even though the prosperity of the corporation and the value of its stock have increased. Jacobson *v.* Brooklyn, etc. Co., 184 N. Y. 152 (1906). Where directors are interested in a contract with a corporation a minority stockholder may insist on the contract being a reasonable one, even though a majority of the stockholders have approved it, it appearing that those particular directors constituted a majority of the board and also owned a majority of the stock. Booth *v.* Land, etc. Co., 68 N. J. Eq. 536 (1905). A majority of the stockholders in interest cannot ratify the officers unlawfully taking for their own use its moneys in excess of their salaries or the value of their services. Von Arnim *v.* American Tube Works, 188 Mass. 515 (1905).

Second, a similar situation arises where one corporation owns a majority of the stock of another, and hence controls it, and brings about a lease, consolidation, sale, or contract between the two.[1] This is very much the same as where a corporation sells property to one of its directors,[2] or buys property from him.[3] The courts will scrutinize the transaction very closely and will set it aside, at the instance of a stockholder, if it is unreasonable, unfair, and practically fraudulent.[4] The New York court of appeals has well said

him to an accounting, although the director controls the directorate and a majority of the shares of stock. Also Atwool *v.* Merryweather, L. R. 5 Eq. 464, note (1867), where a dissenting stockholder sued to set aside a sale of property to the company by the defendant, who divided the profits with one of the directors. Although a majority of the stockholders had voted not to bring the action, yet this majority was made up by counting the stock of the guilty parties, and hence was not binding. In a stockholders' vote ratifying the acts of directors, a stockholder has no right to vote stock which he has transferred to others, even though it still stands in his name on the books. Graves *v.* Mono Lake, etc. Co., 81 Cal. 303 (1889). A creditor who is also a stockholder may vote his stock in favor of a mortgage to himself. Rittenhouse *v.* Winch, 11 N. Y. Supp. 122 (1890). Works built by a director in opposition to the corporation may be purchased by the latter and new stock issued therefor. Such a transaction is certainly legal where a majority of the minority stockholders, not including the parties interested, vote in favor of it. Barr. *v.* Pittsburgh, etc. Co., 51 Fed. Rep. 33 (1892). In Cumberland Coal Co. *v.* Sherman, 30 Barb. 553 (1859), the court held that a unanimous vote of the stockholders was necessary to confirm. A ratification by the stockholders of directors' acts cannot be made by a general resolution ratifying "all of the acts of the officers." Farmers' L. & T. Co. *v.* San Diego, etc. Co., 45 Fed. Rep. 518 (1891), holding also that the directors holding a majority of stock cannot by its vote ratify a preference to them by the corporation, which is insolvent. A stockholder may vote on the propriety of a sale to the corporation in which he is interested as vendor. Worth, etc. Co. *v.* Bingham, 116 Fed. Rep. 785 (1902).

1 This is practically a private sale of the corporate property to one of the stockholders and may be objected to. See Mason *v.* Pewabic Min. Co., 133 U. S. 50 (1890). See also § 671, *infra.*

2 See § 653, *supra.*

3 See § 652, *supra.*

4 Where one railroad owns a majority of the stock and controls the board of directors of another railroad, and causes the latter to lease its road to the former, a stockholder of the former may file a bill in equity to set aside such lease on the ground that its terms were so inequitable as to constitute fraud. In such case no demand need be made to the board of directors to bring suit, if the facts alleged in the bill show that the board of directors is controlled by the guilty party. Rogers *v.* Nashville, etc. Ry., 91 Fed. Rep. 299 (1898). Where one mining company owns the majority of the stock of another mining company and elects the directors of the latter, and causes its property to be sold out to the former on its own terms, the minority stockholders of the latter may cause the sale to be set aside, even though no actual fraud is shown. Glengary, etc. Co. *v.* Boehmer, 28 Col. 1 (1900).

that where "a majority of the stock is owned by a corporation or a combination of individuals, and it assumes the control of another

This would seem to be the logical rule under the decision of the supreme court of the United States in Mason *v.* Pewabic Min. Co., 133 U. S. 50 (1889), which held that a majority of the stockholders could not sell out all the property of the company to themselves at a fixed price at a private sale, even though the minority stockholders were given an opportunity to participate in such sale the same as the majority stockholders. See on this subject § 671, *infra.*

Where one corporation has taken a lease of the property of another and guarantees dividends on the stock of the latter, and then acquires a majority of the stock of the latter and proposes to rescind such an agreement, a minority stockholder may enjoin such action. McLeary *v.* Erie, etc. Co., 38 N. Y. Misc. Rep. 3 (1902). Even though one railroad company owns the majority of the stock of another railroad company and purchases the property of the latter at a foreclosure sale thereof, yet, if there was no actual fraud, the minority stockholders of the insolvent company cannot complain, especially where they waited seventeen months and allowed large expenditures to be made in reliance on the sale. Rothchild *v.* Memphis, etc. R. R., 113 Fed. Rep. 476 (1902). Where an insolvent savings bank is really controlled by a national bank, although they have not the same directors, yet the former cannot prefer the latter. It is an illegal preference in behalf of the directors. Slack *v.* Northwestern, etc. Bank, 103 Wis. 57 (1899). In a stockholders' suit to set aside a consolidation on the ground that it was *ultra vires* and also fraudulent in that one company controlled the other, a *preliminary* injunction will not be granted if the consolidation has already been completed. Stevens *v.* Missouri, etc. Ry., 106 Fed. Rep. 771 (1901). As to one corporation voting stock in another corporation, see § 615, *supra.*

Where one street railway owns all the stock of another street railway (excepting five shares, the owner of which does not object), and the former makes a contract authorizing a third street railway to run its cars over the tracks of the company whose stock is so owned, such contract is legal and will be enforced. South, etc. Ry. *v.* Second Ave. etc. Ry., 191 Pa. St 492 (1899). The provision in a lease that any differences arising shall be decided by arbitration cannot be avoided by a minority stockholder, even though the lessee owns a majority of the stock of the lessor and controls its board. Wolf *v.* Pennsylvania R. R., 195 Pa. St. 91 (1900). Where a holding company increases the capital stock of one of its subsidiary companies and then causes it to purchase the common stock of the holding company, thereby creating a conflict of interest between the preferred stockholders of the holding company and the subsidiary company, which by the plan would control the holding company itself, minority stockholders may enjoin such a reorganization, it being a part of the plan that the holding company shall sell its various stocks to such subsidiary company. Robinson *v.* Holbrook, 148 Fed. Rep. 107 (1906). Even though a corporation is in debt to its directors, yet if its income is sufficient to pay the interest, the directors cannot legally sell their holdings of stock to a competing concern, together with such debt, whereby the competing concern obtains a majority of the stock, even though the minority are offered the same price, such action being followed practically by the new corporation taking a lease of the assets of the old corporation,

company's business and affairs through its control of the officers and directors of the corporation, it would seem that for all practical purposes it becomes the corporation of which it holds a majority of stock, and assumes the same trust relation towards the minority stockholders that a corporation itself usually bears to its

and doing all the business. The minority stockholders may hold the directors personally liable, and may have a receiver appointed, and may have the mortgage securing the directors' debts canceled, and the business itself continued by the receiver. The former directors who resigned, as well as new directors who took their place, are proper party defendants. Jacobus *v.* Diamond, etc. Co., 94 N. Y. App. Div. 366 (1904). A stockholder in a corporation entitled to certain bonds, which by reason of an act of the legislature have been canceled in exchange for stock, may attack a fraudulent agreement by which the company does not get the stock, especially where he alleges that the statute was unconstitutional. Edwards *v.* Mercantile, etc. Co., 124 Fed. Rep. 381 (1903), involving the complicated transactions of the Bay State Gas Company.

In the case Colgate *v.* United States, etc. Co., 67 Atl. Rep. 657 (N. J. 1907), it is held that where a consolidation is to be ratified by a vote of the stockholders, it is immaterial that one of the companies owns the majority of the stock of the other, and that the two companies have directors in common, the court declaring that such consolidation being statutory, it was different from an ordinary contract, and moreover, that any other rule would lead to the "more objectionable feature of 'dummy' directors in place of directors actually representing stockholders' interests." Where a New Jersey holding company owns all the stock of certain Rhode Island street railroad companies and as such stockholder causes them to be leased to a new corporation which guarantees five per cent. on the stock of the Rhode Island corporation, and then causes another New Jersey holding company to be organized to issue one share of its stock for every four shares of stock in the first holding company, and all the stockholders of the first holding company accept the offer excepting one stockholder, he may maintain a bill in equity in the United States Court in Rhode Island against both holding companies to compel the payment to him of an equitable compensation corresponding to the earnings over and above the five per cent. Four years' delay is no bar. Sabre *v.* United, etc. Co., 156 Fed. Rep. 79 (1907). Where a construction company owning the bonds and stocks of street railway companies sells the same to a trust company on the agreement of the latter to complete the work, and by the contract a majority of the directors of the construction company resign, and appointees of the trust company are substituted, a stockholder of the construction company cannot compel the trust company to account for the value of the stocks and bonds, unless he shows actual fraud, even though a part of the agreement was made after the appointees of the trust company had been installed in office. Kidd *v.* New Hampshire, etc. Co., 66 Atl. Rep. 127 (N. H. 1907).

Where a majority of the stock of a railroad company is held by another company, and the latter company uses its control to acquire all the property of the former company fraudulently, a minority stockholder may bring the latter company to account therefor. Pondir *v.* New York, etc. R. R., 72 Hun, 384 (1893).

stockholders."[1] A consolidation is not illegal from the fact that one of the companies owns a majority of the stock of the other and they have directors in common.[2]

Third, the same principles of law apply, where an individual or several individuals, instead of a corporation, own the majority of the stock of another corporation and bring about a sale, lease, consolidation, contract, or foreclosure, to their own personal gain, at the expense of minority stockholders. The law requires of the majority of the stockholders the utmost good faith in their control and management of the corporation as regards the minority, and in this respect the majority stand in much the same attitude towards the minority that the directors sustain towards all the stockholders.[3] Hence, where the majority are interested in another corporation, and the two corporations have contracts between them,

1 Farmers' L. & T. Co. *v.* New York, etc. Ry., 150 N. Y. 410, 430 (1896), the court saying also (p. 434): "There are circumstances under which the majority stockholders occupy substantially the same relation of trust towards the minority as the board of directors would occupy towards the stockholders it represents." This decision was followed in a stockholders' suit in the federal court to remedy the same wrong in De Neufville *v.* New York, etc. Ry., 81 Fed. Rep. 10 (1897). A stockholder in one railroad corporation cannot maintain a suit at law against another railroad corporation for damages to his shares of stock on account of the latter railroad corporation owning a majority of the stock of the former, and so managing the former as to cause a mortgage to be foreclosed resulting in a purchase of the property by the latter railroad corporation. Niles *v.* N. Y. etc. R. R., 35 N. Y. Misc. Rep. 69 (1901), involving the same transaction as the preceding two cases. Even though one electric light company buys a majority of the stock of a competing company and uses the plant of the latter upon the former's plant being burned, and does many acts which are for the benefit of the former company, yet unless actual damage is shown the minority stockholders cannot complain. Cannon *v.* Brush, etc. Co., 96 Md. 446 (1903). Even though a bridge company, which has made a long-time contract with a railroad company, and which has the same officers and directors and majority stockholders as the railroad company, modifies the contract so as to reduce the income of the bridge company, yet if for nineteen years the minority stockholders of the bridge company acquiesce therein, such modification is legal. Pittsburg, etc. Ry. *v.* Dodd, 115 Ky. 176 (1903).

2 Bonner *v.* Terre Haute & I. R., 151 Fed. Rep. 985 (1907).

3 Quoted and approved in Continental Ins. Co. *v.* New York, etc. R. R., 187 N. Y. 225, 238 (1907), and Kidd *v.* New Hampshire Traction Co., 66 Atl. Rep. 127, 136 (N. H. 1907), the former case holding that even though a lessor railroad and a lessee railroad have directors in common and they compromise as to which company shall have the benefit of a saving in interest by the refunding of the bonds of the lessor, yet if a majority of the stockholders of the lessor ratify the agreement, the minority cannot complain, unless it is shown that the ratification was obtained by fraud or concealment.

it is fraudulent for that majority to manage the affairs of the first corporation for the benefit of the second. A court of equity will intervene and protect the minority upon an application by the latter.[1] The principle of law has been laid down that "when a

[1] Quoted and approved in the case Farmers' L. & T. Co. *v.* New York, etc. Ry., 150 N. Y. 410, 430 (1896).

In the case Flynn *v.* Brooklyn, etc. R. R., 158 N. Y. 493 (1899), the court said that a lease of one railroad to another is illegal, even though made by vote of the stockholders in accordance with the statutes, where it is shown that the same parties controlled both corporations, and the lease itself was unfair in that the lessee was a dummy corporation without responsiblity, and the rental consisted of a guarantee of dividends to a certain amount and the right to purchase a certain amount of stock of the lessee for $15 per share; but the court further held that a proper request to the board of directors to bring suit had not been made. A minority stockholder may object to a consolidation where the same parties control both companies, but only when the consolidation is so far opposed to the true interests of his company as to lead to the clear inference that the majority did not have an honest desire to secure that company's interest, and hence where every two shares earning twenty-five per cent. are exchangeable for one share in a consolidated company, which will probably earn forty-eight per cent., this is not so unconscionable as to invalidate the consolidation. Colby *v.* Equitable Trust Co., 124 N. Y. App. Div. 262 (1908), aff'd 192 N. Y. —. A minority stockholder in a railroad company may prevent a sale or lease of a part interest in its right of way, whereby two companies will operate its trains on a schedule to be agreed upon, where the effect would be to render worthless the stock of the first-named company, and it is shown that the majority stockholders are the same in both companies. Robinson *v.* New York, etc. R. R., 55 N. Y. Misc. Rep. 516 (1907); aff'd, 123 N. Y. App. Div. 339 (1908). Where the majority, who are in control of the corporation, cause it to give illegal rebates to themselves and others, and another corporation then recovers judgment for a similar rebate, the minority may compel the majority to make good to the corporation the amount. Dodd *v.* Pittsburg, etc. R. R., 106 S. W. Rep. 787 (Ky. 1908).

Where a corporation sells or leases all its property to another corporation, which the majority of the stockholders of the former corporation own or control, the contract is not illegal in itself, but it will be scrutinized carefully by the court, and if unfair will be set aside. Mumford *v.* Ecuador, etc. Co., 111 Fed. Rep. 639 (1901). See also § 671, *infra*, as to the majority buying the property at private sale on dissolution. A lease of all the corporate property made by a majority vote of the stockholders and directors may be set aside at the instance of a dissenting stockholder, where the lessee owned a majority of the stock and controlled the board of directors of the lessor. Parsons *v.* Tacoma, etc. Co., 25 Wash. 492 (1901). A minority stockholder may enjoin a public sale of the property of a prosperous corporation, even though the company has been dissolved, under the New York statute, where he shows that the public sale is not being fairly advertised and conducted, and shows also that the dissolution is for the purpose of reorganizing under the laws of another state and freezing out the minority, and that information could not be obtained as to the actual condition of the company. Treadwell *v.* United, etc. Co., 47 N. Y. App. Div. 613 (1900). See also § 629, *supra*. The voluntary dissolution, under the New

number of stockholders combine to constitute themselves a majority

York statute, of a prosperous corporation will be enjoined at the instance of minority stockholders where it is alleged that it is a mere scheme to freeze out the latter and to buy in the property for a partnership. Elbogen *v.* Gerbereaux, etc. Co., 30 N. Y. Misc. Rep. 264 (1900). Where the same person controls two corporations in the same line of business, and is conducting one at the expense of the other, a minority stockholder of the latter may have relief. Jacobus *v.* American, etc. Co., 38 N. Y. Misc. Rep. 371 (1902). In the case of Drake *v.* New York, etc. Co., 36 N. Y. App. Div. 275 (1899), where the owner of ten out of two thousand shares of stock attacked a foreclosure decree on the ground of fraud, the court refused to grant relief, the purchaser at the foreclosure sale being willing to pay to such stockholder his proportion of the actual value of the property irrespective of the price realized at the foreclosure sale. The court said that the expense of further litigation would be many times the actual value of the plaintiff's interest, and that while the plaintiff in a court of law would be entitled to the full measure of his legal rights, yet in a court of equity a different rule prevails and he may be compelled to take his actual interest.

The holder of seventy-five shares cannot enjoin the holder of three thousand six hundred and seventy-five shares from making a private sale of the corporate assets at a fair price, where the corporate business is unprofitable and each stockholder has an opportuntiy of participating in the purchase. Phillips *v.* Providence, etc. Co., 21 R. I. 302 (1899). It has been held that where a majority stockholder buys the property at foreclosure sale and sells it to a new company for stock and bonds, a minority stockholder has a right to his proportion of the new stock subject to a lien of the majority stockholder for claims owned by him against the old company which have not been paid by bonds of the new company, no actual fraud being involved. Cutting *v.* Baltimore, etc. R. R., 35 N. Y. Misc. Rep. 616 (1901). The minority stockholders appealed from this decision, but the judgment was affirmed in 65 N. Y. App. Div. 514; appeal dismissed, 177 N. Y. 552.

Where a person controls a majority of the stock of a ferry and also a railroad company, and puts his "dummies" in as directors, and leases all the property of the former to the latter at an unfair price, the court will set the lease aside at the instance of a minority stockholder. Meyer *v.* Staten Island Ry., 7 N. Y. St. Rep. 245 (1887). Where a lessor and a lessee company are controlled by the same person, and the lessor company is insolvent, and the lessee company is advancing large sums of money to pay interest on the bonds of the lessor company, with no hope of repayment, the minority stockholders of the lessee company may enjoin such payments. Jeans *v.* Pittsburgh, etc. Ry. (Com. Pl. Ohio, 1885), stated in Moran *v.* Pittsburgh, etc. Ry., 32 Fed. Rep. 882 (1885). See Menier *v.* Hooper's Tel. Works, L. R. 9 Ch. 350 (1874); also Peabody *v.* Flint, 88 Mass. 52 (1863), where, however, laches barred the remedy; Gorham *v.* Gilson, 28 Cal. 479 (1865), where, however, the action failed because the stockholders sued to compel a conveyance to each of his proportionate part. Where the majority of the stockholders vote to make a lease of the whole corporate property to themselves, a dissenting stockholder may have the lease set aside. Meeker *v.* Winthrop Iron Co., 17 Fed. Rep. 48 (1883); Rice's Appeal, 79 Pa. St. 168, 204 (1875). Where, however, corporate property has been sold and the proceeds retained by one stockholder,

in order to control the corporation as they see fit, they become for

another stockholder cannot sue him for money had and received. The action must be in equity and for the benefit of the corporation. Hodsdon *v.* Copeland, 16 Me. 314 (1839). Equity will set aside a lease which the directors make of a mine to the minority stockholders in order to take it from the control of incoming directors who were elected by the majority. Mahoney Min. Co. *v.* Bennett, 5 Sawyer, 141 (1878); s. c., 16 Fed. Cas. 497. The mere fact that a person owns a majority of the stock does not raise a legal inference that he dominates the board of directors. Porter *v.* Pittsburg, etc. Co., 120 U. S. 649, 670 (1887). The sale of all corporate assets to the majority, where others offer a higher price, is fraudulent. Wilson *v.* Central Bridge, 9 R. I. 590 (1870); Gregory *v.* Patchett, 33 Beav. 595 (1864), where a sale of all the corporate assets to two of the stockholders on the purchase of their stock by the company was set aside as a fraud on the remaining stockholders. Where the stockholders enter into a contract by which they give a certain amount of their stock to a person who agrees to do certain work for the corporation in consideration of the stock, the remedy for a breach of contract on his part is an action for damages, unless by the contract the stock was to be returned in case of non-payment. Gillett *v.* Bowen, 23 Fed. Rep. 625 (1885). If the action is to recover back the stock, the corporation is a proper party in order to obtain a transfer. Johnson *v.* Kirby, 65 Cal. 482 (1884). See also Cates *v.* Sparkman, 73 Tex. 619 (1889); §§ 334, 350, *supra.* Where a branch corporation faithfully performs its duty as agent, the contract of agency cannot be set aside on the ground that individuals supposed to be hostile to the principal own a majority interest in a corporation which in turn owns a majority interest in the agent corporation. Brush Electric Co. *v.* Brush-Swan, etc. Co., 49 Fed. Rep. 8 (1892). Minority stockholders cannot have an accounting on the ground that the company is managed in the interest of one stockholder, who owns a majority of the stock; also that the corporation is insolvent, and that under different management it would be profitable, no fraud being alleged. Wheeler *v.* Pullman Iron, etc. Co., 143 Ill. 197 (1892). A majority of the members of a corporation organized not for profit cannot vote a part of the assets to themselves Another member may prevent it. Ashton *v.* Dashaway Assoc., 84 Cal. 61 (1890). Damages may be recovered by a corporation for a fraud practiced upon it, even though an agent of the corporation who aided in the perpetration of the fraud was a stockholder in the corporation. Grand Rapids, etc. Co. *v.* Cincinnati, etc. Co., 45 Fed. Rep. 671 (1891). Where the stockholders in a power company sell their stock and then obtain control of water rights on which the company had an option, which option has expired, the party purchasing the stock may by a suit in equity compel them to turn over such water rights. Valentine *v.* Berrien, etc. Co., 128 Mich. 280 (1901). The largest stockholder in a corporation may, as the holder of its purchase-money bonds and mortgage, foreclose the same, and may join as party defendant the person to whom the corporation, subsequently to the execution of the mortgage, contracted to sell the property. Blair *v.* Silver Peak Mines, 93 Fed. Rep. 332 (1899). Where there are only five stockholders and all of them are directors, three of them cannot, either at a stockholders' or directors' meeting, vote to themselves exorbitant salaries nor the entire profits made by the company on articles manufactured under patents owned by them. In this case the court decreed that one-third of the

all practical purposes the corporation itself, and assume the trust relation occupied by the corporation towards its stockholders." [1]

Thus, the majority of stockholders cannot cause the corporate property to be sold to themselves at private sale at a price agreed upon by them and the directors whom they placed in office. The minority are entitled to a public sale.[2] A minority preferred stockholder may cause to be set aside the consolidation of his company with another company which the majority of the stockholders of his company own, where before the consolidation his preferred stock represented an amount equal to one-half of the combined value of the two companies, and after consolidation less than five thirty-seconds, and before consolidation the assets of the other company represented six thirty-sevenths of the combined assets and after consolidation it represented four-fifths. This is an abuse of trust by the majority stockholders.[3]

profits from articles manufactured under such patents should belong to the company. The minority stockholders in a suit to compel the declaration of a dividend may bring into the fund moneys so illegally paid out. Crichton *v.* Webb Press Co., 113 La. 167 (1904).

1 Ervin *v.* Oregon R. & Nav. Co., 27 Fed. Rep. 625 (1886); s. c., 20 Fed. Rep. 577. In Lowe *v.* Pioneer Threshing Co., 70 Fed. Rep. 646 (1895), the court enjoined the company from transferring nearly all of its property to a few stockholders in purchase of their stock, but the court refused to appoint a receiver. Where a person in control of a company obtains control of a rival company and allows judgments against the latter, and the sale of its bonds on execution at nine cents on the dollar, and executes a mortgage and controls the business, all for the benefit of the former corporation, he and the dummy directors and third persons may be joined in a bill filed by a minority stockholder to enjoin their acts and obtain a personal judgment. Gray *v.* Fuller, 17 N. Y. App. Div. 29 (1897). An able New Jersey court, in the case of Robotham *v.* Prudential Ins. Co., 64 N. J. Eq. 673 (1903), called attention to the fact that the persons holding a majority of the stock occupied no fiduciary relations towards the minority, but if the majority caused the directors to commit a breach of duty then the minority may complain of the acts of the majority. In the case Colgate *v.* United States, etc. Co., 67 Atl. Rep. 657 (N. J. 1907), the court declared that a majority of the stockholders are not trustees for all the stockholders, and the majority may vote their stock on a statutory consolidation, even though they control both companies.

2 Mason *v.* Pewabic Min. Co., 133 U. S. 50 (1890). See also § 671, *infra.* A corporation owning a majority of the stock of another company may legally take the latter's bonds at a fair price, ninety cents on the dollar in this case. Gloninger *v.* Pittsburgh, etc. R. R., 139 Pa. St. 13 (1891). On the dissolution of a national bank its assets may be conveyed to a new bank from which some of the minority are excluded, and they cannot complain if the full value and the best price was thereby obtained. Green *v.* Bennett, 110 S. W. Rep. 108 (Tex. 1908).

3 Jones *v.* Missouri, etc. Co., 144 Fed. Rep. 765 (1906). In a suit by a minority stockholder to set aside a consolidation because the majority of

Where two stockholders own two-thirds of the capital stock, and cause the directors to sell all the corporate property to a person who buys for them, the owner of the other one-third may cause the sale to be set aside, even though a stockholders' meeting has authorized it.[1]

Where a stockholder is under contract to carry along the corporate debt, and instead of doing so obtains control of the board of directors, and causes a mortgage to be given to a confederate, and thereby causes the corporate property to be foreclosed and sold, and wrecks the corporation, he is liable in damages to other stockholders.[2]

the stockholders own the other company and made an unfair contract of consolidation, the guilty directors and stockholders are proper parties defendant, and this joinder does not make the bill multifarious. The suit may be in equity. Instead of setting aside the transaction the court may give complainant the value of his stock. Jones *v.* Missouri, etc. Co., 144 Fed. Rep. 765 (1906). Where the statutes authorize a lease it may be for nine hundred and ninety-nine years, unless it actually constitutes a fraud on the rights of minority stockholders. Wormser *v.* Metropolitan, etc. R. R., 98 N. Y. App. Div. 29 (1904); aff'd, 184 N. Y. 83. Even though two corporations are neither of them legally incorporated, yet if they are consolidated a stockholder in the consolidated company cannot claim that the stockholders are partners, although the consolidated company is not a legal corporation; neither are the officers of the consolidated company merely agents for the stockholders, no partnership being intended. Hence any question of fraud on the part of the majority stockholders will be determined by the principles of corporation law. Cannon *v.* Brush, etc. Co., 96 Md. 446 (1903). A sale of all the assets to another corporation may be set aside at the instance of minority stockholders, especially where both corporations have directors in common. McLeod *v.* Lincoln, etc., 69 Neb. 550 (1904). A preferred stockholder of a constituent company who by a consolidation is entitled to bonds in the new company having a par value one and one-third times the par value of his preferred stock, cannot object thereto, it being shown that the bonds were worth more in the market than the stock had been worth, and the new company offering to pay him the present value of his stock at the time of the consolidation or the present value with future preferred dividends discounted. Beling *v.* American, etc. Co., 65 Atl. Rep. 725 (N. J. 1907). Where the same party controls two corporations and causes one to issue stock and bonds fraudulently to the other, a minority stockholder may maintain a suit to have them canceled. O'Connor *v.* Virginia, etc. Co., 46 N. Y. Misc. Rep. 530 (1905).

1 Chicago Hansom Cab Co. *v.* Yerkes, 141 Ill. 320 (1892).

2 Hanley *v.* Balch, 94 Mich. 315 (1892). In Ritchie *v.* McMullen, 79 Fed. Rep. 522 (1897), the court held that if a pledgee, being in control of the corporation, refuses to develop the property and to accept subsidies which are offered, and to accept profits under a contract which are possible, and to sell the property at a large price, all for the purpose of depreciating the pledged stock and thus obtain the stock himself, the pledgor may call the pledgee to account for the loss suffered from this conspiracy and wrong. The court

Where the majority stockholders through directors who are their tools, having sold property to the corporation and agreed to pay a mortgage on such property, afterwards cause the corporation to assume and pay the mortgage, the minority stockholders may have the transaction set aside.[1]

A contract by which a purchaser of a majority of the stock of three corporations agrees that the corporations should employ the seller of the stock at a fixed salary for a certain time, and after a certain time should give him a salary and allow him to name one-half of the directors, is illegal and cannot be enforced by the vendor as against the vendee, even though the stock has been delivered and paid for under such agreement.[2] A sale of the business of one steel manufacturing company to another steel manufacturing company on a guaranty of dividends on the stock of the former, may be enjoined by a minority stockholder of the former where the majority stockholders in both companies are the same and the contract itself is unfair.[3]

Nevertheless, although a person holds a majority of the stock and causes his friends to be made directors, he may sell property to the corporation and take stock in payment, if the transaction is a fair one.[4] And the fact that the holders of a majority of the stock are stockholders in another contracting corporation does not render the contract voidable.[5] "There is no law which makes it

held also that, although the damage was directly to the corporation, yet that, indirectly, it was a damage to the pledgor, and that hence the copledgor could sue in his own behalf alone, and that the measure of damage is the difference between the market value at the time of suit and what it would have been if the conspiracy had not been set on foot. The court held, however, in the case before it, that the proofs did not sustain the allegations.

1 Woodruff *v.* Howes, 88 Cal. 184 (1891), holding also that where the majority stockholders cause the directors to purchase stock from themselves for the corporation at a price higher than the market price, the minority may cause the transaction to be set aside.

2 Fennessy *v.* Ross, 5 N. Y. App. Div. 342 (1896). On this subject, see § 622, *supra*.

3 Devine *v.* Frankford, etc. Co., 205 Pa. St. 114 (1903).

4 Russell *v.* Rock, etc. Co., 184 Pa. St. 102 (1898). Where a mining corporation makes a contract with a person holding a majority of its stock, and who has furnished the qualification shares for the directors, by which contract the stock is issued to him for work to be done on the mine, minority stockholders may cause the contract to be set aside, and the decree may provide that the stock shall be delivered back upon the repayment of the money. Jones *v.* Green, 129 Mich. 203 (1901). A mining company may make a contract with some of its stockholders for the transportation and milling of the ore, even though such stockholders own a large amount of the stock of the company. Fox *v.* Mackay, 125 Cal. 57 (1899).

5 Ziegler *v.* Lake Street El. R. R., 69 Fed. Rep. 176, 182 (1895).

impossible for a majority stockholder to enter into a contract with his company."[1] Where a lease of its property is made by a corporation, it is legal for the lessee to pay secretly to one of the stockholders of the lessor a sum of money to induce such stockholder to favor the lease.[2] A stockholder may vote for the dissolution of the corporation as allowed by the statute, even though his object is to terminate a contract which he has with the corporation.[3] A stockholder has a right to sell his stock at any time unless he has specifically agreed otherwise.[4] On a reorganization involving a pur-

1 Central Trust Co. *v.* Bridges, 57 Fed. Rep. 753, 767 (1893). It is legal for a corporation to purchase property from a woman who owns the majority of the stock, even though she is the wife of the manager. Figge *v.* Bergenthal 130 Wis. 594 (1906). A majority stockholder who purchases property from a corporation is not liable on a claim that the corporation acquired such property by conversion, he having no knowledge of such conversion. Liebhardt *v.* Wilson, 38 Colo. 1 (1906). A suit does not lie against an individual to enjoin the violation of a contract between the plaintiff and a corporation, even though it is alleged that the individual controls the corporation, it not being alleged that he owns all or a majority of its stock. Aberthaw, etc. Co. *v.* Ransome, 192 Mass. 434 (1906). A promoter may sell properties to a corporation even though he owns all the stock at the time of the sale. Tompkins *v.* Sperry, etc. Co., 96 Md. 560 (1903). A stockholder may contract with the corporation the same as a stranger. Bramblet *v.* Commonwealth, etc. Co., 83 S. W. Rep. 599 (Ky. 1904).

2 But where subsequently the stockholder becomes a director and takes part in reducing the rent paid to the corporation, it was his duty to disclose the extra price which he was continually receiving, and for failure so to do he must account to the corporation and pay over an equal percentage of his secret profit subsequently received, it being presumed that a reduction on his secret profit would have been made for the benefit of the corporation. Bird, etc. Co. *v.* Humes, 157 Pa. St. 278 (1893). It is legal for a person who is endeavoring to purchase all the property of a corporation to pay a stockholder for consenting thereto. Lamkin *v.* Palmer, 24 N. Y. App. Div. 255 (1897); aff'd, 164 N. Y. 201.

3 Windmuller *v.* Standard, etc. Co., 115 Fed. Rep. 748 (1902). A corporation that owns stock in another corporation may vote such stock in favor of dissolution of the latter, even though it was influenced so to vote by the fact that it has guaranteed dividends on the stock of the latter so long as the latter exists. Windmuller *v.* Standard, etc. Co., 114 Fed. Rep. 491 (1902). Compare the comments on this case in Robotham *v.* Prudential Ins. Co., 64 N. J. Eq. 673 (1903). A guarantee of dividends on stocks, so long as the certificates are outstanding, but not to exceed the period for which the company was incorporated, ceases upon the dissolution of the company, even though the guarantor owns a majority of the stock of the company and brings about the dissolution, unless the dissolution was for the purpose of escaping this liability. Mason *v.* Standard, etc. Co., 85 N. Y. App. Div. 520 (1903). A stockholder may vote on a question in which he has a personal interest other than his interest as a stockholder. Middleton *v.* Arastraville, etc. Co., 146 Cal. 219 (1905). See also § 629, *supra.*

4 "We do not understand that one

chase of the corporate property at a public sale, the majority of the stockholders may, by bidding the highest price, purchase without allowing the minority to participate in their purchase.[1] Even though three persons who own all the stock of a corporation, enter into a contract to sell it, and one of them secretly receives a higher price for his holdings of the stock, yet the other vendor cannot by an action in *assumpsit* claim a part of such extra price. His remedy, if he has any, is in equity for an accounting, or an action for deceit.[2] The em-

stockholder is, by virtue of his ownership of stock, bound to continue in the holding of it in order to allow another stockholder to make a profit out of the negotiations then pending. . . . We do not understand that a stockholder is under obligations, legal or moral, to sacrifice his personal interests in order to secure the welfare of the corporation of which he is a stockholder, or to enable another stockholder to make gains and profits." Farmers', etc. Co. *v.* Chicago, etc. Ry., 163 U. S. 31 (1896). See § 622, *supra*. A stockholder cannot maintain a suit against the corporation to enjoin other stockholders from selling their stock to a second corporation, such second corporation and the other stockholders not being parties to the suit. Ingraham *v.* National Salt Co., 36 N. Y. Misc. Rep. 646 (1902); aff'd, 72 N. Y. App. Div. 582; appeal dismissed, 172 N. Y. 644. Even though the court at the instance of a dissenting stockholder has enjoined a corporation from issuing stock in payment for the property of another corporation to be purchased at a high valuation, this does not prevent the majority of the stockholders forming a holding corporation in another state and issuing the stock of the latter in exchange for the stock of the two former corporations at a price equivalent to the above-mentioned valuation. The court has no power to enjoin such a transaction at the instance of a dissenting stockholder. The fact that the holding company may name the directors of both companies is not objectionable in itself. Pierce *v.* Old Dominion, etc. Co., 67 N. J. Eq. 399 (1904).

1 See § 653, *supra*, and § 886, *infra*. Where a stockholder of a railroad which has been foreclosed and reorganized attacks the foreclosure on the ground of fraud, he cannot on appeal change his complaint and claim that inasmuch as the plan of reorganization allowed the majority stockholders to come in on a more favorable basis than the minority, he was entitled to come in on the same terms as the majority. MacArdell *v.* Olcott, 189 N. Y. 368 (1907). The dissenting opinion is to the effect that on the merits the majority stockholders should have allowed the minority stockholders to come in on the same basis as the former came into the reorganization. A sale of the assets of a bank at public auction with the consent of the stockholders will not be set aside when the price was a fair one and there was no fraud, even though the liquidators were directors in the company that purchased. *In re* Liquidation, etc., 43 S. Rep. 270 (La. 1907).

2 Cummings *v.* Synnott, 120 Fed. Rep. 84 (1903). See also §§ 650, 320, 321, *supra*. Where a party desires to purchase a majority of the stock of a corporation and makes an offer to all the stockholders to purchase their stock, provided a majority in interest will sell, and agrees to pay the amount so offered a specified sum per share, he may legally pay more than that price for a portion of the stock, and need not divulge that fact to the others who sell at the price first men-

ployment by the corporation of a person as general manager is not proved by proving that the person who owned all the stock of the corporation so employed him.[1]

Where two companies in litigation pass under the same control, the court will no longer retain the case, inasmuch as the same parties control both sides, but, in order to protect the minority stockholders, the case will be left open.[2]

Where on a winding up the court decrees a sale of the corporate mining property at public sale, any one or more of the stockholders may bid, and the court will not readily set the sale aside on the ground that after the property was struck off some one offered a higher price.[3]

Sales of property by a corporation may be valid, although made at the instigation of stockholders whose stock really belongs to others.[4] Even though a corporation in competing with another concern is selling its product below cost, yet a stockholder cannot enjoin such sales, there being no bad faith or palpably bad judgment shown.[5] A minority stockholder cannot have a receiver appointed, even

tioned. Newman *v.* Mercantile T. Co., 189 Mo. 423 (1905).

1 Hammond *v.* Hammond, etc. Co., 72 Conn. 130 (1899). See also § 709, *infra.*

2 South Spring, etc. Co. *v.* Amador, etc. Co., 145 U. S. 300 (1892). Where an insolvent corporation passes into a receiver's hands and the receiver acquires all the interests of the parties to the suit, an outside creditor may file a new bill to reach certain equitable assets of the corporation. Harp *v.* Abbeville, etc. Co., 108 Ga. 168 (1899). A decree entered in regard to a patent after the complainant has acquired control of the defendant is not valid. McElroy *v.* American, etc. Co., 122 Fed. Rep. 441 (1903).

3 Pewabic Min. Co. *v.* Mason, 145 U. S. 349 (1892). A stockholder may bid for the property at a public sale, even though he owns a majority of the stock. Wilson *v.* Central Bridge, 9 R. I. 590 (1870). The person owning a majority of the stock of a failing corporation may at the *public* sale of its property buy such property. "He has his own interests to protect, and is not charged with the care of the interests of the other stockholders. They act for themselves." Price *v.* Holcomb, 89 Iowa, 123 (1893). A company which is in debt and unable to raise funds to continue its business may, under the Wisconsin statute authorizing corporations on a majority vote of their stockholders to sell all their property, make such sale at public auction, giving the stockholders the first opportunity to purchase, and if one stockholder purchases at such sale he may associate with him such other stockholders as he sees fit. Werle *v.* Northwestern, etc. Co., 125 Wis. 534 (1905). Even though the owner of a majority of the mortgage bonds of the corporation owns also a majority of the stock, yet he may purchase the property at foreclosure sale, and minority stockholders cannot hold him liable as a trustee. MacArdell *v.* Olcott, 104 N. Y. App. Div. 263 (1905); aff'd, 189 N. Y. 368.

4 Gottfried *v.* Miller, 104 U. S. 521 (1881).

5 Trimble *v.* American, etc. Co., 61 N. J. Eq. 340 (1901). See also § 681, *infra.*

though the president has used corporate funds to purchase a majority of the company's stock, and the officers are fraudulently misusing the funds, inasmuch as an accounting may be sufficient, the officers being solvent.[1]

A corporate creditor cannot complain of the acts specified above to the same extent that a stockholder may complain.[2]

§§ 663, 664. *"Dummy" corporations—The courts will ignore the corporate existence where it is fraudulently used to do what the stockholders cannot legally do — An individual or corporation owning all the stock of another corporation is not ordinarily liable for the debts of the latter.*—A corporation is in law a person or entity entirely distinct from its stockholders and officers. It may become insolvent and yet not make them insolvent. It may commit fraudulent or *ultra vires* acts and yet they be not liable therefor. It may do acts which its stockholders as individuals may be under contract not to do, and the stockholders may do acts which the corporation cannot do. The disabilities of the corporation are not disabilities of the stockholders, nor are the disabilities of the stockholders the disabilities of the corporation. Hence it is that a corporation is often organized to act as a "cloak" for frauds. Such cases as these are becoming common, and the courts are becoming more and more inclined to ignore the corporate existence, when necessary, in order to circumvent the fraud.[3] Thus, it has been held that, where a person has contracted that he will not do a certain act, he cannot form and control a corporation and have the corporation do that act.[4] And where a bankrupt practically owns the entire capital stock of a corporation, the bankruptcy court will consider the corporation as merely an agent of the partnership, and will extend its

1 Hayes *v.* Jasper Land Co., 147 Ala. 340 (1906).

2 See § 735, *infra.* A company is not liable for the contracts of a person who makes a construction contract with it, even though that person is the principal stockholder and dominates and controls the action of the corporation. Although other stockholders, bondholders, or the corporation itself might question such a contract, yet subcontractors cannot. Central Trust Co. *v.* Bridges, 57 Fed. Rep. 753 (1893).

3 Quoted and approved in Donovan *v.* Purtell, 216 Ill. 629 (1905). See § 6, *supra.*

4 Beal *v.* Chase, 31 Mich. 490 (1875). When a person sells a trade-mark and then sells an infringement upon it to a corporation organized and controlled by himself, the latter may be enjoined from using it. Le Page Co. *v.* Russia Cement Co., 51 Fed. Rep. 941 (1892). Unless there is a positive allegation and proof that the corporation was fraudulently formed to violate the individual contract, the suit will fail. Moore, etc. Co. *v.* Towers Hardware Co., 87 Ala. 206 (1888). A contract by a person to sell all lumber manufactured by him through certain agents cannot be evaded by his forming a corporation and manufacturing and selling through it. Hagy *v.* McGuire, 147 Pa. St. 187 (1892).

jurisdiction over its property and determine in the bankruptcy proceedings the respective rights of the creditors of both concerns.[1] The mere fact, however, that a person has contracted to sell a patent-right does not affect the title of a corporation to whom he transfers such patent.[2] But where a patentee is under obligation to assign his patent, a corporation wholly owned by him is not protected as a *bona fide* purchaser of the patent from him.[3] Although a lessee cor-

1 *In re* Rieger, etc., 157 Fed. Rep. 609 (1907). The court said: "The fiction of legal corporate entity cannot be so applied by the partners as to work a fraud on a part of their creditors, or hinder and delay them in the collection of their claims, and thus defeat the provisions of the bankrupt act. The doctrine of corporate entity is not so sacred that a court of equity, looking through forms to the substance of things, may not in a proper case ignore it to preserve the rights of innocent parties or to circumvent fraud."

2 Davis, etc. Co. *v.* Davis, etc. Co., 20 Fed. Rep. 699 (1884); Averill *v.* Barber, 6 N. Y. Supp. 255 (1889). See also § 727, *infra*, on Notice. The vendor of a good-will who agrees not to engage in the same business again in a certain territory cannot evade his agreement by becoming a stockholder in, or organizing, or managing a competing corporation; but, there being other stockholders in the corporation, an injunction will not be granted against the corporation or such other stockholders. Kramer *v.* Old, 119 N. C. 1 (1896). A foreign corporation cannot prevent a domestic corporation from using the same name, especially where the latter was incorporated first, even though the public may be misled. In this case a party sold out to individuals, but did not sell any trademarks. He then incorporated a company under the name of the trademark. Hazelton Boiler Co. *v.* Hazelton, etc. Co., 142 Ill. 494 (1892). In Gormully, etc. Co. *v.* Bretz, 64 Fed. Rep. 612 (1894), where a firm, being under contract to manufacture and sell only certain bicycle patents and machines, formed a corporation to manufacture and sell other machines, the court held that if the holdings of stock showed that the two concerns were practically one, then that the corporation would be enjoined. See also Pratt *v.* Wilcox Mfg. Co., 64 Fed. Rep. 589 (1894). Where a person contracts to give to another person a fourth interest in any mines which the former may buy, the former must give the latter a fourth of stock which the former purchases in a mining company. Dennison *v.* Chapman, 105 Cal. 447 (1895). See also Fitzgerald *v.* Fitzgerald, etc. Co., 41 Neb. 374 (1894), to the effect that the corporation is liable for the fraud of its board of directors against another corporation which the same board controlled. Where defendant employed plaintiff to assist in building up a business, the plaintiff to be paid necessary expenses, and the balance of his pay to be determined at a future time, and plaintiff to have half the business, and eleven years thereafter the defendant organizes a corporation and turns over the business to the latter, the defendant becoming the owner of the stock, the plaintiff may hold him liable, not only for services before the corporation was organized, but for those rendered afterwards. Bonsell *v.* Platt, 153 Fed. Rep. 126 (1907).

3 National, etc. Co. *v.* Connecticut, etc. Co., 73 Fed. Rep. 491 (1896). See also § 727, *infra*. Where an attorney in fact for the sale of a patent causes his friends to organize a corporation,

poration has a right to payment for improvements, if the lessor does not renew, such payment need not be made, if the new lease is to a new corporation organized by the same stockholders as are in the old.[1] Where it would be illegal for two or more corporations to unite in regulating the production and price of an article, it is illegal to accomplish that result by placing all the shares of stock of those corporations in the hands of trustees and thereby securing co-operating boards of directors.[2]

There are many other instances in which the corporate existence will not suffice to evade liabilities, disabilities, and frauds. An individual or partnership cannot transfer all of his or its property to a corporation for shares of stock and thereby defraud the creditors of the partnership.[3] The officers and agents of a corporation who cause the corporation to defraud its creditors or subscribers to its stock by means of fraudulent misrepresentations are liable to the persons so defrauded.[4] The stockholders and officers of a corporation which was not properly organized may be liable as partners for all of its debts,[5] but this liability is not based on fraud.

A few cases hold that a corporation incorporated in one state for the purpose of doing all its business in another state is a fraud on the law, and is only a partnership; but the weight of authority holds otherwise.[6] If the promoters or officers or a majority of stockholders defraud the corporation itself or the minority stockholders, a court of equity will give full and ready relief.[7] Where persons in control of a corporation use that control to defraud persons with whom they have contracted in reference to stock, a court of equity will aid the persons so defrauded.[8] The stockholders of a corporation are distinct from the corporation itself,[9] and may of

and then sells the patent to the corporation on terms entirely beyond his authority, his principal may repudiate the sale, and the company is not a *bona fide* purchaser, inasmuch as its projector and organizer was the attorney. Another company to which the principal again assigns his patent may sue the former company for infringement. Young, etc. Co. *v.* Young, etc. Co., 72 Fed. Rep. 62 (1896).

1 New York, etc. Ferry Co. *v.* New York, 146 N. Y. 145 (1895).

2 See ch. XXIX, *supra.*

3 See § 672, *infra.*

4 See § 48; also chs. IX and XX, and § 243, *supra.*

5 See ch. XIII, *supra.*

6 See §§ 237–240, *supra.*

7 See the previous sections of this chapter for many instances of such frauds.

8 See § 350, *supra*, and the notes thereto. A stockholder who desires to have the corporation purchase certain property may purchase a mortgage against that property and compel the owner to sell to the corporation under threat of foreclosure. Martin *v.* New Rochelle Water Co., 11 N. Y. App. Div. 177 (1896); aff'd, 162 N. Y. 599.

9 See § 709, *infra.* In a suit against the corporation a stockholder who practically owns the corporation may be examined as though he were the

course transact business irrespective of its contracts or obligations; but an injunction against their doing a specified act is violated if they cause or aid the corporation to do that act.[1] Where one family own all the stock of a mercantile corporation, and one of them is president and has entire control and management of its affairs, and he wilfully fires the property in order that the insurance may be collected, the insurance company is not liable.[2]

Where a corporation secures a rebate from a railroad company, not only on shipments made by the former, but on shipments made by other parties, the active agents of such corporations receiving such moneys may be held personally liable for them. The court said that inasmuch as the company "was organized by the promoters, the defendants, simply for the purpose of consummating the illegal agreement and shielding themselves from the consequences of receiving the illegal exactions made under it, the act of incorporating can be of no avail to them as a defense." [3] Where a person organizes several real estate corporations and owns or controls their entire capital stock and uses them merely to cover up fraudulent real estate transactions he may be held personally liable on a note given by one of them.[4]

The subject of the personal liability of officers and directors of corporations is more fully considered elsewhere.[5]

The above illustrations, however, are merely exceptions to the general rule that a corporation is an entity that exists independently of its stockholders and that that entity will be respected and upheld by the courts. The New York court of appeals has laid down the

defendant. North American Restaurant *v.* McElligott, 388 (Ill. 1907).

1 See King *v.* Barnes, 113 N. Y. 476 (1889) An injunction against certain directors of the corporation from using patented articles is violated by their forming a new corporation to do the same acts, they being directors also of the latter. Iowa, etc. Wire Co. *v.* Southern, etc. Wire Co., 30 Fed. Rep. 123 (1887). Where suit is brought by a riparian owner to enjoin a riparian owner higher up the stream from diverting the water, and the latter pending the suit conveys his rights to a corporation organized for that purpose, and owns all its stock, such corporation is bound, although not a party to the suit. Miller & Lux *v.* Rickey, 116 Fed. Rep. 574 (1906); aff'd, 152 Fed. Rep. 11 and 22.

2 Meily Co. *v.* London, etc. Co., 142 Fed. Rep. 873 (1906); aff'd, 148 Fed. Rep. 683.

3 Brundred *v.* Rice, 49 Ohio St. 640 (1892). A brewing company is not responsible for rebates given to a refrigerator company that handles the former's product, even though a minority of the stock of the brewing company is owned by the owners of a majority of the stock of the refrigerator company. United States *v.* Milwaukee, etc. Co., 145 Fed. Rep. 1007 (1906).

4 Donovan *v.* Purtell, 216 Ill. 629 (1905).

5 See § 682, *infra.*

general rule as follows: "In no legal sense can the business of a corporation be said to be that of its individual stockholders. It is true that they have an interest in the business carried on, and an influence in controlling its conduct; but they have created a legal entity to prosecute such business, make its contracts, and be responsible for its obligations, and that entity is alone responsible to persons dealing with it for the conduct of such business."[1] This rule is fundamental. It is the explanation and cause of the marvelous increase of corporations in modern times. The stockholders are not liable on the contracts of the corporation. The separate existence and entity of the corporation is recognized and preserved. The courts will refuse to ignore the corporate existence, even though all the stock is owned by one person or by another corporation.[2] A newspaper pub-

1 People *v.* American Bell Tel. Co., 117 N. Y. 241, 255 (1889). The fact that the stockholders in two corporations are the same, or that one corporation exercises a control over the other through ownership of its stock or through the identity of the stockholders, such corporations being separately organized under distinct charters, does not make either the agent of the other, nor merge them into one so as to make a contract of one corporation binding upon the other. Richmond, etc. Co. *v.* Richmond, etc. R. R., 68 Fed. Rep. 105 (1895). A suit does not lie against a corporation for the breach of a contract between the stockholders relative to dividends, etc. Aldrich *v.* Crawford Chair Co., 116 N. W. Rep. 461 (Mich. 1908). In the case of St. Louis Breweries, Ltd. *v.* Apthorpe, 79 L. T. Rep. 551 (1898), where an English corporation held all the stock of an American corporation, and dividends paid by the American corporation were paid directly to the stockholders in the English corporation, the court held that the income tax on the English corporation applied also to dividends paid by the American corporation to American stockholders in the English corporation. The court declined, however, to hold that it would ignore the existence of the American corporation, "because experience has certainly satisfied me that if you give a decision embodying large principles and large considerations without having felt exactly where the shoe pinches, it is very likely that the next case that may turn up will show that some consideration has been omitted which might have been very vital, or might have affected one's judgment." Nevertheless the court said, "I cannot say that the commissioners were not justified in coming to the conclusion that 'the head and seat and directing power of the appellant company were at the appellant company's registered offices in the city of London, and that if the business at St. Louis and the profits made thereby were technically the business and profits of the American company, the American company was for such purpose the agent of the appellant company.'"

2 Even though an Illinois railroad corporation owns practically the entire capital stock of a Texas railroad corporation, yet the former cannot be brought into court in Texas by serving officers of the latter. Peterson *v.* Chicago, etc. Ry., 205 U. S. 364 (1907). The fact that all the stock in one corporation is owned by stockholders in another corporation and is held for the benefit of the latter, does not make the latter liable for debts of the former. Crane & Co. *v.* Fry,

lisher who is a stockholder and officer in a corporation which delivers newspapers for several publishers is not liable for a personal injury

126 Fed. Rep. 278 (1903). The agreement of a corporation on selling its property not to engage in the same business, does not prevent one of its officers and stockholders engaging in that business, and the stockholders are not individually liable or subject to an injunction because of unfair competition practiced by the corporation. Hall's, etc. Co. *v.* Herring, etc. Co., 146 Fed. Rep. 37 (1906). Even though the purchaser of land, which is subject to a mortgage, thereafter organizes a company which purchases the land on foreclosure sale, and even though he owns all the stock and controls the board of directors, yet the dower right of his wife in such land is foreclosed, where she did not interpose any defense to the foreclosure suit. Poillon *v.* Poillon, 90 N. Y. App. Div. 71 (1904).

Where a corporation sells all its property to another corporation, including an insurance policy, without the consent of the insurance company, the policy is void, even though the corporations had the same stockholders. Miles, etc. Co. *v.* Erie, etc. Co., 164 Ind. 181 (1905). Where, on foreclosure sale of property purchased by a corporation subject to a mortgage, there is a surplus, it belongs to the corporation without deduction for debts of its stockholders to the purchaser, even though such stockholders are the only stockholders in the company. Hardy *v.* Pecot, 113 La. 350 (1904). It is no defense to an action by an employee that he was employed by a resolution of a dummy board of directors who had no real interest in the company, and that there was a contest in the company and the president had informed the party that the contract was not good. Collier *v.* Consolidated, etc. Co., 70 N. J. L. 313 (1904). Executors and trustees have no legal right to pay the debts of a corporation, even though the estate holds practically all of its stock and bonds. Matter of Corbin, 101 N. Y. App. Div. 25 (1905). Although two corporations have the same officers, one is not liable for the wages of an employee of the other, discharged by such officers. Holder *v.* Cannon Mfg. Co., 138 N. C. 308 (1905). A judgment against a West Virginia corporation cannot be enforced against the president, even though it is alleged that the corporation was a myth and did not exist, and that its organization had not been kept up and that the president was the real owner and carried on the business. The remedy is an original suit against him. Tilley *v.* Coykendall, 172 N. Y. 587 (1902). An officer is not personally liable for an infringement by the corporation, unless it is insolvent or it is a mere dummy to protect others. Loomis, etc. Co. *v.* Manhattan, etc. Co., 117 Fed. Rep. 325 (1902). See also § 682, *infra*. Even though the stockholders and officers of a lumber company and a railroad company are substantially the same, and even though the lumber company has sold its railroad to the railroad company, yet the lumber company is not liable for the negligence of the railroad company. Goodwin *v.* Bodcaw Lumber Co., 109 La. 1050 (1902). Even though a hospital corporation is exclusively for the benefit of a railroad corporation and the officers of the latter are officers of the former, yet the railroad company is not liable for the negligence of hospital employees. Illinois, etc. R. R. *v.* Buchanan, 88 S. W. Rep. 312 (Ky. 1905). A railroad company owning all the stock and bonds of another company does not own the property of the latter and cannot sue on a cause of action belonging to the latter. Fitzgerald *v.* Missouri Pac. Ry.,

done by such corporation, on the theory that it is but a dummy, even though it has not filed annual reports, as required by the statute. It is not for the jury to decide whether the corporation was in good

45 Fed. Rep. 812 (1891). Although one corporation owns all the stock of another corporation, the property of the latter is not subject to a mortgage given by the former, but an independent first mortgage may be given by the latter company. Williamson *v.* New Jersey Southern R. R., 28 N. J. Eq. 277 (1877); aff'd on this point in 29 N. J. Eq. 311 (1878); Central Trust Co. *v.* Kneeland, 138 U. S. 414, 423 (1891); Toledo, etc. R. R. *v.* Hamilton, 134 U. S. 296, 304 (1890), and §§ 852, 857, *infra.* Although one water-works company owns all the stock of another water-works company, a mortgage given by the former company on all its property does not cover the property of the latter company as against *bona fide* pruchasers of bonds of the latter company. National Water-Works Co. *v.* Kansas City, 78 Fed. Rep. 428 (1896).

A bridge owned by a bridge corporation is not to be taxed as railroad property, even though its stock is owned by the stockholders in a railroad corporation, and the stock has been pledged to such railroad corporation and the bridge itself leased to the latter. St. Louis, etc. Ry. *v.* Williams, 53 Ark. 58 (1890). Even though one man owns a majority of the stock of two corporations, and they have dealings with each other, yet upon the insolvency of the one a claim of the other is to be allowed the same as the debt of any other creditor. Lange *v.* Burke, 69 Ark. 85 (1901). A mortgage covering after-acquired property of an irrigation company does not cover property of another company subsequently organized by parties interested in the first company, even though the second company used the property of the first company. Farm, etc. Co. *v.* Alta, etc. Co., 28 Col. 408 (1901).

Although one railroad owns or controls all the stock of another railroad, yet the former is not personally liable for the negligence, debts, etc., of the latter. Atchison, etc. R. R. *v.* Cochran, 43 Kan. 225 (1890). A corporation owning all the stock of another corporation is not liable for the rent due from the latter to a third corporation, even though said third corporation charges that the accounts of the lessee are not properly kept by such owner of all its stock. East St. Louis, etc. Ry. *v.* Jarvis, 92 Fed. Rep. 735 (1899). The fact that the same persons own all the stock in two corporations does not make one corporation responsible for the contracts of the other. Waycross, etc. R. R. *v.* Offerman, etc. R. R., 109 Ga. 827 (1900). Even though a person buys all the stock, bonds, and property of a corporation, and a suit is pending against the corporation for negligence, yet he is not liable for a judgment thereon. Tilley *v.* Coykendall, 69 N. Y. App. Div. 92 (1902); aff'd, 172 N. Y. 587. Where an individual constructs an electric light system in a village and then transfers it to a corporation in which he holds most of the stock, he may be personally liable for the death of a person by reason of the crossing of the electric wire with a telephone wire, causing the electric wire to melt and fall and convey the current through such person, the negligent construction of the electric system having been made by him before the property was transferred to the corporation. Gordon *v.* Ashley, 34 N. Y. Misc. Rep. 743 (1901). The fact that one corporation owns a large amount of stock in another corporation does not affect the identity of the two. *Ex parte* Fisher, 20

faith or was a mere form and evasive device to escape liability. The only question for the jury is whether the corporation was the real

S. C. 179 (1883). Although a stockholder purchases corporate property at a tax sale this does not constitute payment of the taxes in favor of the mortgagee of the property. Jenks *v.* Brewster, 96 Fed. Rep. 625 (1899). Upon the expiration of a charter and the winding up of its affairs, stock which it holds in another corporation may be sold, but not the property of the latter corporation, even though the former corporation owned all of the stock of the latter. Stewart *v.* Pierce, 116 Iowa, 733 (1902). Even though a bank, in order to handle real estate which it acquires on foreclosure, organizes a corporation and owns all the stock and is the sole creditor of such corporation, yet it cannot ignore the corporate existence and convey, incumber, or deal with the property as its own. Watson *v.* Bonfils, 116 Fed. Rep. 157 (1902). Even though an English corporation owns ninety-five per cent. of the stock of an American corporation, yet the separate identity of the two corporations continues, and the income of the American corporation cannot be taxed in England as the income of the English corporation. Kodak Limited *v.* Clark, [1902] 2 K. B. 450. The fact that two irrigation companies have the same officers and the same stockholders and the same purposes, except that one operates in one state and the other in another state, does not make one of them liable for the debts of the other. White *v.* Pecos, etc. Co., 18 Tex. Civ. App. 634 (1898). A statutory lien which is good against a lessee mining company is not good against a lessor mining company, even though the stockholders are substantially the same. United Mines Co. *v.* Hatcher, 79 Fed. Rep. 517 (1897), rev'g Hatcher *v.* United Leasing Co., 75 Fed. Rep. 368. A deed of corporate property by a person who owns all the stock does not convey good title, especially where he has pledged some of the stock. Parker *v.* Bethel, etc. Co., 96 Tenn. 252 (1896). Even though one corporation is a stockholder in another, yet a debt due from the latter to the former may be enforced, although one company is practically a branch of the other. Alabama, etc. Co. *v.* Chattanooga, etc. Co., 37 S. W. Rep. 1004 (Tenn. 1896). Although a construction company owns all the stock of a railroad company, and a bank has loaned large sums of money to the construction company, yet mortgage bonds issued by the railroad company have priority over the claims of the bank. Exchange Bank *v.* Macon Const. Co., 97 Ga. 1 (1895). Where a failing bank organizes a trust company and owns all its stock, the stock standing in the names of "dummies," and uses the funds of the trust company, it is a debtor of the trust company. Fisher *v.* Adams, 63 Fed. Rep. 674 (1894). See also the cases in the notes below. A company is not liable for the contracts of a person who makes a construction contract with it, even though that person is the principal stockholder and dominates and controls the action of the corporation. Although other stockholders, bondholders, or the corporation itself might question such a contract, yet subcontractors cannot. Central Trust Co. *v.* Bridges, 57 Fed. Rep. 753 (1893). Where the president owns nearly all of the stock, and keeps no proper accounts, and mingles the business with his own business, and the corporation is insolvent, a creditor of the corporation may attach its property on the ground that it is being fraudulently disposed of. Senour Mfg. Co. *v.* Clarke, 96 Wis. 469 (1897).

employer.[1] Again, a restriction in a deed to the effect that no part of the property should ever be owned by a negro does not prevent its being owned by an amusement park corporation all of whose stockholders are negroes.[2]

The lower English courts held that where a merchant transfers all his business to a corporation formed for that purpose, and continues to carry on the business in the name of the corporation, he being practically the only stockholder, he is liable for the corporate debts on the theory of principal and agent; but the House of Lords reversed all this and held that he is not liable.[3]

This principle of law is particularly applicable to the plan of a parent company owning all or a majority of the shares of stock of numerous subsidiary companies, such subsidiary companies being local in their operations for the purpose of dividing the responsibilities, liabilities, duties, and details of the business,[4] or for the purpose of regulating taxes,[5] or for the purpose of exercising the

1 Werner *v.* Hearst, 177 N. Y. 63 (1903).

2 People's etc. Co. *v.* Rohleder, 61 S. E. 794 (Va. 1908).

3 Salomon *v.* Salomon & Co., [1897] A. C. 22. The supreme court of Louisiana, however, has held that in such a case the corporate existence will be ignored. Samuel, etc. Co. *v.* Illinois, etc. Co., 51 La. Ann. 64 (1898). Even though an English corporation owns nearly all the stock of an American corporation, yet the income of the latter is not subject to the income tax of England. Kodak Limited *v.* Clark, [1903] 1 K. B. 505.

4 Such is the case of the Bell Telephone Company. It is legal for a manufacturing company to organize a subsidiary company to sell its product, the entire capital stock of the latter being owned by the former. Dittman *v.* Distilling Co., 64 N. J. Eq. 537 (1903).

5 Such was the original purpose of the Standard Oil Companies. Mr. John D. Rockefeller on January 10, 1900, before the Industrial Commission of Congress, said in reply to a question as to what are the chief advantages of industrial combination: "All the advantages which can be derived from co-operation of persons and aggregation of capital. Much that one man cannot do alone two can do together, and once we admit the fact that co-operation, or, what is the same thing, combination, is necessary on a small scale, the limit depends solely upon the necessities of business. Two persons in partnership may be a sufficiently large combination for a small business, but if the business grows or can be made to grow, more persons and more capital must be taken in. The business may grow so large that a partnership ceases to be a proper instrumentality for its purposes, and then a corporation becomes a necessity. In most countries, as in England, this form of industrial combination is sufficient for a business coextensive with the parent country, but it is not so in this country. Our federal form of government, making every corporation created by a state foreign to every other state, renders it necessary for persons doing business through corporate agency to organize corporations in some or many of the different states in which their business is located. Instead of doing business through the agency of one corpora-

power of eminent domain. Such a company is commonly called a "holding company" and its status is fully discussed elsewhere.[1] The fact that a New York telegraph corporation, a parent company, owns practically all the stock of an Idaho corporation, does not prevent the latter exercising its power of eminent domain in Idaho.[2] A con-

tion, they must do business through the agencies of several corporations." For a careful and clear statement of the plan of having a parent company own stock in subsidiary companies, see People *v.* American Bell Telephone Co., 117 N. Y. 241, 244, 255 (1889). A receiver of the parent company will not necessarily be appointed receiver of the branch companies. Evans *v.* Union Pac. Ry., 58 Fed. Rep. 497 (1893). As to the power of one company to acquire the stock of another company, see ch. XIX, *supra.* Where a parent company, owning the stock of branch companies, passes into a receiver's hands, and the latter expends money in operating one of the branch companies, he cannot recover it as against a mortgagee of the branch company. The rule is otherwise as to necessary improvements. Coupons paid by the receiver on bonds issued by the branch road rank next after the bonds and other coupons are paid. Phinizy *v.* Augusta, etc. R. R., 62 Fed. Rep. 771 (1894). Where one street railway owns all the stock of another street railway (excepting five shares, the owner of which does not object), and the former makes a contract authorizing a third street railway to run its cars over the tracks of the company whose stock is so owned, such contract is legal and will be enforced. South, etc. Ry. *v.* Second Ave. etc. Ry., 191 Pa. St. 492 (1899).

1 See § 317, *supra.* An American stockholder in an English corporation which owns the entire capital stock of an American brewing company may bring suit against directors of the American company to account for misappropriating its funds with the connivance of the English corporation, and the latter may be made a party and served by publication. Gordon *v.* Sorg, 113 Ill. App. Rep. 522 (1904). Even though an English holding company owns the entire capital stock of a German company and controls its entire business, yet the profits of the German company are not considered profits of the English company under the income tax law, except so far as they are actually received by the English company. The German company is not a mere alias or trustee or agent for the English company. Gramophone, etc. Ltd. *v.* Stanley, 95 L. T. Rep. 461 (1906). Even though one railroad owns all the stock and bonds of a connecting railroad the separate identity of the companies will be considered by a railroad commission in fixing a joint rate. Hill *v.* Wadley, etc. Ry., 57 S. E. Rep. 795 (Ga. 1907).

2 Oregon, etc. R. R. *v.* Postal, etc. Co. of Idaho, 111 Fed. Rep. 842 (1901). In a condemnation proceeding instituted by a local telegraph corporation it is no defense that such corporation is a mere "dummy" for a non-resident corporation. Postal, etc. Co. *v.* Oregon, etc. R. R., 114 Fed. Rep. 787 (1902). The fact that a New York telegraph company owns all the stock of a Utah telegraph company does not prevent the latter exercising the power of eminent domain under the Utah statutes. Moreover, the *de jure* existence of a corporation which is a *de facto* corporation will not be inquired into in condemnation proceedings, unless fraud in its organization is involved. Postal Tel. etc. Co. *v.* Oregon, etc. R. R., 23 Utah, 474 (1901). A gas company may condemn even though all of its stock is owned by another gas com-

tract by a subsidiary company is not illegal on the ground that the parent company is avoiding the statutory obligations relative to foreign corporations doing business within the state.[1] Even though a Nebraska railroad corporation sells all its property to an Illinois railroad corporation in exchange for stock of the latter, which is issued to the stockholders of the former, the latter does not thereby become a Nebraska corporation, preventing the removal of cases to

pany. Calor, etc. Co. *v.* Franzell, 109 S. W. Rep. 328 (Ky. 1908). The fact that a Colorado telegraph company is but a subsidiary company of a New York corporation, does not prevent the former condemning a right of way on a railroad as allowed by the statutes of Colorado. Union Pacific R. R. *v.* Colorado, etc. Co., 30 Col. 133 (1902). A railroad company regularly organized is entitled to condemn a right of way, even though it was organized in the interest of a coal company which furnished the capital for such railroad. The claim that the railroad company is merely a dummy for the coal company is no defense to the condemnation proceedings. Kansas, etc. Ry. *v.* Northwestern, etc. Co., 161 Mo. 288 (1901). In Central R. R. *v.* Pennsylvania R. R., 31 N. J. Eq. 475, 494 (1879), the defendant was enjoined from building another railroad by means of an independent corporation operated by "dummies." The court said: "A corporation cannot in its own name subscribe for stock or be a corporator under the general railroad law, nor can it do so with a simulated compliance with the provisions of the law through its agents as pretended corporators and subscribers of stock." Although a new railroad corporation is clearly a "dummy" corporation, its incorporators and officers being officers in another railroad corporation, and its expenses being paid by the latter company, still it is a legal corporation. Southern Kansas, etc. R. R. *v.* Towner, 41 Kan. 72 (1889); Atchison, etc. R. R. *v.* Cochran, 43 Kan. 225 (1890). In Nebraska a "dummy" domestic corporation cannot condemn land for a foreign corporation. Koenig *v.* Chicago, etc. R. R., 27 Neb. 699 (1889). Condemnation proceedings by a railroad cannot be defeated on the ground that all the stockholders are also stockholders in a granite company, which will be chiefly benefited by the proposed railroad. Madera Ry. *v.* Raymond, etc. Co., 3 Cal. App. 668 (1906). A property owner may enjoin condemnation proceedings by a railroad company on the ground that it was not intended to be for public use, but was merely a dummy for a coal company. State *v.* Caretta Ry., 56 S. E. Rep. 520 (W. Va. 1907).

1 Cunningham *v.* City of Cleveland, 98 Fed. Rep. 657 (1899), the court saying: "It is a common plan to have a parent company engaged in a national business of installing local companies and taking stock in the local companies, but they are distinct legal entities, and the interest of the larger company in the smaller is no reason for holding otherwise." Where a railroad company of one state organizes a railroad company in another state to construct and operate a connecting railroad in the latter state, and owns a majority of the stock and bonds of the latter corporation and controls its policy and divides rates on a mileage basis, it will be considered as doing business in the latter state sufficiently to enable a non-resident to bring suit against it in the latter state for an injury occurring outside of the state. Buie *v.* Chicago, etc. Ry., 95 Tex. 51 (1901).

the federal court.[1] Sometimes a "dummy" corporation is used to hold land, the stockholders being aliens or foreign corporations.[2]

This general rule, however, like all general rules, has exceptions, and the New York court of appeals stated the exception forcibly as follows: "We have of late refused to be always and utterly trammeled by the logic derived from corporate existence where it only serves to distort or hide the truth."[3] And again: "The abstraction of the corporate entity should never be allowed to bar out and pervert the real and obvious truth."[4]

The chief application of this statement of law is in cases of fraud,[5] but there is a line of cases which apply this rule where there is no fraud, and where the owner of the stock is held liable merely because he owns all the stock of the corporation. Thus, it has been held that where a railroad company causes a telegraph company to be incorporated, and subscribes to all its stock, and appoints all its officers, and holds it out as the future owner of a telegraph system which the railroad owns, and then sells that system to some one else, a person contracting with the telegraph company on the faith of the scheme being carried out may hold the railroad company liable on the contract, on the principle of a principal being liable on the contracts of its agent.[6] It has also been held that where the corporation does business by organizing branch corporations, and the stockholders in the latter are disregarded, and the main corpora-

1 Walters *v.* Chicago, etc. R. R., 104 Fed. Rep. 377 (1900); aff'd, 186 U. S. 479.

2 See § 694, *infra.*

3 Anthony *v.* American Glucose Co., 146 N. Y. 407 (1895). In connection with the interstate commerce act two corporations may be considered as one, where they have the same interests and are owned by the same officers and stockholders. United States *v.* Milwaukee, etc. Co., 142 Fed. Rep. 247 (1905), the court saying (p. 255): "When the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons. This much may be expressed without approving the theory that the legal entity is a fiction, or a mere mental creation; or that the idea of invisibility or intangibility is a sophism. A corporation, as expressive of legal rights and powers, is no more fictitious or intangible than a man's right to his own home or his own liberty." As regards jurisdiction the federal courts will sometimes look beyond corporate existence. Hence, where there are two corporations of the same name, chartered in two states, each owning a part of a certain property which is covered by mortgage, the foreclosure decree based on an allegation of divers citizenship will not be disturbed on the ground that the wrong state was named in the bill as the state in which one of the parties was incorporated. Riverdale Mills *v.* Manufacturing Co., 198 U. S. 188 (1905).

4 Seymour *v.* Spring, etc. Assoc., 144 N. Y. 333, 340 (1895).

5 See § 663, *supra.*

6 Interstate Tel. Co. *v.* Baltimore, etc. Tel. Co., 51 Fed. Rep. 49 (1892).

tion pays up the stock and manages it without regard to its corporate character, the property of the branch corporation is subject to the debts of the parent company.[1] A corporation organized by a patentee to infringe a patent, which he sold, is estopped the same as he would be to deny its validity.[2] And there are other decisions to practically the effect that the courts will ignore the corporate existence under certain circumstances.[3]

1 Day *v.* Postal Tel. Co., 66 Md. 354 (1887).

2 National, etc. Co. *v.* International, etc. Co., 158 Fed. Rep. 824 (1908).

3 For an interesting discussion of the question as to why the artificial existence of the corporation, as distinguished from that of stockholders, should be ignored, see Cincinnati, etc. Co. *v.* Hoffmeister, 62 Ohio St. 189 (1900); and Andres *v.* Morgan, 62 Ohio St. 236 (1900). Where all the stockholders of a company transfer their stock to a trustee and receive in exchange therefor bonds of the company guaranteed by another company and secured by such stock, the latter company, being the owner of the equity of redemption, may be considered as practically owning the property of the former company. Chicago, etc. Co. *v.* City of Chicago, 199 Ill. 579 (1902). A company owned entirely by bankrupts, the business having been intermingled, may not be able to claim goods on hand at the time of bankruptcy. Ludvigh *v.* American Woolen Co., 159 Fed. Rep. 796 (1907). Where, in order to develop the property of a land company, its stockholders organize a railroad company and also a light, heat, and power company, the respective interests of the various companies being practically the same, it is legal for the land company to indorse and guarantee the notes of the other companies, the court saying, "for purposes of equity, courts will look behind that artificial personality, and, if need be, ignore it altogether, and deal with the individuals who constitute the corporation; and that is what, in justice and fairness, must be done here, where practically the same persons were associated together for one common purpose, under three or four different names, corresponding to the several branches of the single common enterprise, and acted together only formally as distinct organizations, each devoted to the corporate pursuit of its appropriate branch." Kendall *v.* Klapperthal Co., 202 Pa. St. 596 (1902). Where a person, who is carrying on a dairy business, buys all the stock of a dairy company and becomes its general manager and conducts both businesses the same as one, the bank in which the accounts are kept is not responsible for the funds of the dairy company being transferred to him. Bank of New South Wales *v.* Goulburn, etc. Co., 87 L. T. Rep. 88 (1902). Where a bank, in order to handle real estate which it acquires on foreclosure, organizes a corporation and owns all the stock and is the sole creditor of such corporation, the object of the whole transaction being to conceal the amount of money the bank has invested in real estate, the transaction is fraudulent as to creditors of the bank and the real estate may be attached as the property of the bank. Watson *v.* Bonfils, 116 Fed. Rep. 157 (1902). Where a railroad company owns all the stock of certain other railroad companies and all the property is operated as one system, the parent company may be liable as principal for the negligence of one of the subordinate companies causing injury to an employee of the latter. Lehigh, etc. R. R. *v.* Dela-

Where one corporation is merely a "dummy" of another corpo-

chesa, 145 Fed. Rep. 617 (1906). Where a company operating a plant controls a company owning the plant, the former company is liable for damages due to a boiler exploding through its negligence. James McNeil, etc. Co. *v.* Crucible, etc. Co., 207 Pa. St. 493 (1904). For the purposes of income tax, a Cape Colony corporation resides in England, if a majority of its directors reside in England and the important business of the company is transacted in England, except the actual mining operations. De Beers, etc. Mines, Ltd. *v.* Howe, 95 L. T. Rep. 221 (1906). A railroad corporation that has been operating a railroad cannot avoid liability for accidents on the ground that it leased the same to another company, such other company being a mere nominal corporation and the interest being the same. Chesapeake & Ohio R. R. *v.* Howard, 14 App. Cas. Dist. of Col. 262 (1899). See 47 S. Rep. 55.

Where one corporation owns all the stock and purchases all the property for another corporation, and employs a person to do work for the latter, it is liable for his wages on the ground that the subordinant company was merely an agency or instrumentality for carrying out the purposes of the former. Kelly *v.* Ning, etc. Assoc., 2 Cal. App. 460 (1905). A subsidiary company may be liable to a lawyer for services, even though he has been paid by the parent company for services rendered to the latter. Trimble *v.* Texarkana, etc. Ry., 199 Mo. 44 (1906). Where a railroad pays for the construction of another railroad company's line on an understanding that they should be consolidated, and assumes all the obligations of the latter and practically owns all its stock and takes possession and operates it, the two roads may be considered as having been consolidated, sufficiently at least to come within the meaning of a statute authorizing the consolidation of certain consolidated companies. Toledo, etc. R. R. *v.* Continental Trust Co., 95 Fed. Rep. 497 (1899). A railroad contractor in suing the construction company may join also the railroad company on an allegation that the construction company is a mere dummy of the railroad company. O'Brien *v.* Champlain, etc. Co., 107 Fed. Rep. 338 (1901). Where a corporation owns and operates a hotel and then leases it to another corporation without notice to the employees, and the latter fails, the former may be held liable to them. Oriental, etc. Co. *v.* Barclay, 25 Tex. Civ. App. 543 (1901). Where one corporation owns all the stock of another and the business is intermingled they may be considered as one under the bankrupt act. *In re* Southwestern, etc. Co., 133 Fed. Rep. 568 (1904). Where the only stockholders in a corporation are two men and their wives, and the corporation is merely an instrument for their business, and they are adjudged bankrupts, the assets of the corporation belong to them and may be administered in the bankruptcy court. *In re* Horgan, 97 Fed. Rep. 319 (1899). Where the president owns all or nearly all of the stock and mingles his business with that of the company, and causes a debtor of the company to make a payment on his individual debt to a bank, the payment is legal. Brunswick, etc. Co. *v.* Nat. Bank, etc., 99 Fed. Rep. 635 (1900). Where one person is president and general manager and owns all the stock, a note executed by him in the name of the corporation is valid, the proceeds being used in the corporate business. Africa *v.* Duluth, etc. Co., 82 Minn. 283 (1901). A promoter's agreement involving the getting in to a new organization of many properties is satisfied as to one property if ninety-five per cent. of the stock of the latter is obtained. Jewell *v.*

ration, a mortgage on the property of the latter may attach to prop-

McIntyre, 33 N. Y. Misc. Rep. 26 (1900). Where a person has turned in securities under a plan of consolidation which states the aggregate capacity of properties which it is proposed to acquire, or so many of them as the organizers may deem best, the party cannot withdraw, where the plan has been carried out, even though less than half of the properties have been actually acquired. And even though the preliminary contract provided for the acquisition of a certain company, yet if the consolidated company acquires practically all the stock and bonds of that company, the party turning in securities cannot withdraw, and especially cannot reclaim the securities as against a transferee in good faith who had no notice of personal representations. Jewell *v.* McIntyre, 62 N. Y. App. Div. 396 (1901); aff'd, 172 N. Y. 638. Where a person owns the entire capital stock of a corporation and contributes money to it, by reason of its capital stock being impaired, and then sells all the stock, he cannot claim that the corporation owes him the money so contributed, such money having been charged by him on the books to profit and loss. Times, etc. Co. *v.* Given, 106 Fed. Rep. 253 (1900). Even though two persons own the entire capital stock of a railroad company, yet if they use a part of its assets for their own individual purposes and make false entries on the books, some of the entries showing cash on hand, but which is not on hand, they are liable to the company later when it has passed into other hands. Saranac, etc. R. R. *v.* Arnold, 167 N. Y. 368 (1901). Where a partnership owns all the stock of a corporation which was organized for the purpose of holding timber lands, the court in appointing a receiver of the partnership may ignore the incorporation and may authorize the receiver to take possession of the property of the corporation, it being merely an organization for convenience. Cole *v.* Price, 22 Wash. 18 (1900). Where an Arkansas mercantile company and an Ohio real estate company are practically one company, having the same stockholders and officers, two contracts between a third person and each of them may be considered as one contract, where practically two parts of the same transaction are involved. Bloch, etc. Co. *v.* Metzger, 70 Ark. 232 (1901). A railroad company owning practically all the stock of another company may lease the line of the latter company to another company. Chicago, etc. Ry. *v.* Union Pac. Ry., 47 Fed. Rep. 15 (1891). Where a bank buys wall-paper at a sheriff's sale and organizes a corporation to sell the paper, all the stock of the corporation being owned by the bank, and guarantees debts thereafter incurred by such corporation, the bank is liable on such debts. American Nat. Bank *v.* National Wall-Paper Co., 77 Fed. Rep. 85 (1896). Where the contractor to construct the road is merely a "dummy" for the officers and stockholders, and there is evidence that the company's name and credit were used to construct the road, it is for the jury to say whether the company is liable for the debts incurred by the contractor in construction. Hirschmann *v.* Iron Range, etc. R. R., 97 Mich. 384 (1893). Where a railroad company is interested in the construction of a connecting line, it is liable for the services of an attorney employed by it in connection therewith. St. Louis, etc. R. R. *v.* Kirkpatrick, 52 Kan. 104 (1893). A firm, one of the members of which owns all the stock of a corporation which owes money to such firm, cannot participate with other creditors of the corporation in the distribution of the latter's assets, where the firm have treated the debt as the individual debt of that member

erty of the former, even in priority to a new mortgage on the property of the former.[1]

Again, there is a line of cases holding that, by agreement between

of the firm. Pott *v.* Schmucker, 84 Md. 535 (1897). A contract between three local companies, by which one runs over the tracks of another for a consideration paid to the third, is legal as to the second corporation, where such second corporation is a mere dummy of the third corporation and the earnings of both corporations went together. Union, etc. Ry. *v.* Chicago, etc. Ry., 163 U. S. 564, 592 (1896). Under the usual contract, by which a construction company takes all the stock and bonds and does all the work, and the railroad company is dormant until the road is finished, a creditor of the construction company may file a lien, under the statute, the same as though he furnished the labor and materials to the railroad company itself. McDonald *v.* Charleston, etc. R. R., 93 Tenn. 281 (1893). If one person buys all the stock of another company, it thereby becomes dormant, and he is liable for the debts incurred thereafter, except as to those debts which were incurred on the credit of the company only. Louisville Banking Co. *v.* Eisenman, 94 Ky. 83 (1893). Under a constitutional provision that conveyances to a corporation, a majority of the stock of which is held by aliens, shall be void the attorney-general may commence suit to have certain conveyances declared void, even though a majority of the stock was owned by citizens at the time of the conveyance, such majority having since that time passed into alien hands. State *v.* Hudson Land Co., 19 Wash. 85 (1898). Where a manufacturing company sells its patents, etc. to a holding company in consideration of stock of the latter, under a plan for controlling the patents and business in that line of business, this is entering a combination within the meaning of a contract of the former by which royalties were to be paid to another corporation. Brownsville Glass Co. *v.* Appert Glass Co., 136 Fed. Rep. 240 (1905). Where a telephone company agrees to pay to another company a certain percentage of all rentals received on telephones which are leased, and the former company grants exclusive licenses in exchange for stock of still other companies, such stock is in the nature of a rental and is to be included in the contract Western, etc. Co. *v.* American, etc. Co., 125 Fed. Rep. 342 (1903). The right of one of the owners of a mining claim to forfeit the interest of his co-owners for failure to contribute to certain work is not lost, even though the former conveys the property to a corporation for stock, it appearing that the corporation joined with him in signing and serving the notice. Badger, etc. Co. *v.* Stockton, etc. Co., 139 Fed. Rep. 838 (1905). A railroad company which acquires all the stock of another railroad company and then files a certificate with the secretary of state under the New York statute, which prescribes that thereupon the former succeeds to the property of the latter, is practically dissolved. Rochester Railway *v.* Rochester, 205 U. S. 236 (1907), aff'g 182 N. Y. 116. A domestic corporation cannot obtain a patent to a mining claim under the federal statutes unless all of its stockholders are citizens of the United States, and are severally and individually qualified and competent to make the location. Thomas *v.* Chisholm, 13 Colo. 105 (1889). As to the power of one corporation to buy the stock of other corporations, see §§ 315–317, *supra.* On this general subject see also § 709, *infra.*

1 Central T. Co. *v.* Kneeland, 138 U. S. 414 (1891).

all the stockholders, the assets of a private corporation may be distributed among the stockholders, without formal corporate action, or may be used for *ultra vires* purposes by unanimous consent, and that all this is legal if corporate creditors are not injured and the state does not object.[1] It is to be borne in mind, however, that these decisions arose out of unusual circumstances and hence are applicable only to cases of unusual equitable considerations.

The liability of a corporation on the obligations of another corporation whose entire assets it purchases at private sale,[2] or at judicial sale,[3] is considered elsewhere, such a purchase being different from a purchase of the stock of such other corporation.

§ 665. *Participation, ratification, and laches as a bar to stockholders' complaints.*—This subject is considered elsewhere.[4]

§ 666. *Parties, pleadings, etc.*—This subject also is considered elsewhere.[5]

1 See §§ 6, 546, 641, *supra*, and § 671, *infra*. The court may look behind the corporate existence when it is necessary to do so, in order to do equity. Home Fire Ins. Co. *v.* Barber, 67 Neb. 644 (1903), involving a suit to recover back dividends, the suit being based on technicalities which were inequitable. Persons sued at law by a corporation for accepting its money from its president and using it to pay the president's debt, may file a bill in equity to enjoin the suit at law on the ground that the president owned or controlled all the stock and used the corporation for his private purposes, and that the money was so paid with the consent of all the stockholders and officers. Leigh *v.* Kewanee, etc. Co., 127 Fed. Rep. 990 (1904). And where a corporation or person owns all the stock and bonds of another corporation and causes the latter to lease all its property, it is legal to have the rent made payable to the first-named corporation or person. Union Pac. Ry. *v.* Chicago, etc. Ry., 51 Fed. Rep. 309 (1892).

2 See § 672, *infra*.

3 See § 890, *infra*.

4 See ch. LXIV, *infra*.

5 See ch. XLV, *infra*.

CHAPTER XL.

ULTRA VIRES ACTS AND CONTRACTS—IN OTHER WORDS, ACTS AND CONTRACTS WHICH ARE IN EXCESS OF THE CHARTER POWERS OF THE CORPORATION, DIRECTORS, OR STOCKHOLDERS.

§ 667. *Meaning of the term ultra vires.*—The term *ultra vires,* as used in this treatise, means any act of a corporation which the corporation is not authorized to do, either by its express or implied powers. This term has been objected to as having no fixed and clear meaning, and to some extent the objection is reasonable. There is no other term, however, that has acquired the significance, general use, and peculiar meaning that are attached to the words *ultra vires;* and consequently the term probably has acquired a permanent place in the vocabulary of corporation law.[1]

1 "The contracts of corporations are said to be *ultra vires* when they involve some adventure or undertaking not within the scope of their charter, which is their rule of corporate action." Leslie *v.* Lorillard, 110 N. Y. 519 (1888). For various definitions of the words *ultra vires*, see Pierce, Railroads (2d ed.), p. 516; Taylor *v.* Chichester, etc. Ry., L. R. 2 Exch. 356,

§ 668. *Method of treatment of the subject.*—There has been extreme difficulty and confusion in defining the validity, effect, rights, and remedies of an *ultra vires* act. The attempt to formulate general rules on this subject has only added to the confusion.[1] Accordingly, the plan of explanation pursued in this work is to state

378 (1867); Bissell *v.* Michigan, etc. R. R. Cos., 22 N. Y. 258, 293 (1860); National Pemberton Bank *v.* Porter, 125 Mass. 333 (1878); Whitney Arms Co. *v.* Barlow, 63 N. Y. 62 (1875); Shrewsbury *v.* North Staffordshire Ry., L. R. 1 Eq. 593 (1865); Nassau Bank *v.* Jones, 95 N. Y. 115 (1884); Green's Brice, Ultra Vires (2d ed.), 35; Miners' Ditch Co. *v.* Zellerbach, 37 Cal. 543, 579 (1869); McPherson *v.* Foster, 43 Iowa, 48, 64, 65 (1876); Ashbury, etc. Co. *v.* Riche, L. R. 7 H. L. 653, 672 (1875); 2 Kent's Com. *300 (12th ed.), note. Two difficulties have arisen in agreeing upon a definition of this term. First, the term *ultra vires* was often used to designate not only acts beyond the express and implied powers of the corporation, but also acts which are contrary to public policy, and are void whether done by corporations or individuals. Such acts when done by corporations are now termed "illegal" acts, and the term *ultra vires* is not used so as to include them. Second, the term *ultra vires* has been applied to acts which are beyond the powers of the directors, but within the powers of the majority of the stockholders. This use of the term, however, is now discarded, and it is used to designate acts which are beyond the powers of a majority of the stockholders as against a minority; or are beyond the powers of the stockholders acting unanimously as against the state. In Taylor *v.* Chichester, etc. Ry., L. R. 2 Exch. 356, 378 (1867), Blackburn, J., said: "I think it very unfortunate that the same phrase *ultra vires* has been used to express both an excess of authority as against the shareholders, and the doing of an act illegal as being *malum prohibitum;* for the two things are substantially different; and I think the use of the same phrase for both has produced confusion." Even though a railroad is giving a lower rate to one customer than to another, yet a stockholder cannot maintain a suit of injunction to compel the party to pay what he should have paid. While the act is illegal, it is not *ultra vires*, and as to the illegal act it is for the corporation to decide whether or not it will sue. Anderson *v.* Midland Ry., [1902] 1 Ch. 369.

1 For instance, the general rule that "any ambiguity in the terms of the grant must operate against the corporation and in favor of the public, and the corporation can claim nothing that is not clearly given by the law," etc. (Perrine *v.* Chesapeake, etc. Co., 9 How. 172—1850), is sound aw, and has been laid down in many cases; but as a matter of fact, this principle gives little light or satisfaction to the bench, bar, or layman. Each case turns largely on its own facts. Moreover, the decision turns largely on who sues, who is sued, what relief is sought, and whether the act has been performed by one side or not. General rules cannot clearly make the distinctions. The old ideas have been changed. Indeed it is refreshing to hear from that great judge, Mr. Justice Miller, such sound sense as this: "The truth is, that, with the great increase in corporations in very recent times and in their extension to nearly all the business transactions of life, it has been found necessary to hold them responsible for acts not strictly within their corporate powers, but done in their corporate name, and by cor-

those acts which have been adjudged *ultra vires*,[1] and also those acts which have been adjudged to be *intra vires*.[2] It must be borne in mind that nearly every corporate act is *ultra vires* or *intra vires* in a broad sense. It was from this standpoint that Professor Brice's work on Ultra Vires was written. The plan of this book, however, has been to divide the subject into other and more practical headings, such as "preferred stock" and the various other chapter headings herein contained, rather than to group everything under the heading of *ultra vires* or *intra vires*. Most corporate acts, whether *ultra vires* or *intra vires*, have been or will be considered in other parts of this book. Hence only such subjects are treated here as are not extensive enough or important enough for separate chapters.

In general, it remains to add that at common law an *ultra vires* act may be objected to by the state, a stockholder, the corporation, or the person contracting with the corporation; and since often one of these parties may sustain the objection, where the others are not allowed to do so, it is necessary to consider always the four questions: Who brings the suit; who is sued; what act is complained of; and what performance has already been had. It rarely happens that the state objects to an *ultra vires* act. That it has a right to object by *quo warranto* is undoubted.[3] The question of when and whether the stockholder must first apply to the directors or stockholders to remedy the wrong before he brings suit,[4] and also the question of when a ratification of the act by the other stockholders is a bar,[5] is considered elsewhere.

The tendency is to limit the application of the doctrine of *ultra vires*, especially in regard to partially executed contracts. In this respect the New York court of appeals is in conflict with the supreme court of the United States.[6]

§ 669. *A stockholder may object to an ultra vires act.*—That a charter constitutes a contract between the corporation and its stockholders is a principle of law that has become firmly imbedded in the jurisprudence of modern times.[7] Upon this principle of law rest the stability, permanence, and honesty of management of many cor-

poration officers who were competent to exercise all the corporate powers." Salt Lake City *v.* Hollister, 118 U. S. 256 (1886). See also Pennsylvania R. R. *v.* Keokuk, etc. Co., 131 U. S. 371, 384, 389 (1889); Stourbridge Canal *v* Wheeley, 2 Barn. & Ad. 792 (1831)

1 This is the subject of this chapter.

2 This is the subject of the following chapter, XLI.

3 See § 635, *supra*.

4 See § 740, *infra*.

5 See §§ 649, 652, 662, and ch. XLIV.

6 See § 681, *infra*.

7 Quoted and approved in Harding *v.* American, etc. Co., 182 Ill. 551 (1899) See §§ 492–496, *supra*.

porations, particularly those of railroads, and from it arises much of the confidence, safety, and protection of the stockholder himself. It was first promulgated in America, in 1820, in Livingston *v.* Lynch,[1] and was applied to corporations in Hartford & New Haven Railroad Company *v.* Croswell,[2] and in England, in 1824, in Natusch *v.* Irving.[3] These cases have been followed by a long list of supporting decisions. They were the first to establish clearly the doctrine that any act or proposed act of the corporation, or of the directors, or of a majority of the stockholders, which is not within the express or implied powers of the charter of incorporation or of association — in other words, any *ultra vires* act — is a breach of the contract between the corporation and each one of its stockholders, and that consequently any one or more of the stockholders may object thereto and compel the corporation to observe the terms of the contract as set forth in the charter.[4]

§ 670. *Neither the directors nor a majority of the stockholders have power to sell all the corporate property as against the dissent of a single stockholder, unless the corporation is in a failing condition.*—Ever since the case of Abbot *v.* American Hard Rubber Company,[5] the law has been clearly established in this country that a dissenting stockholder may prevent the sale of all the corporate

1 4 Johns. Ch. 573.

2 5 Hill, 383 (1843).

3 2 Cooper's Ch. 358, by Lord Eldon; also reported in Gow on Partnership, 398. Thus, Lord Chancellor Campbell, in Simpson *v.* Westminster, etc. Co., 8 H. L. Cas. 712 (1860), said: "I bow to the authority of Natusch *v.* Irving. . . . The funds of a joint-stock company established for one undertaking cannot be applied to another. If an attempt to do so is made, this act is *ultra vires;* and, although sanctioned by all the directors and by a large majority of the shareholders, any single shareholder has a right to resist it, and a court of equity will interpose on his behalf by injunction." In Pickering *v.* Stephenson, L. R. 14 Eq. 322 (1872), the court said: "It is difficult to conceive any system of jurisprudence in which Natusch *v.* Irving would have been differently decided."

4 Quoted and approved in Harding *v.* American, etc. Co., 182 Ill. 551 (1899). A stockholder may file a bill to enjoin or set aside an *ultra vires* act, even though every other stockholder is opposed to him. Hoole *v.* Great Western Ry., L. R. 3 Ch. App. 262 (1867); Beeman *v.* Rufford, 1 Sim. (N. S.) 550 (1851), where a majority of the stockholders had even voted to ratify the illegal act; Bagshaw *v.* Eastern Union Ry., 19 L. J. (Ch.) 410 (1850); aff'g, 7 Hare, 114; Hare *v.* London, etc. Ry., 30 L. J. (Ch.) 817, 829 (1861); s. c., 2 Johns. & H., 80; Winch *v.* Birkenhead, etc. Ry., 5 De G. & Sm. 562 (1852). A stockholder in a trust company may file a bill in equity to enjoin the company from paying an illegal income tax to the federal government. Pollock *v.* Farmers' L. & T. Co., 157 U. S. 429 (1895).

5 33 Barb. 578 (1861). See also Abbot *v.* American Hard Rubber Co., 4 Blatchf. 489 (1861); s. c., 1 Fed. Cas. 13.

property where the corporation is a solvent, going concern.[1] And

[1] People *v.* Ballard, 134 N. Y. 269 (1892), reviewing the cases (rehearing denied, 136 N. Y. 639); *Re* Sovereign L. Ass. Co., L. R. 42 Ch. D. 540 (1889); aff'd, [1892] 3 Ch. 279. See also Smith *v.* New York, etc. Co., 18 Abb. Pr. 419, 435 (1865); Rollins *v.* Clay, 33 Me. 132 (1851); Barclay *v.* Quicksilver Min. Co., 9 Abb. Pr. (N. S.) 283 (1870); Copeland *v.* Citizens' Gas Light Co., 61 Barb. 60 (1871); Conro *v.* Port Henry Iron Co., 12 Barb. 27 (1851); Astor *v.* Westchester Gas Light Co., 33 Hun, 333 (1884); Bird *v.* Bird's, etc. Co., L. R. 9 Ch. App. 358 (1874); Adriance *v.* Roome, 52 Barb. 399 (1868); Brady *v.* New York, 16 How. Pr. 432 (1857); Middlesex R. R. *v.* Boston, etc. R. R., 115 Mass. 347 (1874). *Cf.* Dana *v.* Bank of U. S. 5 Watts & S. (Pa.) 223, 247 (1843); Union Bank *v.* Ellicott, 6 Gill & J. (Md.) 363 (1834). See also Sheldon, etc. Co. *v.* Eickemeyer, etc. Co., 90 N. Y. 607 (1882); Balliet *v.* Brown, 103 Pa. St. 546 (1883); Gray *v.* New York, etc. Steamship Co., 5 Thomp., 3 Hun, 383. But see Hutchinson *v.* Green, 91 Mo. 367 (1886), and Mills *v.* Hurd, 29 Fed. Rep. 410 (1887), relative to unincorporated associations. A stockholder of a manufacturing company may enjoin a lease of all its property and business to another corporation for twenty-five years at a rental equal to one-half of the profits of the business. Small *v.* Minneapolis, etc. Co., 45 Minn. 264 (1891). The board of directors have no power to sell all the property of the company without action by the stockholders. Consolidated, etc. Co. *v.* Nash, 109 Wis. 490 (1901). A stockholder may cause to be set aside a sale of all the property of the corporation at an inadequate price to another corporation having the same officers and directors. Hinds *v.* Fishkill, etc. Co., 96 N. Y. App. Div. 14 (1904). Even though a suit in New Jersey by a stockholder in a Maine corporation to enjoin a New Jersey corporation from taking over the assets of the Maine corporation joins the Maine corporation as a party defendant, and the latter is not served, yet the court may grant relief. Wilson *v.* American, etc. Co., 67 N. J. Eq. 262 (1904). The minority may cause to be set aside a sale of all the corporate assets to a syndicate representing the majority. Blais *v.* Brazeau, 25 R. I. 417 (1903). A stockholder may file a bill to set aside a sale of the entire assets of the company, which is solvent and a going concern, to another company, and no request to the directors need be made where they authorized the transaction and a majority of the stockholders had ratified it. Tillis *v.* Brown, 47 S. Rep. 589 (Ala. 1908). Where a receiver has been appointed at the instance of a minority stockholder on account of the company having sold all its property to another corporation, but the transaction has been undone and canceled, the court should discharge the receiver. Forrester *v.* Boston, etc. Co., 22 Mont. 430 (1899). A corporation is not bound by a contract for the sale of its property, even though four or five directors and also the owner of the majority of the stock write their names on the contract under the word "accepted." Moreover, the statute of frauds applies to the transaction as affecting real estate. Taylor *v.* Scott & Co., 113 N. W. Rep. 32 (Mich. 1907). A lease of all the corporate property made by a majority vote of the stockholders and directors may be set aside at the instance of a dissenting stockholder where the lessee owned a majority of the stock and controlled the board of directors of the lessor. Parsons *v.* Tacoma, etc. Co., 25 Wash. 492 (1901). A transfer of a lease of property by the general manager, who has exercised all the powers of the company, is valid, even though there is no vote of the stockholders, where

even where a dissolution is the purpose in view, yet, if the corpora-

such lease does not constitute all the assets of the corporation and the transaction was fair in itself. Pennsylvania, etc. Co. *v.* Pure-Oil Co., 195 Pa. St. 388 (1900). A member of a mutual insurance company may enjoin the company from transforming itself into a joint-stock company. Schwarzwaelder *v.* German Ins. Co., 59 N. J. Eq. 589 (1899). In the case of Arents *v.* Blackwell's, etc. Co., 101 Fed. Rep. 338 (1900), where the holders of 159,769 shares out of 160,000 shares of the stock of a tobacco company wished to accept the offer of another company to buy it out for $2,800,000, and a person had purchased one share for the purpose of stopping the sale and having the charter repealed, the court appointed a receiver to sell the property as preliminary to a dissolution and distribution of the assets. Where the president of an unincorporated association issues treasury stock and thereby obtains control of the association, and sells it out to a corporation organized by himself, the minority stockholders of the association may compel him to account for the property. As regards the person to whom the stock was issued, however, a general allegation that he acted in connection with the president is not sufficient to render him liable on the ground of fraud. Booth *v.* Dodge, 60 N. Y. App. Div. 23 (1901). In the case of De La Vergne, etc. Co. *v.* German, etc. Inst., 175 U. S. 40 (1899), a contract was made by which the president of an Illinois manufacturing corporation sold all its assets to a rival New York corporation, and all the shares of stock in the Illinois corporation were also delivered to the New York corporation. The court held the transaction to be illegal on the ground that the president was not authorized to sell the assets, and that on the other hand the New York corporation was prohibited by its charter from purchasing stock in other corporations. A mining corporation may at common law lease its property for five years for a rental, payable in a certain portion of the product of the mine. A stockholder cannot complain, even though the contract be an error of judgment. Hennessy *v.* Muhleman, 40 N. Y. App. Div. 175 (1899). A receiver was appointed at the instance of minority stockholders, under the Louisiana statutes, in the case of Davies *v.* Monroe, etc. Co., 107 La. 145 (1901), where the majority were about to sell out an electric-light and water-works plant to a foreign corporation controlled by the president at a price less than the debts, and the president, in addition to his salary, had been charging for traveling expenses. A sale of all the corporate property to an individual who purchases in good faith cannot be set aside by the corporation as *ultra vires*. Miners' Ditch Co. *v.* Zellerbach, 37 Cal. 543 (1869). An injunction against transferring all the property to another corporation will not be granted where only a leasing of part of the property is contemplated. Small *v.* Minneapolis, etc. Co., 10 N. Y. Supp. 456 (1890). A vendee of all the property of a corporation cannot avoid the purchase on the ground that the stockholders had not assented thereto. Stokes *v.* Detrick, 75 Md. 256 (1892). A charter cannot be assigned. Only the property or shares of stock can be assigned. Welch *v.* Old Dominion, etc. Co., 10 N. Y. Supp. 174 (1890). Directors who are merely vested with the ordinary powers of executive management cannot radically affect the chartered rights of stockholders (Baker's Appeal, 109 Pa. St. 461 (1885), 42 Leg. Int. 226); and hence have no authority to dispose of the corporate plant by lease, sale, or otherwise. Martin *v.* Continental, etc. Ry., 14 Phila. 10 (1880). A secession of the

tion is a prosperous one, such a sale cannot be made.[1] Indeed it is very doubtful whether a dissolution can ever be had at common law

majority, carrying corporate funds to a new corporation, is a fraud on the old corporation. Tomlinson *v.* Bricklayers' Union, 87 Ind. 308 (1882). Where all the property of the corporation is sold, together with the stock of the company, the directors cannot subsequently act as a board, they no longer being stockholders, as required by the statute. Orr, etc. Co. *v.* Reno Water Co., 17 Nev. 166 (1882). In Citizens' Street R. R. *v.* Robbins, 144 Ind. 671 (1896), the administratrix had illegally sold stock to a party, who then caused the corporation to sell all its property to another corporation. A subsequent administrator sued to set aside the sale of the corporate property or for damages. The court held that, as the purchasing corporation had expressly assumed the liabilities of the vendor corporation, it must pay for the value of the stock, inasmuch as the vendor corporation was liable for allowing the transfer. It is legal for a person who is endeavoring to purchase all the property of a corporation to pay a stockholder for consenting thereto. Lamkin *v.* Palmer, 24 N. Y. App. Div. 255 (1897); aff'd, 164 N. Y. 201. The case of Hirsch *v.* Burns, 74 L. T. Rep. 769 (1897), was affirmed in 77 L. T. Rep. 377, to the effect that a person having an option to purchase the unissued stock of a company has a claim for damage in case the company sells the business to another company without protecting such option.

Where, by a majority vote of the stockholders, all the assets of a Maine corporation are transferred to a New Jersey corporation, the latter agreeing to pay all the debts and to issue one share of its stock for every two shares of the stock in the former corporation, and for two years the New Jersey corporation fails to pay such debts and the stock of the Maine corporation has not been fully delivered, a dissenting stockholder in the Maine corporation may enjoin the New Jersey corporation from disposing of such assets. Eldred *v.* American Palace-Car Co. etc., 96 Fed. Rep. 59 (1899). In a stockholder's suit to set aside an illegal transfer of the assets of his corporation to another corporation and to compel a re-transfer, the persons through whom the property was transferred need not be made parties if the persons in possession of the assets are made parties. Eldred *v.* American, etc. Co., 99 Fed. Rep. 168 (1900). But the federal

1 Quoted and approved in Harding *v.* American, etc. Co., 182 Ill. 551 (1899); People *v.* Ballard, 134 N. Y. 269; 136 N. Y. 639 (1892). A minority stockholder may enjoin a public sale of the property of a prosperous corporation, even though the company has been dissolved, under the New York statute, where he shows that the public sale is not being fairly advertised and conducted, and shows also that the dissolution is for the purpose of reorganizing under the laws of another state and freezing out the minority, and that information could not be obtained as to the actual condition of the company. Treadwell *v.* United, etc. Co., 47 N. Y. App. Div. 613 (1900). The voluntary dissolution, under the New York statute, of a prosperous corporation will be enjoined at the instance of minority stockholders where it is alleged that it is a mere scheme to freeze out the later and to buy in the property for a partnership. Elbogen *v.* Gerbereaux, etc. Co., 30 N. Y. Misc. Rep. 264 (1900). See also § 629, *supra*.

by a majority of the stockholders where the corporation is a going,

court in New Jersey has no jurisdiction of a suit brought by stockholders in a Maine corporation against that corporation and a New Jersey corporation to set aside an illegal transfer of property from the Maine corporation to the New Jersey corporation, the property itself not being in New Jersey. Eldred *v.* American, etc. Co., 105 Fed. Rep. 455 (1900). Moreover, if the Maine corporation is not served and does not voluntarily appear, final relief cannot be granted and a preliminary injunction will be dissolved. Eldred *v.* American, etc. Co., 105 Fed. Rep. 457 (1900). In a stockholder's suit to set aside a sale by a Maine corporation of all its assets to a New Jersey corporation, the suit being in New Jersey, the Maine corporation is a necessary party defendant, and a court in Maine will not appoint a receiver of the same for the sole purpose of appearing in the suit in New Jersey. Hutchinson *v.* American, etc. Co., 104 Fed. Rep. 182 (1900). A New York court will not, at the instance of a New York stockholder in an Arizona mining company, enjoin the company from transferring its property in Arizona, and appoint a receiver thereof, inasmuch as such an injunction will not be effective except with the aid of the Arizona courts, and the question involved is one relating to the internal affairs of the company which should be controlled by the statutes and public policy of Arizona. The court, however, in the final decree, may set aside illegal sales, even though the property is beyond the jurisdiction. Hallenborg *v.* Greene, 66 N. Y. App. Div. 590 (1901). Where the secretary and treasurer has managed the business as though the property was his own, a sale of all the property with the consent of ninety-five per cent. of the stockholders to an innocent purchaser for value is legal, even though no meeting of the directors or stockholders authorized the sale. Magowan *v.* Groneweg, 14 S. D. 543 (1901). See s. c., 16 S. D. 29. Where, in a stockholder's suit in the federal court to set aside a sale of all the assets of the company to another company, an injunction has been denied on the giving of a bond, an injunction will not be granted in a similar suit by the same parties in the state court, especially where the purchaser is outside of the jurisdiction of the court, and the advantage to the complainant will be small as compared with the injury to the defendant. Mumford *v.* Ecuador, etc. Co., 50 Atl. Rep. 476 (N. J. 1901). Where a minority stockholder starts a suit in the federal court to set aside a sale of the property of the company to another corporation, but does not bring in as a party defendant a railway company which is about to issue securities, in accordance with contracts with the two companies, and afterwards starts a suit in the state court for the same relief, and brings in the railway company as party defendant, laches in bringing in the railway company is a bar to relief against that company. A protest not followed by prompt application to a court does not excuse laches. Mumford *v.* Ecuador, etc. Co., 50 Atl. Rep. 476 (N. J. 1901). In the case of Drake *v.* New York, etc. Co., 36 N. Y. App. Div. 275 (1899), where the owner of ten out of two thousand shares of stock attacked a foreclosure decree on the ground of fraud, the court refused to grant relief, the purchaser at the foreclosure sale being willing to pay to such stockholder his proportion of the actual value of the property, irrespective of the price realized at the foreclosure sale. The court said that the expense of further litigation would be many times the actual value of the plaintiff's interest, and that, while the plaintiff in a court of law would be entitled to the full measure of his legal rights, yet

prosperous concern.[1] And certainly if the purpose of such dissolution is not the *bona fide* discontinuance of the business, but is the continuance of that business by another new corporation, then the rule is that a dissenting stockholder may prevent the sale, even though it is made with a view to dissolution of the corporation. This is the law as laid down in the well considered case of Kean *v.* Johnson.[2] Such a dissolution is practically a fraud on dissenting stockholders. It seeks to do indirectly that which cannot legally be done directly.[3] Where, however, the statutes authorize dissolution on a certain vote of the stockholders, a dissolution so voted is legal, irrespective of the motives of the stockholders in voting it.[4] A state may enact a statute authorizing a railroad corporation to condemn a minority of the stock in another company, the former company being already the owner of the majority of the stock, it being shown that the public interest so demands, and the improvement of the railroad itself being of sufficient public interest.[5] A stockholder in a railroad

in a court of equity a different rule prevails, and he may be compelled to take his actual interest. *Cf.* 96 Pac.Rep. 271.

1 Quoted and approved in Theis *v.* Spokane, etc. Co., 34 Wash. 23 (1904). See § 629, *supra.*

2 9 N. J. Eq. 401 (1853); Ervin *v.* Oregon, etc. Nav. Co., 27 Fed. Rep. 625 (1886). Where before the dissolution of an insurance company all of its assets were transferred to another responsible company which contracted to meet all obligations, the court will not necessarily set the transfer aside and appoint a receiver, but will allow the transfer to stand, if fair and best. The minority are not absolutely entitled to a receivership and sale. Baltimore, etc. R. R. *v.* Cannon, 72 Md. 493 (1890). An oil mining corporation may lease its oil lands, reserving a royalty. Starke *v.* Guffey Pet. Co., 80 S. W. Rep. 1080 (Tex. 1904); aff'd, 98 Tex. 542. Even though a corporation is in debt to its directors, yet if its income is sufficient to pay the interest, the directors cannot legally sell their holdings of stock to a competing concern, together with such debt, whereby the competing concern obtains a majority of the stock, even though the minority are offered the same price, such action being followed practically by the new corporation taking a lease of the assets of the old corporation, and doing all the business. The minority stockholders may hold the directors personally liable, and may have a receiver appointed, and may have the mortgage securing the directors' debts canceled, and the business itself continued by the receiver. The former directors who resigned, as well as new directors who took their place, are proper party defendants. Jacobus *v.* Diamond, etc. Co., 94 N. Y. App. 366 (1904). The soundness of this last decision may well be doubted.

3 Quoted and approved in Theis *v.* Spokane, etc. Co., 34 Wash. 23 (1904). Boston, etc. R. R. *v.* New York, etc. R. R., 13 R. I. 260 (1881). See §§ 629, 630, *supra.*

4 See § 629, *supra.* The "right to have the business carried on until the natural death of the corporation is subject to the will of the majority of two-thirds provided for in the statute." Beling *v.* American, etc. Co., 65 Atl. Rep. 725 (N. J. 1907).

5 Offield *v.* New York, etc. R. R., 203 U. S. 372 (1906). See also § 671, *infra.*

company which has sold its property to another railroad company cannot have the sale set aside on the ground that the buying company had no authority to purchase.[1] The rule that a going corporation cannot be sold out to another corporation does not apply to a medical school, even though it has a capital stock, its real purpose not being for profit.[2] Fraternal beneficiary corporations have no power to consolidate unless the statute expressly authorizes them to do so.[3]

If, however, the corporation is an unprofitable and failing enterprise, then a sale of all the corporate property with a view to dissolution may be made.[4] And it has been held in Washington that

1 Hinds County *v.* Natchez, etc. R. R., 85 Miss. 599 (1905).

2 McLeod *v.* Lincoln, etc. College, 69 Neb. 550 (1903).

3 Bankers', etc. *v.* Crawford, 67 Kan. 449 (1903).

4 Quoted and approved in Price *v.* Holcomb, 89 Iowa, 123 (1893), and Harding *v.* American, etc. Co., 182 Ill. 551 (1899); Doyle *v.* Leitelt, 97 Mich. 298 (1893); Lauman *v.* Lebanon Valley R. R., 30 Pa. St. 42 (1858). Where a corporation is in a failing condition the stockholders may vote that the plant should be sold at the best price obtainable, and if no purchaser be found by a certain date it should be sold to such of the stockholders as were creditors, on condition that they pay all the debts, and it is not objectionable that some of such stockholders were also directors, all of the stockholders being given an opportunity to participate. Heidbreder *v.* Superior, etc. Co., 184 Mo. 446 (1904). A company which is in debt and unable to raise funds to continue its business may, under the Wisconsin statute authorizing corporations on a majority vote of their stockholders to sell all their property, make such sale at public auction, giving the stockholders the first opportunity to purchase, and if one stockholder purchases at such sale he may associate with him such other stockholders as he sees fit. Werle *v.* Northwestern, etc. Co., 125 Wis. 534 (1905). An insurance company, which is solvent but is doing a losing business and unable to continue without further loss, may sell its business to another insurance company and wind up its affairs. Raymond *v.* Security, etc. Co., 111 N. Y. App. Div. 191 (1906). The capital stock is not a trust fund for the stockholders after the payment of the debts, and hence immediately prior to dissolution a liquidator may be appointed by the corporation with power to sell its assets. Knott *v.* Evening Post Co., 124 Fed. Rep. 342 (1903); rev'd on another point in 130 Fed. Rep. 820. An embarrassed corporation may lease its property for a year in order to keep afloat, such lease being reasonable in its terms. Plant *v.* Macon, etc. Co., 103 Ga. 666 (1898). Where the stockholders of an insolvent corporation have authorized the directors to sell the property and public sale is thereupon made, the court will not set the sale aside, although directors who were creditors of the corporation purchased at such sale at a low figure. Patterson *v.* Portland, etc. Works, 35 Or. 96 (1899). The holder of seventy-five shares cannot enjoin the holders of three thousand six hundred and seventy-five shares from making a private sale of the corporate assets at a fair price, where the corporate business is unprofitable and each stockholder has an opportunity of participating in the purchase. Phillips *v.*

a minority stockholder in a gas company, which, to preserve its property and business, must either borrow money for extensions or else consolidate with another company, cannot enjoin a sale of the assets of the former to the latter, such sale having been authorized by the directors and a majority of the stockholders, even though a majority of the stock of the former company is owned by the latter company, there being no actual fraud.[1]

Providence, etc. Co., 21 R. I. 302 (1899). Where the business was a losing one, a lease of all the property by the stockholders, having wide powers by the charter, was upheld. Featherstonhaugh *v.* Lee, etc. Co., L. R. 1 Eq. 318 (1865). A dissenting stockholder cannot enjoin the corporation from selling all its property where its debts are large and a mortgage is about to be foreclosed, and a sale is the only means of protecting the company, and there is no fraud involved, and a large majority of the stockholders are in favor of the sale, and the company will have the proceeds of the sale in its treasury to continue business. Sewell *v.* East, etc. Co., 50 N. J. Eq. 717 (1893). A manufacturing corporation may, for the purpose of protecting its stockholders from further loss, discontinue its operations when unprofitable, and may sell or lease the property. Skinner *v.* Smith, 134 N. Y. 240 (1892). To discontinue a failing business and proceed to sell the property and pay the debts is not a breach of trust. Rothwell *v.* Robinson, 44 Minn. 538 (1890). A sale, however, of all the corporate assets for stock in another company is not legal, even though the vendor corporation is insolvent, where the intent is, not to wind up the insolvent company, but to hold the stock indefinitely in the names of trustees. Byrne *v.* Schuyler, etc. Co., 65 Conn. 336 (1895). By a vote of the board of directors and a majority of the stockholders, in a meeting assembled a rubber manufacturing company may lease its entire business to another rubber manufacturing company, the financial condition of the leasing company being depressed and its business not profitable for want of capital, and the lease being the best, if not the only, means of preventing insolvency, and there being no fraud in the case. Bartholomew *v.* Derby R. Co., 69 Conn. 521 (1897). In New Jersey a failing corporation cannot sell out all its assets to another corporation, inasmuch as the statutes authorize a dissolution by a failing corporation, and the sale can be made in connection with such dissolution. Hunt *v.* American, etc. Co., 81 Fed. Rep. 532 (1897). If the corporation is financially embarrassed, a majority of the stockholders may authorize the directors to sell all its property at public auction, and a reorganization committee representing a part of the stockholders may buy it in, the price paid being a fair one. Hayden *v.* Official, etc. Co., 42 Fed. Rep. 875 (1890). Where one building association absorbs another and takes all of its assets and tries to force the minority stockholders to transfer or surrender their stock, and causes the absorbed association to become insolvent, a receiver will be appointed at the instance of minority stockholders, even though the absorbed association is a failing one. Continental, etc. Assoc. *v.* Miller, 44 Fla. 757 (1902). The directors of a failing company have no power to sell all its assets to another company and agree to assess the stockholders for any deficit in the assets as compared with the liabilities. Farmers', etc. Trust Co. *v.* Hazen, 21 Pa. Sup. 130 (1902).

1 Theis *v.* Spokane, etc. Co., 95 Pac. Rep. 1074 (Wash. 1908).

Where an insurance company, having authority to sell its property, proceeds to sell to another company which has no authority to buy, the transaction is illegal, and a stockholder in the former who agrees to take stock in the latter in exchange for his old stock is not bound to carry out the transaction.[1] But even though a note given by one insurance company to purchase the business of another insurance company is not legal, yet if the assets of the corporation that issued the notes are used to take it up, the money cannot be recovered back.[2] Where a sale of all the corporate assets is set aside, and a receiver is authorized to borrow money to repay the money received on the sale, the loan made by him is legal.[3]

By the unanimous consent of the stockholders it is always legal to sell all the property of a private corporation,[4] proper provision

1 Dougan's Case, 28 L. T. Rep. 60 (1873); aff'd, L. R. 8 Ch. App. 540 (1873).

2 McClure *v.* Trask, 161 N. Y. 82 (1899).

3 St. Paul Trust Co. *v.* St. Paul Globe Pub. Co., 60 Minn. 105 (1895).

4 See § 671, *infra.* A corporation may convey its property with the consent of stockholders. State *v.* Western, etc. Co., 40 Kan. 96 (1888). Where an iron manufacturing concern owns an iron manufacturing plant and stocks in an ore company and a railway company and a steamboat company and other corporations, and also a farm, and by consent of all the partners the firm is transformed into a corporation which takes all the property, including the stocks and the farm, one of the participants cannot afterwards complain that it was illegal for the corporation to acquire such stocks and the farm. Burden *v.* Burden, 159 N. Y. 287 (1899). The agreement of a creditor of a corporation with a stockholder who is also a creditor of the same, that if the latter will consent to a sale of the property the former will pay the latter's debt, is enforceable even though oral. Lamkin *v.* Palmer, 164 N. Y. 201 (1900). So long as a corporation is solvent it may, with the consent of its stockholders, dispose of property at such price as it sees fit, and may even make a gift of property, and, present creditors being protected, future creditors cannot complain. Hamilton *v.* Menominee, etc. Co., 106 Wis. 352 (1900). Where a mining company has sold all its property with the consent of the stockholders, a subsequent purchaser of the stock cannot complain. Boldenweck *v.* Bullis, 90 Pac. Rep. 634 (Col. 1907). Stockholders in selling their stock in connection with the transfer of all the property to a new corporation may reserve what may be thereafter realized from a suit. Independent, etc. Co. *v.* Anderson, 106 La. 55 (1901). See 106 La. 95. Where the purchaser of a plant and stock is sued for the price and judgment is recovered, he may afterwards bring suit for the stock and for divdends paid after the time when he would have been entitled to the stock, if he had fully complied with his contract. Beaty *v.* Johnston, 66 Ark. 529 (1899). The board of directors with the consent of the stockholders may sell all the property. Robinson, etc. Co. *v.* De Bautte, 50 La. Ann. 1281 (1898). A stockholder who knows that her stock has been voted by her husband in favor of selling all the corporate property for stock in another corporation cannot object thereto where she afterwards disposes of part of

being made for the protection of corporate creditors.[1] Moreover, where by the written consent of all the stockholders of a New

the new stock so issued. Hoene *v.* Pollak, 118 Ala. 617 (1898). Where but one meeting of the board of directors was ever held and then the charter was forfeited, and the president, with the consent of the directors individually, and of all the stockholders, conveyed away the property, and creditors were not injured, the transaction is legal. Aransas, etc. Co. *v.* Manning, 94 Tex. 558 (1901). By unanimous consent of the stockholders a mercantile company may sell all its property and take land in part payment therefor for the purpose of winding up the business. Morisette *v.* Howard, 62 Kan. 463 (1901). Where a private corporation sells all its property to another corporation on the agreement of the latter to pay the debts of the former, and the latter has paid a part of such debts, the selling corporation cannot claim that the deed is *ultra vires* and retake possession. Savings & T. Co. *v.* Bear Valley, etc. Co., 112 Fed. Rep. 693 (1902). Even though the purchaser of the property of a corporation takes, in addition to the deed, all of the shares of stock, the consideration going directly to the stockholder, the transaction is a sale of the property and not of the stock, and hence the proceeds of the sale belong to the corporation. Pendery *v.* Carleton, 87 Fed. Rep. 41 (1898). Where a corporation sells its property through misrepresentations, and in deeding the property causes all its outstanding capital stock to be delivered to the vendee, the vendor in suing to recover back the money need not allege that the stock was valueless, there being an allegation that the property was valueless. Keener *v.* Baker, 93 Fed. Rep. 377 (1899). A corporation in acquiring the assets of a partnership may acquire a cause of action which the latter has against another corporation for negligence and may enforce such cause of action, even though it would have had no power to buy it separately from the other property. Central, etc. Co. *v.* Capital, etc. Co., 60 Ohio St. 96 (1899). Where a corporation has sold all its property with the consent of all its stockholders, the transaction cannot subsequently be attacked by a subsequent purchaser of stock. City of Spokane *v.* Amsterdamsch, etc., 22 Wash. 172 (1900). The sale of a business of a corporation which does not specifically transfer the trade name and good will does not enable the purchaser of the business from the corporation to claim such trade name. Cutter *v.* Gudebrod, etc. Co., 44 N. Y. App. Div. 605 (1899); aff'd, 168 N. Y. 512. Where in a dissolution proceeding an injunction has been issued against a corporation doing any further business or disposing of its property, a sale or mortgage of its property to one of its stockholders is illegal and will be set aside by the court, especially where it is made to a director for an inadequate consideration. Grant *v.* Lowe, 89 Fed. Rep. 881 (1898). Even though three persons who own all the stock of a corporation, enter into a contract to sell it, and one of them secretly receives a higher price for his holdings of the stock, yet the other vendor cannot by an action in *assumpsit* claim a part of such extra price. His remedy, if he has any, is in equity for an accounting, or an action for deceit. Cummings *v.* Synnott, 120 Fed. Rep. 84 (1903), rev'g 116 Fed. Rep. 40. See also § 320, *supra.* Where the directors own all the stock of a corporation, they may authorize its president to sell its assets; and the fact that the

[1] See § 672, *infra.*

Jersey corporation, and the action of its board of directors, a corporation sells all its property for stock and bonds of a new company to be distributed among the old stockholders, a pledgee of one of the old stockholders cannot object, especially where the statute authorizes the pledgor of stock to represent the stock and no notice had been given of the pledge.[1] These rules do not apply, however, to railroad and certain other quasi-public corporations. The state has an interest in their continuance, and they cannot sell their property except upon the express consent of the state.[2]

Where the by-laws of a private corporation authorize a sale of all its property, such sale may be made even against the wishes of

authority was not given at a regular directors' meeting is immaterial. Jordan *v.* Collins, 107 Ala. 572 (1895). A sale by a corporation of all its property does not entitle the vendee to stock in the corporation which the corporation itself has purchased on a sale for a delinquent assessment and not re-issued. Tulare, etc. Dist. *v.* Kaweah, etc. Co., 44 Pac. Rep. 662 (Cal. 1896). The new company may enforce the right of the old one to indemnity. Miller *v.* Lancaster, 5 Coldw. (Tenn.) 514 (1868). Or may settle a suit against the old one. Paine *v.* Lake Erie, etc. R. R., 31 Ind. 283 (1869). In general see Slattery *v.* St. Louis, etc. Co., 91 Mo. 217 (1886). The incorporation of a reorganized company, giving it all the rights, etc. of the old company, does not give it title to a judgment obtained by the old company. Wilmington, etc. R. R. *v.* Downward, 14 Atl. Rep. 720 (Del. 1888). Sometimes the stock as well as the property is delivered Pendery *v.* Carleton, 87 Fed. Rep. 41 (1898). Where a street railway is sold by unanimous consent, no one but the state can object, and hence a custodian of a part of the securities involved in the sale cannot raise such objection. Read *v.* Citizens', etc. R. R., 110 Tenn. 316 (1903). Persons sued at law by a corporation for accepting its money from its president and using it to pay the president's debt, may file a bill in equity to enjoin the suit at law on the ground that the president owned or controlled all the stock and used the corporation for his private purposes, and that the money was so paid with the consent of all the stockolders and officers. Leigh *v.* Kewanee, etc. Co., 127 Fed. Rep. 990 (1904). Where the stockholders of a telephone company do not object to a sale of its property to another company, it is presumed that they acquiesce. Badger, etc. Co. *v.* Wolf River, etc. Co., 120 Wis. 169 (1904). Where a consolidation is brought about by the fraudulent representations of a stockholder in one cf the corporations, the remedy of the consolidated company against him is not a suit for money received by him as a stockholder, but is an action for damages for fraud or a suit to rescind. Anderson, etc. Co. *v.* Pungs, 134 Mich. 79 (1903). Where one company sells all its property to another, pursuant to resolutions of the stockholders of both companies, and in the deed a portion of the property is omitted, a suit lies to correct the deed. Pinchback *v.* Bessemer, etc. Co., 137 N. C. 171 (1904). A stockholder who consents to the corporation selling all its property cannot afterwards object thereto. Sheehan *v.* O'Rourke Iron Works, 112 La. 461 (1904).

1 Elyea *v.* Lehigh, etc. Co., 169 N. Y. 29 (1901).

2 See ch. LIII, *infra*.

a minority of the stockholders.[1] So, also, where the charter expressly authorizes such a sale it is legal.[2] A corporation may lease or sell all its property where the statutes authorize the same at the time of its incorporation.[3] Even though the statutes of New York authorize

1 It is legal for the by-laws to provide that the company may sell out all its property at any time. Cotton *v.* Imperial, etc. Corp., [1892] 3 Ch. 454. The by-laws may provide that the company may sell out its entire business. Republican, etc. Mines *v.* Brown, 58 Fed. Rep. 644 (1893), reversing Brown *v.* Republican, etc. Mines, 55 Fed. Rep. 7.

2 See § 892, notes, *infra.* The sale may have to be a public sale. See § 671, *infra.* The principle that the board of directors has no power to sell out the entire property does not apply where the statute under which it was incorporated authorized such a sale. St. Louis *v.* St. Louis Gaslight Co., 70 Mo. 69, 98 (1879). Under the English statutes authorizing the holders of the securities to reorganize or modify the original plan, provided the court approves the same, the plan may be amended so that dissenting security-holders be paid in cash their proportion of the assets as they then exist. Foreign, etc. Trust Co. *v.* Sloper, [1894] 3 Ch. 716, rev'g [1893] 2 Ch. 96. Where a waterworks company has power to sell its entire property, and the sale has been authorized by a vote of 1,100 shares out of 1,350 shares, the court will not enjoin the sale at the instance of the minority stockholders, on the ground that the price is inadequate. Peabody *v.* Westerly Waterworks, 20 R. I. 176 (1897). In *Re* Buenos Ayres, etc. Co., 66 L. T. Rep. 408 (1892), a sale of the company's enterprise to the government upon terms which paid something to the preferred stockholders, but left nothing for the common stockholders, was sustained. Power to sell to a company does not authorize a sale to an individual. Bird *v.* Bird's, etc. Co., L. R. 9 Ch. App. 358 (1874). In Clinch *v.* Financial Corp., L. R. 5 Eq. 450 (1868), the company had power to consolidate with another company if the liabilites of the stockholders were not increased. A stockholder enjoined a consolidation in which such liabilities would be increased. Where a corporation is given power to lease its property without the mode of making the lease being prescribed, it may be by a vote of the majority of the stockholders. Dickinson *v.* Consolidated, etc. Co., 114 Fed. Rep. 232 (1902). A statute authorizing a sale of corporate property in whole or in part upon a vote of the stockholders does not require such vote upon an ordinary sale of real estate. Marvin *v.* Anderson, 111 Wis. 387 (1901). Where a corporation sells or leases all its property to another corporation which the majority of the stockholders of the former corporation own or control, the contract may not be illegal in itself, but it will be scrutinized carefully by the court, and, if unfair, will be set aside. Mumford *v.* Ecuador, etc. Co., 111 Fed. Rep. 639 (1901). Under a statute requiring the lessee of a railroad to purchase dissenting stock of the lessor within thirty days on an appraisal of its value, stock which has been voted in favor of the lease cannot afterwards be the basis of a claim that it be appraised and paid for. In the appraisal proceedings all questions arising may be adjudicated. If the dissenting stock is not purchased under the statute, the lessee runs the risk of the lease being held void at the instance of a dissenting stockholder. Boston, etc. R. R. *v.* Graham, 179 Mass. 62 (1901). As to such an appraisement, see also § 671, *infra.*

3 Starke *v.* J. M. Guffey, etc. Co.,

the insertion of special provisions in a charter, not inconsistent with law, yet the secretary of state need not accept a certificate of incorporation which gives the power to sell all the property to any foreign or domestic corporation on a two-thirds vote, it appearing that the statute would require a ninety-five per cent. vote in case of a sale to a foreign corporation.[1] A statute requiring the consent of the stockholders to the sale of corporate property does not mean all the stockholders, but means a majority.[2] Under a reserved right to amend charters the legislature may authorize a sale of all the corporate property on a vote of two-thirds in interest of the stockholders.[3] A corporation may amend its certificate of incorporation by inserting power to consolidate as granted by a statute passed after the original certificate of incorporation has been filed. A stockholder who became such after the charter has been amended, authorizing a consolidation, cannot complain.[4] Where a statute authorizes a sale such sale is made by the directors and not by the stockholders.[5] But statutory power to transfer the business and

98 Tex. 542 (1905). Under the West Virginia statutes a meeting of the stockholders may authorize a sale of all the corporate property and hence their ratification of an illegal sale by the directors is sufficient. Metcalf *v.* American, etc. Co., 122 Fed. Rep. 115 (1903).

1 People *v.* Whalen, 119 N. Y. App. Div., 749 (1907); aff'd, 189 N. Y. 560. Where the statutes allow the incorporators to insert in the charter any provision relative to the powers of the company, or of its stockholders and directors, the right to vote may be withheld from the stockholders until a certain date, thus leaving the first directors in office during the intervening time, and a further provision that during that time the directors may do any act which the stockholders might do enables them to sell all the property, where that was the chief purpose of the corporation, and the corporation was unable to develop the property. Union T. Co. etc. *v.* Carter, 139 Fed. Rep. 717 (1905).

2 Louisville, etc. R. R. *v.* Jarvis, 87 S. W. Rep. 759 (Ky. 1905). The state cannot oust a foreign railroad corporation from operating a railroad in the state on the ground that the railroad in the state had been leased to the foreign company without the consent of the stockholders, as required by statute, it appearing that such stockholders did not object. Louisville & N. R. R. *v.* State, 45 S. Rep. 296 (Ala. 1907).

5 Allen *v.* Ajax, etc. Co., 30 Mont. 490 (1904). A statute authorizing corporations to sell all their property on a certain vote of the stockholders applies to corporations existing at the time of the enactment of the statute, the legislature having the reserved right to alter, amend or repeal charters. Germer *v.* Triple-State, etc. Co., 54 S. E. Rep. 509 (W. Va. 1906). Under its reserved power, the legislature may authorize a consolidation of railroads, especially where they are in a failing condition. A majority of the stockholders may accept such an amendment. Hinds County *v.* Natchez, etc. R. R., 85 Miss. 599 (1905). See also § 501, *supra*.

4 Colgate *v.* United States, etc. Co., 67 Atl. Rep. 657 (N. J. 1907).

5 See § 709, *infra*. The stockholders and not the directors in a national bank are to decide whether the stock

property of a corporation does not authorize a transfer of its unpaid subscriptions.[1] A hotel company may sell its hotel and with the proceeds purchase another hotel.[2] And in any case the right of a dissenting stockholder to object may be lost by laches or ratification.[3]

shall be assessed in order to restore the impaired capital stock. Commercial, etc. Bank *v.* Weinhard, 192 U. S. 243 (1904), the court saying: "It would be going far beyond the usual powers conferred upon directors to permit them to thus control the corporation. . . . The origin and continuation of the association would seem to be matters in which the owners and not the managers of the bank are primarily interested. Action upon the comptroller's order involves extraordinary action of the association, and determines its future operations or liquidation, and is not found within the powers conferred upon the directors for the management of the business of the bank. If this were not so, then the decision of a question of such vital importance is left to the directors, who may or may not be large holders of stock. As it is a matter foreign to the powers of such boards and not conferred by statute or required for the transaction of the business of the bank, we think it was intended to be vested in the shareholders. Whether a given power is to be exercised by the directors or the shareholders depends upon its nature and the terms of the enabling act."

1 Bank of China *v.* Morse, 168 N. Y. 458 (1901). In this case a New York subscriber to stock in an English corporation was sued by the company for the amount of such subscription, such company having been reorganized under the peculiar English statutes. The court refused to enforce the liability on the ground that the funds were not for the purpose of paying debts of the old corporation, but were partially for the purposes of the new corporation which the New York subscriber did not become interested in and had no notice thereof, and on the further ground that the reorganization scheme was practically a sale by the old company to the new company.

2 Freeman *v.* Sea View Hotel Co., 57 N. J. Eq. 68 (1898). The directors of a mining company, with the consent of a majority of the stock, may sell its mines, inasmuch as it may buy others. Lange *v.* Reservation, etc. Co., 93 Pac. Rep. 208 (Wash. 1908). A sale of the entire property is different from the sale of the whole of its business, and the former may be legal where the latter would be illegal. Ritchie *v.* Vermillion Min. Co., 1 Ont. L. Rep. 654 (1901).

3 See ch. XLIV, *infra;* Banks *v.* Judah, 8 Conn. 145 (1830), holding that long delay of a dissenting stockholder in bringing suit will bar his remedy. This, perhaps, is the first reorganization case that is to be found in the books. The whole business of the corporation cannot be sold out except by unanimous consent of the stockholders, but a stockholder who acquiesces in it cannot afterwards complain. Field *v.* Roanoke Inv. Co., 123 Mo. 609 (1894). Where a part of a charter is illegal, and a new corporation is formed to take over the property and debts and issue share for share of stock in the old, a stockholder who assented cannot now refuse to take the new stock. Glymont Imp. etc. Co. *v.* Toller, 80 Md. 278 (1894). Five years after a corporation has sold all its property to another corporation, and received the consideration, it cannot maintain a bill to set aside the sale as *ultra vires*, the rights of third parties having intervened in the meantime. Bear Valley, etc. Co. *v.* Savings, etc. Co., 117 Fed. Rep. 941 (1902).

The subject of the reorganization of corporations upon foreclosure is considered elsewhere.[1]

§ 671. *Sale of corporate property to another corporation in exchange for stock and bonds of the latter — Distribution of such stock and bonds.*—In addition to the objections to a sale of all the corporate property to another corporation, referred to in the preceding section, there often is involved the question of whether the sale may be in exchange for the bonds and stock of the vendee company. In these days of consolidations, reorganizations, and mergers of corporations it frequently happens that the purchase price is paid in the stock and bonds of the purchasing company. The question then arises whether the selling company has power to take stock and bonds in payment, and whether it may compel its stockholders to accept such stock and bonds upon a distribution of the assets of such selling company. The general rule has been that the stock of the vendee company received by the vendor company in payment for the property cannot be forced upon dissenting stockholders of the vendor company in a distribution of its assets. They are entitled to money. Such of them as do not wish to accept the stock of the new corporation are entitled to the value of their stock in the old corporation in cash, and may have an injunction until they are secured.[2] It has been held that a stockholder may enjoin a sale of all

1 See ch. LII, *infra*.

2 State *v.* Bailey, 16 Ind. 46 (1861); Kelly *v.* Mariposa Land, etc. Co., 4 Hun, 632 (1875). *Cf.* New Jersey Zinc Co. *v.* New Jersey Franklinite Co., 13 N. J. Eq. 322 (1861); s. c., 15 N. J. Eq. 418 (1862). *Contra*, Sawyer *v.* Dubuque Printing Co., 77 Iowa, 242 (1889). A stockholder may have a preliminary injunction against a sale of all the property to a new corporation for cash and the right to subscribe for stock in the new company, the new company being controlled by the directors of the old company. Mitchell *v.* United, etc. Co., 66 Atl. Rep. 938 (N. J. 1907). The New York courts refused to hold a New York stockholder in an English corporation liable for his unpaid subscription where under a plan of reorganization, sanctioned by the English courts, in accordance with English law, the amount collected is to go to the reorganized company, while other stockholders need not pay their subscriptions if they take part in the reorganized company and pay a small sum, especially where, if all the stockholders paid in full, the amount would be more than necessary to pay the debts. Bank of China *v.* Morse, 168 N. Y. 458 (1901). Under an English floating debenture, stockholders have no right to sell out the entire property to another corporation in exchange for stock unless the debenture holders consent, Foster *v.* Borax Co., [1899] 2 Ch. 130, or unless money is deposited in court to pay the dissenting debenture holders. Foster *v.* Borax Co., [1899] 2 Ch. 130, 137. Under a statute authorizing one company to sell out to another for any consideration that may be agreed upon betwen them, it is legal that the consideration be a right extended by the new company to the old stockholders to demand partly paid up stock of the new company within a limited

the corporate property to another corporation in exchange for the stock and mortgage bonds of the latter, even though the corporation

time, a dissenting stockholder being given the right to have the fairness of the proposed sale passed upon by the court. It is the duty of the stockholder in such a case to attend the meeting and vote against it if he objects. It is no excuse that he was ill or abroad or negligent in dissenting under the English statute. Burdett-Coutts *v.* True Blood, etc. Ltd., [1899] 2 Ch. 616. It is not legal for a receiver, even under an order of the court, to sell nearly all the property of the company to another corporation in exchange for stock of the latter to be given to stockholders of the former, with a provision that dissenting stockholders should be paid on a certain basis which is different from stock of the former corporation acquired by the latter corporation. People *v.* Anglo-American, etc. Assoc., 60 N. Y. App. Div. 389 (1901). A minor who has subscribed and paid for stock in a corporation, which corporation was afterwards merged in another corporation, for stock of the latter, cannot recover back his money from the second corporation. White *v.* Mount Pleasant, etc. Corp., 172 Mass. 462 (1899). Even though an officer of a mortgagor owns a majority of the stock, and is also a creditor, and promotes a suit for a receivership and sale of the corporate property, yet he may purchase at the foreclosure sale, even at a nominal figure, and a corporation to which he transfers it in exchange for the latter's capital stock may be a *bona fide* purchaser for value, even though it is chargeable with notice of all the facts, and may insure the property for its own benefit and not for the benefit of an underlying mortgage. Farmers', etc. Co. *v.* Penn, etc. Co., 103 Fed. Rep. 132, 157 (1900); aff'd, 186 U. S. 434. Where the directors of a corporation sell out its assets in consideration of a person paying the debts, and the latter organizes a new corporation and gives to the old directors stock in the new corporation equal to their stock in the old, but does not give anything to the other stockholders of the old corporation, the directors and the persons so purchasing the assets are liable to the old corporation for the value of the stock so given to the directors. A pledgee of the stock of the old corporation may bring suit for that purpose. Smith *v.* Smith, etc. Co., 125 Mich. 234 (1900). Taylor *v.* North Star, etc. Co., 79 Cal. 285 (1889), holds that laches may bar the stockholders' right to object. Although a corporation is authorized by its charter "to take stock" in other corporations, this does not authorize it to sell all its property to another corporation in payment for stock of that corporation to be distributed among the stockholders of the vendor corporation. Elyton Land Co. *v.* Dowdell, 113 Ala. 177 (1896). Where a corporation sells its business for stock in another company, it may distribute the stock among those of its stockholders who are willing to take it; but any stockholder may demand money instead. If he accepts the stock, however, he cannot afterwards complain. Feld *v.* Roanoke Inv. Co., 123 Mo. 603 (1894). Where a company is reorganized by a new company buying the property of the old, and giving the stock of the new company to the old company in payment therefor, the transaction being carried out by 160,165 shares out of 164,211 shares, over 4,000 shares not being represented, the old company cannot distribute the stock among the stockholders unless the company is dissolved. Kohl *v.* Lilienthal, 81 Cal. 378 (1889). A stockholder in a Maine corporation may bring suit in New Jersey to set aside an illegal transfer

offers to pay in cash the full value of his stock and that not even a statute can deprive a stockholder of this right, except possibly under the reserved right to amend the charter. To compel the stockholder

of the property of the former to the latter, even though service in such suit cannot be obtained on the Maine corporation Wilson *v.* American, etc. Co., 64 N. J. Eq. 534 (1903). In a suit by a dissenting stockholder to declare void an agreement of sale of the corporate assets to another company for stock of the latter, the vendee corporation is a necessary party defendant. Doughty *v.* Lomagunda Reefs Limited, 88 L. T. Rep. 337 (1903). A corporation organized to work and deal in mines may by a majority vote of its officers sell its mines, even though that is all the property it has and the price may be stock of another corporation to be received in exchange *pro rata.* The transaction cannot be set aside by one who buys stock which was not voted. Moreover, a holder of $25 worth of stock cannot enjoin a sale by those owning ninety-three per cent. of the entire capital stock. Such a sale is valid, although there were directors in common. Pitcher *v.* Lone, etc. Co., 39 Wash. 608 (1905). On account of the legal difficulties mentioned above it is now quite common to organize a holding company to accomplish very much the same purpose. See § 317, *supra.* Even though the court at the instance of a dissenting stockholder has enjoined a corporation from issuing stock in payment for the property of another corporation to be purchased at a high valuation, this does not prevent the majority of the stockholders forming a holding corporation in another state and issuing the stock of the latter in exchange for the stock of the two former corporations at a price equivalent to the above mentioned valuation. The court has no power to enjoin such a transaction at the instance of a dissenting stockholder. The fact that the holding company may name the directors of both companies is not objectionable in itself. Pierce *v.* Old Dominion, etc. Co., 67 N. J. Eq. 399 (1904). Where the state by a suit in the state court has forfeited the charter of a water-works company, no receiver being appointed, and thereafter on a bill filed in the United States court a receiver is appointed by the latter court, and thereafter under a statute the governor of the state appoints a liquidator of the affairs of such corporation, and thereafter the liquidator is brought in as a party defendant to the suit in the United States court and interposes a plea, and thereafter the stockholders organize a new corporation and receive its stock in exchange for their stock in the old corporation, the state cannot maintain a suit to forfeit the charter of the latter corporation and enjoin a transfer of the assets of the old corporation to the new corporation, on the ground that the stock of the new corporation is issued at a fictitious value, the proof being insufficient to sustain any such claim, and the plant itself not yet having been sold and its value ascertained. State *v.* New Orleans, etc. Co., 111 La. 1049 (1904). Where a holding company increases the capital stock of one of its subsidiary companies and then causes it to purchase the common stock of the holding company, thereby creating a conflict of interest between the preferred stockholders of the holding company and the subsidiary company, which by the plan would control the holding company itself, minority stockholders may enjoin such a reorganization, it being a part of the plan that the holding company shall sell its various stocks to such subsidiary company. Robinson *v.* Holbrook, 148 Fed. Rep. 107 (1906).

to take such stock would be compelling him to sell his stock.[1] Moreover, to compel the stockholders of the old corporation to accept the stock of the new corporation in payment for their interest in the old would be in effect to compel them to join the new corporation, or, what is the same thing, compel them to consent to a consolidation.[2] The supreme court of the United States has decided that the majority stockholders have no right, upon dissolution, to sell the corporate property to a new corporation for stock in the latter, and then say to the minority, "We have formed a new company to conduct the business of this old corporation, and we have fixed the value of the shares of the old corporation. We propose to take the whole of it and pay you for your shares at that valuation, unless you come into the new corporation, taking shares in it in payment of your shares in the old one."[3] At the public sale the majority stockholders may

1 Morris *v.* Elyton, etc. Co., 125 Ala. 263 (1900). A statute forbidding the officers of a mining corporation from selling its property, without such sale being approved by a certain proportion of the stock at a meeting of the stockholders, does not authorize a sale of all the assets of a prosperous mining corporation as against the dissent of minority stockholders, where such sale is not for cash but for the capital stock of a foreign corporation, even though such latter company offers to pay a fixed price in cash to stockholders who do not care to take new stock in exchange for the old. A minority stockholder may enjoin the sale even though the selling corporation offers to give to such minority stockholder a bond that the dissenting stockholders should receive the value of their stock. A court has no power to compel dissenting stockholders to so dispose of their shares *in invito.* Forrester *v.* Boston, etc. Co., 21 Mont. 544, 565 (1898). A by-law, even though passed upon the organization of the company, cannot legally provide that upon a sale of the company's property for stock in another company, the stock going to dissenting stockholders might be sold in such manner as the old company thought fit, and the proceeds paid over to the dissenting stockholder, where the statute provided that the interest of dissenting stockholders should be ascertained by arbitration. Payne *v.* Cork Co., [1900] 1 Ch. 308.

2 *Ex parte* Bagshaw, L. R. 4 Eq. 341 (1867); McCurdy *v.* Myers, 44 Pa. St. 535 (1863); Frothingham *v.* Barney, 6 Hun, 366 (1876); Lauman *v.* Lebanon Valley R. R., 30 Pa. St. 42 (1858). A single stockholder may enjoin his company from selling substantially all its property to another company for shares of stock in the latter. Carter *v.* Producers', etc. Co., 164 Pa. St. 463 (1894). Where two companies are consolidated this is practically a dissolution of the old companies and hence a stockholder in one of them may bring a suit in equity to have the value of his stock determined and insist upon payment therefor in cash. Barnett *v.* Philadelphia, etc. Co., 67 Atl. Rep. 912 (Pa. 1907), the court following Lauman *v.* Lebanon Valley R. R., 30 Pa. St. 42 (1858).

3 Mason *v.* Pewabic Min. Co., 133 U. S. 50 (1890). The result of this Pewabic Mining Company litigation was that the original sale of the property for $50,000 was set aside, and the property then sold for $710,000. See Mason *v.* Pewabic Min. Co., 66 Fed. Rep. 391 (1894). *Cf.* Treadwell *v.* Salisbury Mfg. Co., 73 Mass. 393 (1856). See also Black *v.* Delaware,

buy in the property;[1] but they have no right to buy it at private sale at a price which they themselves put upon it. Where, however, the price is a fair one, and all stockholders are allowed to participate, it is not likely that a court would order a public sale, there being no tangible prospect of benefit from such a public sale.[2] As to a sale of the corporate property for purchase-money bonds in payment, this is equivalent to a sale for money payable in the future, and hence the transaction is not open to the same objections as in the case of stock. Actual fraud, however, will of course always invalidate such a sale.[3]

Where, however, one company is authorized by statute or by its charter to sell its property to another company, it may receive in payment therefor shares of stock in the vendee company, and its stockholders cannot object thereto.[4] Moreover the statutes may be

etc. Canal Co., 22 N. J. Eq. 130, 415 (1871); s. c., 24 N. J. Eq. 455 (1873); Lauman *v.* Lebanon Valley R. R., 30 Pa. St. 42 (1858).

1 See § 653, *supra.* A reorganization committee representing a part of the stockholders may buy in the property at a public sale by the directors, the business being financially embarrassed, and the price being a fair one. Hayden *v.* Official, etc. Co., 42 Fed. Rep. 875 (1890). See also ch. LII, *infra.*

2 See § 662, *supra*, and § 892, *infra.* On the dissolution of a national bank its assets may be conveyed to a new bank from which some of the minority are excluded, and they cannot complain if the full value and the best price was thereby obtained. Green *v.* Bennett, 110 S. W. Rep. 108 (Tex. 1908). Where the articles of association of an unincorporated joint-stock association authorize dissolution at any time upon the vote of a majority in interest, such dissolution may be had, although it is for the purpose of transferring all the assets to a foreign corporation for stock of the latter, the privilege, however, being given to each stockholder to receive payment in cash on the basis of a certain valuation of the assets, which valuation is fair and adequate. Francis *v.* Taylor, 31 N. Y. Misc. Rep. 187 (1900).

3 See § 884, *infra.*

4 Farmers', etc. Co. *v.* Toledo, etc. R. R., 54 Fed. Rep. 759 (1893). Where a corporation has power to sell all its property it may take in payment therefor stock in another corporation, even though dissenting stockholders cannot be compelled to accept such stock. Metcalf *v.* American, etc. Co., 122 Fed. Rep. 115 (1903.) Where by its charter a corporation may sell all its property and deal in stocks it may sell all its property for stock. Traer *v.* Lucas, etc. Co., 124 Iowa, 107 (1904), holding also that where by its charter a corporation may sell all its property and deal in stocks, it may sell all its property for stock. Where a statute authorizes corporations to sell all their property on a vote of the stockholders owning sixty per cent. of the capital stock at a meeting duly called for that purpose, and the charter of the company authorizes it to invest in stock and bonds, the corporate property may be sold on such vote, and stock and bonds taken in payment. Germer *v.* Triple-State, etc. Co., 60 W. Va. 143 (1906). Even though the charter authorized the company to sell its assets and take stock in another corporation in payment and

amended so as to authorize such a sale.[1] Where the charter allows a sale of all the assets for partly paid stock in another company, the contract of sale may provide that such stock as is not accepted by the

distribute the same among the stockholders, yet this does not authorize it to sell and take partly paid up stock in payment. Bisgood *v.* Nile, etc. Co., Ltd., [1906] 1 Ch. 747. Even though the charter authorizes the corporation to sell all its assets, it cannot sell the same to another corporation for partly paid stock to be distributed among its members, members not accepting the shares to lose all their interest in the concern. This is an attempt to force the shareholders to provide more capital on pain of forfeiting their shares. Manners *v.* St. David's, etc. Mines, Ltd., [1904] 2 Ch. 593. Where the charter authorizes a sale of all the assets for stock in another corporation, partly paid up stock may be received in payment for such assets. Mason *v.* Motor, etc. Co. Ltd., [1905] 1 Ch. 419. A trustee holding property for various persons cannot transfer it to a corporation in exchange for stock of the latter, even though the trust agreement authorizes a sale and provides that the proceeds of the sale shall be divided among the beneficiaries. In a suit to enjoin such sale an action to hold members of the executive committee personally liable for conspiracy should not be joined. Moody *v.* Flagg, 125 Fed. Rep. 819 (1903). Where the statute authorizes corporations to consolidate, a stockholder cannot object thereto on the ground that he is given stock in the consolidated company instead of cash, and even though the authorized capital

1 See §§ 499–502, *supra*; and § 896, *infra*. A minority stockholder in a street railway cannot cause to be set aside a sale of its property to another company for stock of the latter, where such sale is authorized by statute, even though the statute was passed subsequently to the incorporation of the street railway, and even though the purchasing company had issued bonds and stocks to the amount of $90,000,000 in payment for street railways, the capital stock and bonded indebtedness of which was only $33,-255,000, and even though in making the sale the majority stockholders voted that the stock was worth $170 a share, and that that price should be paid to minority stockholders, and the vendee company thereupon agreed to pay the same. The remedy of the dissenting stockholder, if any, is at law for the market value of the stock or a proportionate share of the proceeds. Tanner *v.* Lindell Ry., 180 Mo. 1 (1904). The legislature may authorize a railroad corporation to consolidate with other companies, on a vote of a majority of its stock, provision being made for assessing and paying the value of dissenting stock. It is immaterial that the state had not reserved the power to amend the charter. Spencer *v.* Seaboard, etc. Co., 137 N. C. 107 (1904). The board of directors may at the expense of the corporation publish and also issue to the stockholders notice of a proposed scheme of consolidation or for an exchange of the stock for stock in another corporation, even though the plan is not consummated. Rascover *v.* American, etc. Co., 135 Fed. Rep. 341 (1905). Policy holders in a mutual insurance company are practically stockholders therein, and on a distribution of a surplus the existing policy holders are entitled to it, and hence a statute authorizing it to turn its property over to a stock corporation organized for that purpose, only a small part of the stock to go to the policy holders, is illegal. Huber *v.* Martin, 127 Wis. 412 (1906).

stockholders may be sold for their benefit.[1] On a consolidation under a statute existing when the corporation was formed, a stockholder is not entitled to demand cash instead of his proportion of stock in the consolidated corporation.[2] Even though the charter authorizes the company to sell its assets and take stock in another corporation in payment and distribute the same among the stockholders, yet this does not authorize it to sell and take

stock of the consolidated company is much larger than that of the constituent company and no provision has been made for the issue of the balance. Mayfield *v.* Alton, etc. Co., 198 Ill. 528 (1902). A preferred stockholder of a constituent company who by a consolidation is entitled to bonds in the new company having a par value one and one-third times the par value of his preferred stock, cannot object thereto, it being shown that the bonds were worth more in the market than the stock had been worth, and the new company offering to pay him the present value of his stock at the time of the consolidation or the present value with future preferred dividends discounted. Beling *v.* American, etc. Co., 65 Atl. Rep. 725 (N. J. 1907), holding also that in dismissing a minority stockholder's suit in equity, the court may do so without prejudice to an action at law by him for the value of the stock at the time of the consolidation which he complains of. In the case Lee *v.* Atlantic, etc. R. R., 150 Fed. Rep. 775 (1906), consolidation is defined as a dissolution of two old corporations by the formation of a new one, while a merger is a sale of the property of one to the other in exchange for stock of the latter, even though the latter is called a merger and not a sale. Where a corporation sells its assets for stock in another corporation, such stock going to the selling corporation itself, this is a sale and not a consolidation. Hiles *v.* Hiles & Co., 120 Ill. App. Rep. 617 (1905), distinguishing Chicago, etc. Ry. *v.* Ashling, 160 Ill. 373 (1895). A dissenting stockholder may enjoin a New Jersey street railway company from selling its property to another street railway company in exchange for stock of the latter, unless such sale is made in connection with dissolution proceedings. He may enjoin a sale of the property to a Washington street railway company for twenty thousand shares of the full-paid stock of the latter, where dissenting stockholders of the former are to be paid only $35 cash in lieu of each share of the Washington corporation, which he would be entitled to. On its face this is an issue of the Washington stock at $35 per share, and is in violation of the Washington statutes. The court said: "To the extent of sixty-five per cent. of the issue the increase of capital stock will be, therefore, 'fictitious' and, according to the constitution, 'void.' Such a scheme ought not to be forced upon an unwilling stockholder of the New Jersey company." Moreover, it being illegal in Washington for one corporation to own stock in another corporation, a New Jersey corporation cannot legally own stock in a Washington street railway company. Coler *v.* Tacoma Ry. etc., 65 N. J. Eq. 347, rev'g 64 N. J. Eq. 117 (1903).

1 Fuller *v.* White, etc., Ltd., 95 L. T. Rep. 404 (1906).

2 Mayfield *v.* Alton Ry., 100 Ill. App. Rep. 614 (1901); aff'd, 198 Ill. 528. There is no statute under which an Illinois corporation can consolidate with a foreign corporation. Loughlin *v.* United States School Furniture Co., 118 Ill. App. Rep. 36 (1905).

partly paid up stock in payment.[1] Policy holders in a mutual insurance company are practically stockholders therein, and on a distribution of a surplus the existing policy holders are entitled to it, and hence a statute authorizing it to turn its property over to a stock corporation organized for that purpose, only a small part of the stock to go to the policy holders, is illegal.[2] Frequently the statutes provide for buying out dissenting minority stockholders at the appraised value of their stock.[3] Such a statute exists in New York.[4] Some-

1 Bisgood *v.* Nile, etc. Co., Ltd., [1906] 1 Ch. 747. Where the charter authorizes a sale of all the assets for stock in another corporation, partly paid up stock may be received in payment for such assets. Mason *v.* Motor, etc. Co., Ltd., [1905] 1 Ch. 419. *Cf.* note, p. 2011, and 98 L. T. Rep. 809.

2 Huber *v.* Martin, 127 Wis. 412 (1906).

3 Under a statute requiring the lessee of a railroad to purchase dissenting stock of the lessor within thirty days on an appraisal of its value, stock which has been voted in favor of the lease cannot afterwards be the basis of a claim that it be appraised and paid for. In the appraisal proceedings all questions arising may be adjudicated. If the dissenting stock is not purchased under the statute the lessee runs the risk of the lease being held void at the instance of a dissenting stockholder. Boston, etc. R. R. *v.* Graham, 179 Mass. 62 (1901). In determining the value of a dissenting stockholder's stock which is condemned, in connection with a lease in accordance with the statute, it is immaterial that the stock three years prior thereto was worth more, but that on account of bad management its value had diminished; and it is immaterial that three years prior thereto a lease might have been made at a higher rental. The market value of the stock after the lease may be shown, even though the condemnation was by reason of such lease. The regular market value should be the basis of the award. Gregg *v.* Northern R. R., 67 N. H. 452 (1893). A provision in a general act authorizing leases that a dissenting stockholder may have the value of his stock appraised and paid is legal. Dickinson *v.* Consolidated, etc. Co., 114 Fed. Rep. 232 (1902). Where, in

4 See Laws 1901, ch. 130. Where an appraisal of the stock of a dissenting stockholder is made under a statute authorizing a consolidation, and there is no market value for the stock, the award is like an unliquidated account and bears interest only after the appraisers' report. Trask *v.* Peekskill Plow Works, 6 Hun, 236 (1875). A person in whose name stock stands on the books of the company, but who is not the real owner thereof, cannot have the stock appraised under a statute. Matter of Rogers, 102 N. Y. App. Div. 466 (1905). Under the New York statute application for appraisal may be heard after sixty days, provided the notice of such application is given within sixty days. Matter of Ennis *v.* Federal Brewing Co., 123 N. Y. App. Div. 691 (1908). Where a stockholder in a national bank gives notice in accordance with the national bank act of his intention to take the value of his stock on a renewal of the charter, he is not liable on the stock thereafter, but is a creditor, even though the appraisal had not been completed for two years when the bank failed. Apsey *v.* Whittemore, 85 N. E. Rep. 91 (Mass. 1908).

times a more formal condemnation is authorized.[1] A state may enact a statute authorizing a railroad corporation to condemn a minority

order "to enable the company to keep its stock in the ownership of stockholders of its own choosing," each stockholder enters into an agreement with the corporation that in case he wishes to sell his stock it shall first be appraised and then offered to the corporation before it is offered to any one else, the refusal of the board of directors to make an appraisal, in accordance with the agreement, does not render the corporation liable in damages, inasmuch as it is clear that even though the stock were appraised, the corporation would not buy it. Whiton *v.* Batchelder, etc. Corp., 179 Mass. 169 (1901). Where dividends on preferred stock are cumulative and are in arrears, and the company is consolidated with another company, the preferred stockholders cannot be compelled to take bonds and stock in the new company for a less amount than their old holdings with the arrears of dividends, especially where the original stock provided that on liquidation it should be paid in full with arrears, and it appearing that there were existing profits in the old company sufficient to pay such arrears, and that these would go to the common stockholders by way of common stock in the new company. A preferred stockholder may enjoin such consolidation, and is not obliged to allow the value of his stock to be appraised, as provided in the statute. Colgate *v.* United States, etc. Co., 67 Atl. Rep. 657 (N. J. 1907). Where in the organization of a mercantile corporation some of the principal employees become stockholders, under a contract between all the stockholders, by which a majority might declare a stockholder to be undesirable, and thereupon he was to be paid the cash value of the stock as appraised, the stock to be then divided among the other stockholders, a suit in equity lies to compel an employee to give up stock so appraised, and the appraisal is the actual cash value of the assets without anything for good will, and the fact that there is preferred stock is immaterial, if it is redeemable at any time, it being shown also that the common stock had never been sold on the market. Boggs *v.* Boggs & Buhl, 66 Atl. Rep. 105 (Penn. 1907). Under the English Companies Act all the property of a company may be sold to another company, but provision is made for the protection of the minority by paying them the value of their shares. *Re* London, etc. Bread Co., 62 L. T. Rep. 224 (1890). See also Baring-Gould *v.* Sharpington, etc. Syndicate, [1899] 2 Ch. 80. In England it seems that under the statutory power of one company to sell out to another, the sale may be for cash, and the minority are bound, even though the majority own the purchasing company. But all the cash must be paid, and not merely the part that goes to the minority. Holst *v.* Sydney, etc. Ry., 69 L. T. Rep. 132 (1893). Where, upon the voluntary dissolution of a corporation, a reorganization scheme is carried out by which the property is turned over to a new company for its shares and a reasonable time is fixed within which the old stockholders must exercise their option to take stock or have it sold by the liquidator, a stockholder cannot exercise his option after that time, although he was ignorant of the whole matter, nor can he have the scheme set aside. Postlethwaite *v.* Port Phillip, etc. Co., L. R. 43 Ch. D. 552 (1889); Weston *v.* New Guston Co., 62 L. T. Rep. 275 (1889); s. c., 60 L. T. Rep. 805; aff'd, 64 L. T. Rep. 815. Where, according to contract, stock sold to the corporation is ap-

1 See § 896, *infra*.

of the stock in another company, the former company being already the owner of the majority of the stock, it being shown that the public interest so demands, and the improvement of the railroad itself being of sufficient public interest.[1]

A question may also arise as to whether the selling corporation has power to acquire the stock and bonds of another corporation; but it seems that where all the stockholders of the company accepting the stock assent, no one else can object.[2] By unanimous

praised by the corporation, and the appraised price is actually paid to and received by the stockholder, he cannot maintain a bill to obtain a larger price, but must either rescind or sue at law. Tuttle *v.* Batchelder, etc. Co., 170 Mass. 315 (1898). A statute that dissenting stock shall be appraised is not applicable where no appraisal proceedings are had, and hence the owner may claim new stock in exchange therefor, even though considerable time has elapsed. Douglass *v.* Concord, etc. R. R., 72 N. H. 26 (1903).

1 Offield *v.* New York, etc. R. R., 203 U. S. 372 (1906). Where a railroad corporation has legally acquired nearly all the stock of another corporation, the legislature may authorize the former to condemn the minority holdings of such stock. New York, etc. R. R. *v.* Offield, 77 Conn. 417 (1904), holding also that in a proceeding by a railroad to condemn shares of its stock as allowed by statute, it is no defense that the company might have financed its improvements in some other way.

2 Although a corporation cannot purchase or deal in stocks of other corporations unless expressly authorized by law so to do, yet it may take stock in payment for a debt. And where all the stockholders of a manufacturing corporation consent to the sale of all its property to another corporation in exchange for stock in the latter, even though the former corporation was forbidden by statute to purchase the stock of other corporations, the corporation may then sell the stock, and the vendee cannot set up *ultra vires* on the part of the vendor. Holmes, etc. Co. *v.* Holmes, etc. Co., 127 N. Y. 252 (1891). A contract whereby a corporation agrees to sell all its property to another corporation for bonds and stock of the latter company cannot be enforced, nor be the basis of damages for breach, inasmuch as one corporation has no power to buy the stock of another corporation. Easun *v.* Buckeye Brewing Co., 51 Fed. Rep. 156 (1892). An offer of a corporation to sell out, in consideration of stock in another corporation, the latter to pay all existing debts, is not enforceable by the former company, where the latter company accepted the offer on condition that the debts should not exceed a certain amount. Not even the assent of the president of the former company to the condition is sufficient. Bi-Spool, etc. Co. *v.* Acme Mfg. Co., 153 Mass. 404 (1891). The stockholders of a corporation may, together with the directors, cause the corporate property to be sold to a new corporation in exchange for the stock of the latter. A pledgee of stock in the former corporation cannot after the sale undo the sale or hold the latter corporation liable. His remedy is against the pledgor and the first corporation. Leathers *v.* Janney, 41 La. Ann. 1120 (1889), holding also that a purchasing corporation is not bound to see that the selling corporation distributes the stock of the former legally among the stockholders of the latter corporation. Where a consolidation is effected by one company

consent of the stockholders it is legal for a private corporation to sell all its property to another company, take its stock in payment, and divide the stock among the stockholders, all creditors being paid.[1] A stockholder who takes part in and assents to the action of

buying all the stock of another company, and, just before the transaction is completed, the company whose stock is thus sold issues a dividend of inter-bearing securities in order to defraud the purchasing company, the latter may, by a bill in equity, have such securities canceled. Bailey *v.* Citizens' Gaslight Co., 27 N. J. Eq. 196 (1876). A corporation organized to deal in the stock of a stockyard corporation and hold personal and real estate may buy competing stockyards; and may buy the stock of a contemplated competing company; also buy, guarantee, and sell the bonds of such competing company; also pay money to settle suits against the first-named stockyard company, and to bind stockyard men not to erect competing yards for a specified term of years within a certain territory; and may sell any or all of the above property and right to the first-named company. Ellerman *v.* Chicago, etc. Co., 49 N. J. Eq. 217 (1891). A Michigan capsule company has no right or power to sell all its property to a New Jersey capsule company—a combination company—in exchange for or payment of stock of such New Jersey company. The agreement so to do cannot be enforced, even though every stockholder assented to it. Merz Capsule Co. *v.* U. S. Capsule Co., 67 Fed. Rep. 414 (1895). Even though it be illegal for an irrigation company to subscribe for the stock of a land company, yet where it does so subscribe and turns in property in payment, and the stock is taken in the name of its secretary individually and not as secretary, the company may compel him to turn over the stock, even though he has pledged it for his personal debt, the pledgee, however, having taken with knowledge of all the facts. Bear River, etc. Co. *v.* Hanley, 15 Utah, 506 (1897). It is legal for a manufacturing company to organize a subsidiary company to sell its product, the entire capital stock of the latter being owned by the former. Dittman *v.* Distilling Co., 64 N. J. Eq. 537 (1903). It being illegal in Washington for one corporation to own stock in another corporation, a New Jersey corporation cannot legally own stock in a Washington street railway company. Coler *v.* Tacoma Ry., etc., 65 N. J. Eq. 347 (1903). A stockholder in a railroad company which has sold its property to another railroad company cannot have the sale set aside on the ground that the buying company had no authority to purchase. Hinds County *v.* Natchez, etc. R. R., 85 Miss. 599 (1905). A corporation may purchase the assets of another corporation and issue stock in payment therefor. Hiles *v.* Hiles & Co., 120 Ill. App. Rep. 617 (1905).

1 Where an iron manufacturing concern owns an iron manufacturing plant and stocks in an ore company and a railway company and a steamboat company and other corporations, and also a farm, and by consent of all the partners the firm is transformed into a corporation which takes all the property, including the stocks and the farm, one of the participants cannot afterwards complain that it was illegal for the corporation to acquire such stocks and the farm. Burden *v.* Burden, 159 N. Y. Rep. 287 (1899). In the case of Hoene *v.* Pollak, 118 Ala. 617 (1898), where one corporation sold all its property to another corporation for stock of the latter, the stock of the latter was issued directly to the stockholders of the former. A committee appointed

a stockholders' meeting which authorizes a sale of the property to another corporation in exchange for stock of the latter to be issued to

by the stockholders to sell the property for stock in a new corporation and dissolve the old corporation and distribute the assets may be liable to the stockholders, if, after making such sale, they delay in dissolving the old corporation and distributing the assets until the new stock becomes worthless. Their liability is a question of negligence for the jury. *In re* Lincoln, etc. Co., 190 Pa. St. 124 (1899). See also §§ 548, 671, *supra*, and § 766, *infra*. The distribution of the stock of the vendee corporation among the stockholders of the vendor corporation amounts to a distribution of the capital stock of the vendor corporation among its stockholders. But this is not necessarily illegal. See §§ 3, 641, *supra*. A statutory liability for dividends paid out of the capital stock abrogates all common-law liability, and if such statute does not prohibit such dividends they may be declared and paid subject to such liability. People *v.* Barker, 141 N. Y. 251 (1894). The company may distribute the assets, provided all creditors are paid. Rorke *v.* Thomas, 56 N. Y. 559 (1874). See, to same effect, cases in § 670, *supra*. A corporate creditor cannot maintain a bill to enjoin the declaration of a dividend out of the capital stock. Mills *v.* Northern Ry., L. R. 5 Ch. App. 621 (1870). *Cf.* ch. XXXII, *supra*. Where a company leases its property to another company at a nominal rental, and the stockholders of the first company transfer their stock to the second company in exchange for stock of the latter, no dividend is involved, and a tax on dividends of the first corporation does not attach. Allegheny *v.* Pittsburgh, etc. R. R., 179 Pa. St. 414 (1897). Practically, there was a division of the corporate assets among the stockholders in the case of Boston, etc. Co. *v.* Bankers', etc. Co., 36 Fed. Rep. 288; aff'd *sub nom.* United Lines Tel. Co. *v.* Boston, etc. Co., 147 U. S. 431 (1893). In this case the usual and simple process of one company selling all its property to the other company, and taking purchase-money mortgage bonds in payment, and then distributing the bonds among its stockholders, was not adopted, but the mortgage was given by the vendor company, the object being not to have the mortgage cover existing property of the vendee company. The vendee company at the same time agreed to construct new lines and place them under the mortgage. The whole scheme was awkward, and was sustained by the courts only after prolonged litigation. In a suit to compel stockholders of a foreign corporation to discover and account for corporate property illegally divided among them, the property must be definitely described. Service on the corporation by publication is insufficient. King *v.* Sullivan, 93 Ga. 621 (1894). If the stockholders and corporate creditors who are prejudiced thereby do not object, a going corporation may sell all its property to another corporation, payment being by the issue of the stock of the latter corporation to the stockholders of the former corporation, together with the right to such stockholders to subscribe for additional stock in the purchasing corporation. Dissenting stockholders who under protest subscribe for the new stock, and then wait eighteen months before commencing legal proceedings, are estopped from objecting. Post *v.* Beacon, etc. Co., 84 Fed. Rep. 371 (1898). Where a railroad is sold, the proceeds cannot be distributed among the stockholders without paying creditors. Where bonds are received in payment, and distributed among the stockholders and income bondholders, the gen-

stockholders of the former cannot afterwards object thereto and de-

eral creditors may reach such bonds. Chattanooga, etc. R. R. *v.* Evans, 66 Fed. Rep. 809 (1895). The sale of a business of a corporation which does not specifically transfer the trade name and good will does not enable a purchaser of the business from the corporation to claim such trade name. Cutter *v.* Gudebrod, etc. Co., 44 N. Y. App. Div. 605 (1899); aff'd, 168 N. Y. 512. Where a company is in difficulties and an agreement is made by which creditors are given the right to sell all the assets in case the business does not succeed within a certain time, and they do so, the purchaser has no right to organize a corporation having the same name as the old corporation, unless that was a part of the original agreement, and not even a majority of the stockholders have a right to vote to allow such use of the name, unless there is a new consideration therefor. Armington *v.* Palmer, 21 R. R. 109 (1898). Even though a Colorado corporation is organized for the issue of stock in exchange for stock in a Kansas corporation, and a stockholder in the latter assigns his Kansas certificate to another person and causes the Colorado corporation to issue its stock to such other person, yet if he fails to have the transfer recorded in the books of the Kansas corporation he is liable on such Kansas stock. Pine *v.* Western, etc. Bank, 63 Kan. 462 (1901). Even though a Nebraska railroad corporation sells all its property to an Illinois railroad corporation in exchange for stock of the latter, which is issued to the stockholders of the former, the latter does not thereby become a Nebraska corporation, preventing the removal of cases to the federal court. Walters *v.* Chicago, etc. R. R., 104 Fed. Rep. 377 (1900); aff'd, 186 U. S. 479. A corporate creditor cannot attack a sale of all the assets of the corporation for a valuable consideration and in good faith, even though such sale was not formally authorized by the board of directors or stockholders. Magowan *v.* Groneweg, 14 S. D. 543 (1901). See s. c., 16 S. D. 29. Where, upon the sale of all the assets of one corporation to another, stock of the latter is issued to stockholders of the former, and it is provided that any surplus remaining from a certain fund shall be divided among all the stockholders of both companies, this interest in the surplus vests in the then existing stockholders individually, and this interest does not pass on a subsequent sale of his stock by a stockholder. Read *v.* Citizens', etc. R. R., 110 Tenn. 316 (1903). Where on a sale of the corporate property the proceeds are divided among the holders of the entire capital stock, although a part of it is treasury stock, a bank in which money is deposited may interplead as to the part going to the treasury stock. Little *v.* St. Louis, etc. Co., 197 Mo. 281 (1906). Where by consent of all the stockholders the corporate property is sold and the proceeds distributed and one of them secretly receives an additional price and afterwards is sued by another stockholder for his *pro rata* share thereof, he may defend on the ground that the whole transaction was to create a trust. Erpelding *v.* McKearnan, 143 Mich. 409 (1906). A city in buying a waterworks plant may take a deed of the plant itself, and also a transfer of all the shares of stock, and this does not prevent the former stockholders distributing among themselves the purchase price. Connor *v.* City of Marshfield, 128 Wis. 280 (1906). Where in a special act of incorporation thirteen incorporators are named and they organize and elect directors, and the latter accept subscriptions, and all the incorporators are given opportunity to subscribe, those who do subscribe may sell all their stock

mand cash, even though his assent was only by refraining from voting against the proposition.[1]

A solvent copartnership may, by consent of the whole firm, merge itself into a corporation, proper provision being made for the payment of creditors.[2] Where a person who holds property which

and thereby transfer the entire corporation, and those incorporators who do not subscribe are not entitled to any part of the price. Roosevelt *v.* Hamblin, 85 N. E. Rep. 98 (Mass. 1908). The same rule applies to promoters who assist in obtaining the charter. Dobbins *v.* Peabody, 85 N. E. Rep. 102 (Mass. 1908).

1 Carr *v.* Rochester, etc. Co., 207 Pa. St. 392 (1904). Where a corporation has purchased all the assets of another corporation and issued stock in payment of the same, the stockholder in the former who became a stockholder after the transaction, cannot maintain a suit to have the issue declared void, especially where there is no offer to return the property. Buford *v.* Keokuk, etc. Co., 69 Mo. 612 (1879), aff'g 3 Mo. App. 159.

2 Partners who merge their partnership into a corporation and take stock in payment, thereby waive liens which existed in the partnership. Francklyn *v.* Sprague, 121 U. S. 215 (1887). A solvent mercantile firm may transfer all their assets to a new corporation in payment for stock, and then pledge the stock to certain of their creditors. Coaldale Coal Co. *v.* State Bank, 142 Pa. St. 288 (1891). Where a surviving partner organizes a corporation and transfers to it a large part of the assets of the old firm fraudulently, but outside persons become interested in the stock of the corporation, the estate may bring suit to compel the corporation to permit it to become a stockholder, and may join the other stockholders as parties defendant, and may compel the corporation to pay to the estate such part of the profits as in equity it is entitled to, the corporation having acquired patent rights and other property from other sources. Rowell *v.* Rowell, 122 Wis. 1 (1904). Where one of the partners sells all the business to a corporation for stock, and keeps the stock, the other partners may compel him to account, even though they delay five years. Lamb *v.* Lamb, 140 Mich. 85 (1905). As against the dissent of a partner, a limited partnership has no power to sell all of its assets to a corporation in exchange for the stock of the latter. This is not such a winding up of the partnership as is legal. Emery *v.* Kalamazoo, etc. Co., 132 Mich. 560 (1903). Where a person sells goods to a corporation and agrees to take payment in stock, he must take the stock at par, even though its actual and market value is much less than par. Tilkey *v.* Augusta, etc. R. R., 83 Ga. 757 (1889). Where two members of a firm give notice of a dissolution of the firm, and then transfer all the assets to a newly-formed corporation, the court will place all the property in the hands of the third member of the firm for the purpose of winding it up. Macdonald *v.* Trojan, etc. Co., 10 N. Y. Supp. 91 (1890). Where by agreement a partnership is merged into a corporation, and then one partner is refused his part of the stock, he may sue for an accounting and payment in cash. Crosby Lumber Co. *v.* Smith, 51 Fed. Rep. 63 (1892). Under a partnership agreement providing for incorporation, part of the partners may incorporate, transfer the property to the corporation, and compel the other partners to pay in to the corporation the amounts of money contemplated by the partnership agreement before the stock is issued to them. Hennessy *v.* Griggs, 1 N. D.

belongs to another person sells the property for stock in a corporation, the latter person may claim the stock.[1] If one corporation sells out to another for stock of the latter, a stockholder in the former may sue the purchasing corporation for his part of such stock, it not having been delivered.[2]

52 (1890). A corporation formed to purchase the assets of a firm may sue on claims of such firm which have been assigned to it, and the firm are not proper parties to the suit. Lottman, etc. Co. *v.* Houston, etc. Co., 38 S. W. Rep. 357 (Tex. 1896). Although two partners desire to incorporate, and each to have the same interest, and a third party to have a smaller interest, thereby holding the balance of power, and such arrangement is carried out, and the third party is really a dummy of one of the partners, and thereby gives the control of the corporation to that partner, yet the other partner has no legal cause of complaint notwithstanding the general understanding as to the division of control. Baumgarten *v.* Nichols, 69 Hun, 216 (1893). A partnership consisting of responsible persons may sell its busines for stock to a corporation organized for that purpose. The creditors of the partnership cannot claim a lien on the property. Bristol, etc. Trust Co. *v.* Jonesboro, etc. Trust Co., 101 Tenn. 545 (1898). Where a person sells his business to a corporation for the stock of the latter, with the agreement of the latter to indorse the notes of the vendor, such indorsements are legal. Nat. Bank of Commerce *v.* Allen, 90 Fed. Rep. 545 (1898). Where an individual transfers all his property to a corporation in exchange for its capital stock and a mortgage, neither he nor the corporation can subsequently attack the transaction. Burke, etc. Co. *v.* Wells, etc. Co., 7 Idaho, 42 (1900).

1 Chapman *v.* Porter, 69 N. Y. 276 (1877); *Re* Gilbert, 104 N. Y. 212 (1887).

2 The court said: "We have of late refused to be always and utterly trammeled by the logic derived from corporate existence where it only serves to distort or hide the truth." Anthony *v.* American Glucose Co., 146 N. Y. 407 (1895). Where on a consolidation the president of a constituent company receives for the benefit of all the stockholders the stock in the new company and also certain assets of the old company, a stockholder in a suit to compel him to account must join the constituent company and also other stockholders. Knickerbocker *v.* Conger, 110 N. Y. App. Div. 125 (1905). Where one company is sold out to another company on the basis of the latter company issuing its stock share for share for the stock of the former company, a stockholder of the former company may sue the latter company for his stock without joining the old company or any of the old stockholders. Fletcher *v.* Newark, etc. Co., 55 N. J. Eq. 47 (1896). Where by the terms of a lease of all the corporate property the rent is to be paid directly to the stockholders as dividends, and a prior mortgage of the lessee is foreclosed, and the lease is not assumed by the receiver, a stockholder of the lessor cannot object to a subsequent arrangement between the lessor and the reorganized company of the lessee by which a certain sum is paid to the lessor to be used for other purposes than dividends. Central, etc. Co. *v.* Farmers', etc. Co., 112 Fed. Rep. 81 (1901). Where various properties are transferred to a coal company for stock on the further understanding that all moneys already expended on such properties should be repaid in bonds of a railway to be guaranteed by the coal company, but such distribution of

§ 672. *Corporate creditors' rights where the corporation sells all its property to another corporation for stock of the latter — Rights and remedies of creditors of an individual or partnership, all of whose assets are transferred to a corporation in exchange for stock or bonds.*—Where a corporation sells all its property for cash there is no difficulty in regard to creditors, the sale being an honest one, inasmuch as the cash must be applied to the corporate debts before any distribution is made among the stockholders. But where the property is sold for stock a more difficult question arises. A creditor of the corporation then has several remedies open to him. He may subject the stock to the payment of his debt; [1] and if the stock-

bonds is never made on account of the impossibility of such a guaranty being legally made, one of the parties who turned in his property may hold the coal company liable in damages for the amount of money expended by him on the property before turning it in for stock. Crown, etc. Co. *v.* Thomas, 177 Ill. 534 (1898). A contract between two companies, by which one buys out the other and agrees to issue certain securities to stockholders of the vendor does not give such stockholders a direct right as against the purchasing company. *Re* Metropolitan, etc. Co., [1900] 2 Ch. 671. Although a new company with the same name and capital stock buys out the old, yet a stockholder in the old cannot compel a transfer of his stock on the books of the new. Huggins *v.* Milwaukee B. Co., 10 Wash. 579 (1895). Where the sale of one company to another was induced by fraud, the vendor may rescind, even though the stock of the vendor was canceled as a part of the sale. Texas, etc. Assoc. *v.* Dublin, etc. Co., 38 S. W. Rep. 404 (Tex. 1896). Where the vendor of a majority of the stock of a corporation agrees that the company owes no debts except certain specific ones, the vendee may recover back any excess of debts over those specified. Where the debts of one class were not to exceed a certain sum, but did exceed that sum, the vendee may recover the difference, even though the debts of another class were less than a sum specified in the contract of sale. Chicago, etc. Ry. *v.* Hoyt, 89 Wis. 314 (1895). Where the assets of a corporation are turned over to a new corporation and all the stockholders exchange their stock for new stock, they cannot afterwards claim that a surplus of the old corporation should have been divided. Boynton *v.* Roe, 114 Mich. 401 (1897). While negotiations were pending between two gas companies for their consolidation by one company buying the stock of the other, upon a certain basis of capital and indebtedness, one of them, without the knowledge of the other, passed a resolution declaring a scrip dividend of ten per cent. on its capital stock, thus increasing its indebtedness by that amount. The certificates were accordingly issued; but after the consolidation, upon a bill filed for that purpose, the scrip was declared void. Bailey *v.* Citizens' Gas Light Co., 27 N. J. Eq. 196 (1876). As to a suit to collect guaranteed dividends, see § 775, *infra*.

1 Corporate creditors may object to the company selling out all its property to another corporation and receiving pay in the stock of the latter corporation. Such stock may be subjected by the creditors to their debts, or the conveyance may be set aside and the company wound up as insolvent. Vance *v.* McNab, etc. Co., 92 Tenn. 47 (1892); Fort Payne Bank

holders have distributed the stock among themselves without paying the corporate debts, he may compel them to return the stock and apply it to his debt; [1] or he may levy an attachment or execu-

v. Alabama Sanitarium, 103 Ala. 358 (1894). Where the corporation sells all its assets, and the purchasing corporation gives its bonds to the stockholders of the former, such bonds belong to the corporate creditors. Peters *v.* Fort Madison Const. Co., 72 Iowa, 405 (1887). Where a railroad is sold, the proceeds cannot be distributed among the stockholders without paying creditors. Where bonds are received in payment and distributed among the stockholders and income bondholders, the general creditors may reach such bonds. Chattanooga, etc. R. R. *v.* Evans, 66 Fed. Rep. 809 (1895). Where the stockholders distribute the assets of the corporation among themselves, leaving enough, as they suppose, to pay the debts of the company, and it turns out that the amount left is not sufficient, the stockholders must pay back enough to liquidate such debts. Grant *v.* Ross, 100 Ky. 44 (1896). A treasurer cannot interplead between the stockholders and a corporate creditor who is seeking to reach bonds received by the corporation in payment for its property. Stone *v.* Reed, 152 Mass. 179 (1890). Where the officers of a bank use its funds to buy property, which they then turn in to a corporation in payment for stock, the property is impressed with a trust and may be followed. The fact that they were officers of the corporation also is sufficient to give it notice. The bank may follow the stock or the property, at their option. Farmers', etc. Bank *v.* Kimball Milling Co., 1 S. D. 388 (1890). Where a mortgagee in possession of the property leases it with other property and takes stock in payment, he must account to the mortgagor for the dividends received on the stock representing the mortgaged property. The stock is impressed with a trust character. Entries on the stock ledger and corporate books are competent evidence of the issue. Chapman *v.* Porter, 69 N. Y. 276 (1877).

1 Where a street railway sells all its property for stock to be delivered to its stockholders the remedy of its creditors is not against the property but against such stock. The trust fund theory only applies when a corporation is insolvent or dissolved, or has disposed of its property in fraud of corporate creditors, or has sold its property without authority so to do. Hagemann *v.* Southern, etc. R. R., 202 Mo. 249 (1907). Where the company is insolvent and all its property is sold and the proceeds divided among the stockholders the creditors may compel them to repay the same. Mitchell *v.* Jordan, 36 Wash. 645 (1905). Even though a company sells all its assets for cash to another company it may apply such cash to the payment of some of the creditors, and not to others, and if the president is a creditor he may be included among those who are paid. Shipman Co. *v.* Detroit, etc. Ry., 140 Mich. 589 (1905). In a suit by judgment creditors of a corporation to hold stockholders liable for dividing its assets, all of its property having been sold to another corporation for stock of the latter delivered directly to the stockholders of the former, the judgment by the creditor against the corporation cannot be impeached except for fraud or want of jurisdiction. Montgomery *v.* Whitehead, 90 Pac. Rep. 509 (Col. 1907). A corporate creditor, after obtaining a judgment against the corporation and having execution returned unsatisfied, may hold liable the stockholders who received the stock of another corporation which took over all the assets of the former

tion upon the property which was transferred;[1] or, after obtaining an unsatisfied judgment against the corporation,[2] he may file a bill in equity to set aside the sale as being in fraud of creditors;[3] or

corporation, even though such stockholders were not stockholders of record. Each stockholder is liable for the entire amount received by him to the amount of the claim, and it is not necessary to join all the stockholders. Williams *v.* Commercial Nat. Bank, 90 Pac Rep. 1012 (Ore. 1907). Where the stockholders distribute the assets among themselves, a creditor may follow the assets. Panhandle Nat. Bank *v.* Emery, 78 Tex. 498 (1890). Creditors may reach stock which the corporation, which becomes insolvent, has distributed without a dividend. McKusick *v.* Seymour, etc. Co., 48 Minn. 172 (1892). Where a corporation sells its property to another corporation for stock of the latter to be delivered to stockholders of the former, the creditors of the former may hold each stockholder liable for the amount received by him, or such creditors may follow the property itself. Vance *v.* McNabb, etc. Co., 48 S. W. Rep. 235 (Tenn. 1897). Where a construction company distributes its assets among its stockholders without paying its creditors, the stockholders may be compelled to disgorge to the extent of the debts so remaining unpaid. Grant *v.* Southern Contract Co. etc., 47 S. W. Rep. 1091 (Ky. 1898).

1 A creditor of an insolvent corporation may attach its property which has been transferred by it to another corporation in payment for the whole capital stock of the latter corporation. McVicker *v.* American Opera Co., 40 Fed. Rep. 861 (1889). A judgment creditor of an insolvent corporation may levy on and sell under execution the property of the corporation which has been conveyed to a new company, under a reorganization plan to which all of the old stockholders and most of the creditors have assented. Montgomery Web Co. *v.* Dienelt, 133 Pa. St. 585 (1890). A creditor of the corporation that sells out all its property to another corporation for stock in the latter may levy an execution on the property on the ground that it is conveyed in fraud of creditors. Couse *v.* Columbia, etc. Co., 33 Atl. Rep. 297 (N. J. 1895). A stockholder, to whom an insolvent corporation has transferred all its property in exchange for his stock, cannot enjoin a judgment creditor from selling out such assets under execution against the corporation. Moffat *v.* Smith, 101 Fed. Rep. 771 (1900). Where a corporation that is in debt transfers all its assets to a new corporation in exchange for the stock of the latter, a creditor of the former may levy an attachment on such assets. Buckwalter *v.* Whipple, 115 Ga. 484 (1902).

2 A corporate creditor seeking to reach the assets of the company which have been distributed among the stockholders, upon a sale of all the property of the company, cannot file a bill in equity for that purpose until he has first obtained judgment against the company. Swan, etc. Co. *v.* Frank, 148 U. S. 603 (1893); Central R. R. *v.* Pettus, 113 U. S. 116 (1885). A creditor of a stockholder cannot complain that all the corporate property was sold to the stockholders for their stock. Wagner *v.* Marple, 10 Tex. Civ. App. 505 (1895).

3 In a judgment creditor's suit to reach assets of an insolvent corporation which have been turned over to the stockholders in fraud of creditors, the judgment of the creditor against the corporation cannot be impeached except by fraud and jurisdiction. All of the stockholders need not be joined, but if any stockholder wishes the equities adjusted as between the various stockholders, he can file a cross-bill. Singer *v.* Hutchinson, 183

under some circumstances he may hold liable the corporation that

Ill. 606 (1900). A creditor may file a bill to set aside a transfer of all the assets of a corporation without consideration, leaving the company insolvent, and to compel the officers to account therefor. South Bend, etc. Co. *v.* George C. Cribb Co., 105 Wis. 443 (1900). It may be a question for the jury to decide whether a transfer by an insolvent corporation of the greater part of its business and property to another corporation, in exchange for stock and bonds of the latter, was to delay creditors within the meaning of the bankruptcy act. Bean-Chamberlain, etc. Co. *v.* Standard, etc. Co., 131 Fed. Rep. 215 (1904). Where one company has sold all of its assets to another company, a creditor of the former may file a bill in equity against the latter to collect from the assets so transferred, even though the damages are unliquidated, the bill charging that the sale was not in good faith and the transaction being practically a consolidation. Vicksburg, etc. Co. *v.* Citizens' Tel. Co., 79 Miss. 341 (1901). In Barrie *v.* United Rys. Co., 102 S. W. Rep. 1078 (Mo. 1907), it is held that a contract between two corporations having practically the same directors and officers, would be presumed to be fraudulent, especially where it involved a transfer of the property of one to the other, without the creditors of the former being paid. A deed of all the corporate property authorized at a meeting of the board of directors of which no notice was given, and only four out of seven were present, and three of the four were interested in the company which purchased the property, is invalid and may be set aside by a judgment creditor of the selling corporation. Summers *v.* Glenwood, etc. Co., 15 S. D. 20 (1901). Where a corporation sells its property to another corporation, the stock of the latter to be given to stockholders of the former, the creditors of the former may follow the property. Loughlin *v.* United States School Furniture Co., 118 Ill. App. Rep. 36 (1905). A judgment creditor who causes fraudulent preferences by an insolvent corporation to be set aside does not thereby himself obtain a preference over other creditors who did not institute proceedings. Lodi, etc. Co. *v.* National, etc. Co., 41 N. Y. App. Div. 535 (1899). Where a New Jersey corporation is sold out to a New York corporation, a judgment creditor of the former may file a bill in New York to reach the assets of the former corporation, and may join as a party defendant a director in the former corporation who brought about the transfer of such assets. Clokey *v.* International, etc. Co., 28 N. Y. Misc. Rep. 326 (1899). Where, in a foreclosure suit and before sale, the corporation and the bondholders agree to rent the railroad to another company, and do so rent it at a rental which meets the interest but leaves nothing for the unsecured creditors, the latter may have the railroad subjected to the payment of their debts. Farmers', etc. Co. *v.* Missouri, etc. Ry., 21 Fed. Rep. 264 (1884). Although one company owns a majority of the stock of another company, and the property of the latter company is leased to the former at a fixed rental, the rent to be paid to bondholders of the latter, a judgment creditor of the latter cannot have the lease set aside unless he can show that the income of the latter company is more than sufficient to pay the rental, there being no proof that the rental was unfair, and there being proof that the rental is more than the company earned. The principle that the owner of a majority of the stock will not be permitted to defraud stockholders or creditors does not apply. Sidell *v.* Missouri Pac. Ry., 78 Fed. Rep. 724 (1897). Where a brewery company is dis-

purchased the property from the corporation that is indebted to

solved in order that its assets may be sold and consolidated with other breweries, a person who had a bottling contract with it may follow its assets and subject them to his claim. Schleider *v.* Dielman, 44 La. Ann. 462 (1892). Where a creditor of a corporation seeks to reach property which has been fraudulently conveyed away by the company, he need not make the corporation a party defendant to the suit which he brings against the party who received the property. Blanc *v.* Paymaster Min. Co., 95 Cal. 524 (1892). The formation of a new corporation and a transfer to it of all the assets of the old one may be a fraud on the creditors of the old corporation. San Francisco, etc. R. R. *v.* Bee, 48 Cal. 398 (1874). It is legal for a coal corporation, with the assent of all its stockholders, to sell all its property to its president, and for him to pay therefor in cash and by a mortgage on the property so purchased, he also agreeing to pay all the debts of the company. Payment was made directly to the stockholders, and they transferred their stock to him in addition to the transfer of the property. A subsequent creditor of the company who knew all of the facts cannot complain. Parke, etc. Co. *v.* Terre Haute, etc. Co., 129 Ind. 73 (1891). A creditor whose claim for $1,000 is contested cannot have a conveyance of all the corporate property to another corporation set aside. Missouri, etc. Co. *v.* Reinhard, 114 Mo. 218 (1893). Contract creditors cannot cause a *bona fide* sale of all the property of a corporation to be set aside merely because the corporation — a going concern — is insolvent. Chattanooga, etc. R. R. *v.* Evans, 66 Fed. Rep. 809 (1895). The Tennessee statute against liens prior to labor and damage claims does not give such claims a lien ahead of an out-and-out *bona fide* sale of the property. Chattanooga, etc. R. R. *v.* Evans, 66 Fed. Rep. 809 (1895). Where all the stock of a corporation is sold to a vendee, who then takes possession of the corporate assets and ignores the corporate existence, the court may construe this as a sale of the corporate assets. Cusick *v.* Bartlett, 91 Me. 153 (1898). Where a corporation is under contract to pay royalties, and subsequently all its assets are sold to another corporation for stock of the latter, which is distributed among the stockholders of the former, and subsequent royalties are not paid, judgment therefor may be obtained against the old corporation, and, upon execution returned unsatisfied, a bill in equity may then be filed to reach the assets so transferred to the new corporation. Wilson *v.* Æolian Co., 64 N. Y. App. Div. 337 (1901); aff'd, 170 N. Y. 618. Where one corporation transfers all its property to another in consideration of the issue of the stock of the latter to the stockholders of the former, a superintendent and patentee having a contract with the former corporation by which he is entitled to twenty-five per cent. of all profits from manufacturing, use, or sale under said patents, in addition to his salary, and also an interest in all machines sold, may file a bill for an actual accounting as to the value of his interest so transferred to the new corporation, and may join all the stockholders as parties defendant. Schaake *v.* Eagle, etc. Co., 135 Cal. 472 (1901). Even though a corporation is put into a receiver's hands, under a statute relative to insolvent corporations, and notice for the presentation of claims is given, and, in accordance with the statute all claims not presented within four months are barred and the property is then sold, yet a non-resident creditor who had no actual notice may attack the proceedings on the ground that they were fraudulent and for the purpose of reorganizing the company

him.[1] But any unreasonable delay on the part of the creditor in applying for relief will be fatal to his application.[2] Where all the property of a telegraph company is sold and the proceeds distributed among the stockholders, a creditor of the company may, by a bill in equity, compel the stockholders to pay the claim against the corporation, the proceeds being a trust fund.[3] Even though a

in fraud of creditors. Dobson *v.* Peck Bros. & Co., 103 Fed. Rep. 904 (1900). A general creditor of a solvent corporation cannot maintain a bill in equity against a person to whom the corporation has assigned all its property. Ames & Harris *v.* Sabin, 107 Fed. Rep. 582 (1901). An insolvent Ohio corporation may transfer all its assets to a New Jersey corporation which assumes all the debts. The bondholders of the Ohio corporation cannot object. Such bondholders become creditors of the New Jersey corporation. Blake *v.* Domestic, etc. Co., 38 Atl. Rep. 241 (N. J. 1897). Even though a railroad company has guaranteed the bonds of another railroad company, and then sells all its property to a third railroad company, yet the guaranteed bondholders cannot have a receiver appointed of the price received on such sale, nor can they prevent a distribution of the price among the stockholders of the selling company, unless it is shown that thereby the guarantor is made insolvent. Guilmartin *v.* Middle G. & A. Ry., 101 Ga. 565 (1897).

1 See § 673, *infra.*

2 Seven years' delay on the part of an alleged creditor of the old company is fatal to any relief. Townsend *v.* St. Louis, Sandoval, etc. Co., 159 U. S. 21 (1895). A creditor of a corporation who wishes to object to a transfer of its assets to another corporation must do so promptly after he learns of the same, and a delay of three or four years, during which others become creditors of the new corporation and the latter become insolvent, will bar his claim for an equitable lien on the assets. Anthony *v.* Campbell, 112 Fed. Rep. 212 (1901). Where one of the partners in a firm organized to locate, develop, and operate mines does not turn into the firm a mine located by him, but transfers the same to a corporation for stock, and the other partners delay for two years after knowledge thereof before filing a bill claiming an interest in the stock, and in the meantime the corporation has expended money and the stock may have passed into other hands, the court will refuse relief, inasmuch as the firm evidently intended to deny any obligation if the mine turned out to be worthless, but to claim an interest if it turned out to be valuable. Curtis *v.* Larkin, 94 Fed. Rep. 251 (1899). Where the corporate creditor delays and allows the corporation taking over the property to incur debts, he cannot then complain. Vaughn *v.* Comet, etc. Co., 21 Colo. 54 (1895). Corporate creditors of an insolvent corporation may set aside a sale of all its property to another corporation for bonds of the latter, the bonds being then distributed among stockholders of the former, even though such creditors knew of and acquiesced in the sale at the time. Fort Payne Bank *v.* Alabama Sanitarium, 103 Ala. 358 (1894). Creditors who assent to a corporation turning over all its assets to a partnership, and agree to accept the partnership as their debtor, cannot afterwards complain of the transaction. Tenney *v.* Ballard, etc. Co., 17 Tex. Civ. App. 144 (1897).

3 Baltimore, etc. Tel. Co. *v.* Interstate, etc. Tel. Co., 54 Fed. Rep. 50 (1893). Where an insolvent Kansas corporation transfers all its assets to

sale of all the corporate property to an individual may be invalid as to corporate creditors, yet a purchaser cannot defend against the price on the ground of such invalidity.[1]

Where the officers of the corporation have aided in transferring its assets to another corporation, a civil action for damages for a conspiracy to defraud may lie.[2] The receiver of an insolvent corporation which has been rendered insolvent by reason of its assets having been disposed of by another corporation may hold its directors liable for the loss, and his suit may be at law or in equity.[3] In Alabama it is held that directors are not personally liable to creditors of the company for authorizing a transfer of the property of the company to another corporation in payment for stock in such latter corporation. A creditor cannot attack a corporate transfer as *ultra vires,* but can only attack it as fraudulently diverting corporate assets.[4] Where the purchasing company is a mere "dummy" for the selling company, a creditor of the latter may sometimes disregard the identity of the purchasing company.[5] An insolvent corporation cannot transfer all its assets to one of its directors upon his guarantee to pay all the debts. A creditor may file a bill to set aside a sale by such director of part of the assets to one of the creditors in discharge of a debt.[6] A creditor of a railway company which has sold all its property to another company for a specified price, the former company agreeing to pay its own debts and such agreement being guaranteed by outside parties, cannot hold such outside parties

a Missouri corporation, and at the same time all the stock of the former is transferred to the latter, the transaction is *ultra vires* and fraudulent, and the statutory liability of the stockholders in the Kansas corporation continues. Anglo-American, etc. Co. *v.* Lombard, 132 Fed. Rep. 721 (1904).

1 Clapp *v.* Allen, 20 Ind. 263 (1898).

2 Russell *v.* Post, 138 U. S. 425 (1891). Where a corporation turns over all its assets to its president to pay its debts, and he pays all but one debt and then distributes the balance among the stockholders, he is personally liable on that one debt, the amount turned over by him to the stockholders being sufficient to pay it. Carter *v.* Forbes, etc. Co., 22 Tex. Civ. App. 549 (1900).

3 Mason *v.* Henry, 152 N. Y. 529 (1897). The directors of an insolvent mutual insurance association, who have money on hand sufficient to pay a fixed benefit liability, and who, instead of doing so, transfer all the assets to another association, are personally liable on such liability. Harvey *v.* Wasson, 74 Kan. 489 (1906).

4 Force *v.* Age-Herald Co., 136 Ala. 271 (1903). *Contra,* Darcy *v.* Brooklyn, etc. Co., 127 N. Y. App. Div. — (1908). See also p. 2087, *infra.*

5 See §§ 6, 663, *supra,* and § 709, *infra.*

6 Berney Nat. Bank *v.* Guyon, 111 Ala. 491 (1896). As against corporate creditors the company cannot trade off all its assets for other property, where the latter property is not of a character to be used to pay debts, even though ultimately it will probably be very valuable, such trade being with the general manager of the company. Levins *v.* Peeples, etc. Co. 38 S. W. Rep. 733 (Tenn. 1896).

liable on such guaranty.[1] The agreement of a creditor of a corporation to take stock in a proposed reorganized company may be revoked by the creditor at any time before actual performance.[2] The creditor of a corporation may garnishee a person owing such corporation on a subscription for stock, even though such corporation has sold its assets to another corporation.[3] Where an insolvent corporation sells its assets for bonds and stock in another corporation, it may sell such bonds and stock to one of its directors at a fair price, no actual fraud being involved.[4]

The rules above laid down are applicable in most respects to a sale by a partnership of all its property to a corporation in exchange for stock. Such sales often are made in order to merge a solvent copartnership into a corporation. They are also made sometimes by an embarrassed or insolvent firm. In such a case the creditors of the firm may object. They may levy an attachment or execution on the property,[5] or reach the stock,[6] or file a bill in equity to

1 Randall *v.* Detroit, etc. Ry., 134 Mich. 493 (1903).

2 Providence, etc. Co. *v.* Kent, etc. Co., 19 R. I. 561 (1896).

3 Prentice *v.* United States, etc. Co., 78 Fed. Rep. 106 (1897). In Long *v.* Evening News Assoc., 113 Mich. 261 (1897), a judgment creditor of the corporation that had sold all its assets to another corporation in payment of a debt garnisheed the latter for his debt.

4 Graham *v.* Carr, 130 N. C. 271 (1902).

5 Booth *v.* Bunce, 33 N. Y. 139 (1865); San Francisco, etc. R. R. *v.* Bee, 48 Cal. 398 (1874). Creditors of an insolvent individual who transfers his property to a corporation for stock may attach the property on the ground that the act hindered and delayed creditors. Dolan *v.* Wilkerson, 57 Kan. 758 (1897). Creditors of a person who sells his property to a corporation for stock of the latter cannot attach the corporation as garnishee, inasmuch as they may levy on the stock. Plaut *v.* Billings-Drew Co., 127 Mich. 11 (1901). Where an insolvent partnership sells all its assets to a corporation for stock of the latter, a judgment creditor of such partnership may levy on such assets, inasmuch as the stock so received had no value, the corporation itself becoming insolvent within two months. Mulford *v.* Doremus, 45 Atl. Rep. 688 (N. J. 1900). A creditor of an insolvent individual who transfers his property to a corporation in exchange for stock and then distributes the stock *pro rata* among his creditors may levy an attachment upon the property as having been transferred with the result of delaying creditors. Curran *v.* Rothschild, 14 Colo. App. 497 (1900). A creditor of an insolvent firm which has turned over all its assets to a corporation for stock may levy upon the property so transferred especially where one creditor was given a part of the stock for his debt. Colorado, etc. Co. *v.* Acres, etc. Co., 18 Colo. App. 253 (1902).

6 Where a firm turns all its property into a corporation for stock, a firm creditor cannot reach the stock of one member of the firm in preference to other creditors of that member. Singer, etc. Co. *v.* Carpenter, 125 Ill. 117 (1888). If the partnership is insolvent, then the stock issued is "watered," and the subscribers are liable as though no payment was at-

set the sale aside.[1] A creditor who for six months does not object to a transfer of all the property of his insolvent debtor to a corporation

tempted. Sayler v. Simpson, 45 Ohio St. 141 (1888). Where a firm sells its property to a corporation organized for that purpose, the payment being partly in notes of the corporation, and the corporation becomes insolvent, such notes are not second to claims of other corporate creditors. London v. Bynum, 136 N. C. 411 (1904)

1 The creditors of a person may, by bill in equity, set aside a transfer of all his property to a corporation in exchange for shares of stock. Strieby v. Clinton, etc. Co., 29 Atl. Rep. 589 (N. J. 1894). Judgment creditors of an individual may file a bill to set aside a transfer of his property to a corporation for stock, the stock to be distributed among his relatives. Metcalf v. Arnold, 110 Ala. 180 (1896). Where a person deeds land to a corporation for stock, but does not record it until the date when he makes an assignment, and there was no delivery of the deed except to himself as president, the deed may be set aside. Taylor v. Seiter, 199 Ill. 555 (1902). Where an insolvent person transfers all his property to a corporation for stock and bonds and practically ignores the corporate existence, except to transfer certain of its property to his sons for services, and he then transfers property to his wife, his creditors may have the transfer set aside as fraudulent. Goodale v. Wheeler, 41 Oreg. 190 (1902). Where a firm accepts a conveyance from a bankrupt in violation of the bankrupt act, and conveys the same to a corporation formed for that purpose, the conveyance to the corporation may be set aside. Mitchell v. New Orleans, etc. R. R., 36 S. Rep. 1 (Miss. 1904). A transfer by an insolvent person of all his property for stock is fraudulent as to his creditors. Hoppe Hardware Co. v. Bain, 95 Pac. Rep. 765 (Okl. 1908). A judgment creditor of a partnership may set aside a transfer of its property to a corporation in exchange for stock of that corporation. Buell v. Rope, 6 N. Y. App. Div. 113 (1896). In Tradesmen's Nat. Bank v. Young, 15 N. Y. App. Div. 109 (1897), the court refused to set aside a transfer of all the assets of an insolvent partnership to a corporation for stock, inasmuch as the creditors of the partnership would secure more by having the transaction stand than set aside. Where one member of a firm buys out the other member and gives his note, and then forms a corporation and turns in the property for stock, and the corporation becomes insolvent, the property cannot be turned over to the retiring partner in payment of such note. Hall v. Goodnight, 138 Mo. 576 (1896). Where an insolvent person transfers his property to a corporation for all the stock of the corporation, and the corporation assumes a certain debt of such person, and subsequently conveys its property to such creditor, the whole plan being in order to make payment that way, other creditors of the corporation may object. Folsom v. Detrick, etc. Co., 85 Md. 52 (1897). Where an insolvent individual transfers all his property to a corporation for stock, and his principal creditor acquiesces and loans money to the corporation, and then takes the notes of the corporation for the old debt which such creditor had against the insolvent individual, the transaction is illegal as against other creditors of the corporation. Craig v. California, etc. Co., 30 Oreg. 43 (1896). Where a corporation is formed to make advances to an insolvent copartnership, taking a lien on the property of the latter, and the latter continues the business in its own name and turns

to carry on the business for the benefit of all the creditors, cannot set

over the proceeds of the sales to the former, the scheme is illegal as giving the firm a false credit and as being inconsistent with the nature of a chattel mortgage. Mathews *v.* Hardt, 37 N. Y. Misc. Rep. 653 (1902); aff'd, 79 N. Y. App. Div. 570. A deed of land to a corporation for stock will not be set aside at the instance of creditors of the grantor where the corporation has other property and took the property in question in good faith, even though the grantor immediately transferred the stock to his relatives. Shumaker *v.* Davidson, 116 Iowa 569 (1901). In the case of Collins *v.* Stofer's Ex'rs, 52 S. W. Rep. 940 (Ky. 1899), the court held that where the purchaser at foreclosure sale of a gas plant sold the property to an individual on credit, and the latter, instead of operating it himself, operates it in the name of the insolvent corporation, creditors who become such thereafter have no lien prior to the purchase-money lien of the vendor of the property, no deed by the latter having been made. Where a husband and wife accumulate property by their joint efforts and transfer it to a corporation for stock, a creditor of the husband may subject one-half of the stock to the payment of his debt. Croarkin *v.* Hutchinson, 187 Ill. 633 (1900). Where a partnership buys goods in the name of a person as agent and afterwards incorporates, and the corporation makes purchases in the same name as agent, the members of the former firm are liable for the goods so bought for the corporation if the vendor had no notice of the incorporation. Bynum *v.* Clark, 125 N. C. 352 (1899). A transfer of a business by an insolvent person to a corporation for stock is void under the statute of Elizabeth as defeating and delaying creditors. *Re* Carey, Sol. Jour., June 8, 1895, p. 541. A receiver of the corporation was appointed in Bonner *v.* Villaume, etc. Co., N. Y. L. J., Feb. 14, 1895 (Com. Pl.). A conveyance of real estate to a corporation for all its shares of stock is fraudulent as against a mechanic's lien. Gross *v.* Daly, 5 Daly, 540 (1875). Creditors of an insolvent individual who has transferred his property to a corporation may file a bill to set aside the sale and to have the property sold. Cass *v.* Sutherland, 98 Wis. 551 (1898). A creditor of an insolvent individual may cause to be set aside a transfer of all his property to a corporation formed for that purpose in exchange for stock. Reille *v.* Reid, 28 Ont. Rep. 497 (1897). In *Ex parte* Kenmore, etc. Co., 50 S. C. 140 (1897), the court allowed the corporate creditors to participate with the creditors of the insolvent debtor in the assets that had been turned over to the corporation for stock. A creditor of an insolvent person may treat as void a conveyance of all his property to a corporation in exchange for its shares of stock. He may file a bill to set aside the conveyance. Terhune *v.* Skinner, 45 N. J. Eq. 344 (1889). In an action by a judgment creditor of a partnership to set aside a conveyance of all its property to a corporation in consideration of its stock, the corporation, its mortgagee, the copartners, and creditors assenting to the transfer are all necessary parties. National Broadway Bank *v.* Yuengling, 58 Hun, 474 (1890). A judgment creditor of a failing firm may set aside an assignment of their property to a corporation formed to take over the property, even though the shares of stock have been sold. Gardner *v.* Keogh Mfg. Co., 63 Hun, 519 (1892). Creditors of a firm that is transformed into a corporation may pursue the firm's assets so transferred. Williams *v.* Colby, 6 N. Y. Supp. 459 (1889). Where partnership

the transaction aside, all other creditors having assented thereto.[1] Even though a partnership becomes incorporated, yet a party who has dealt with the partnership, and supposes that he is still dealing with it, may hold the partners liable for goods furnished after the incorporation.[2] A contractor, who has assigned his contract to a corporation, which latter then proceeds to carry it out, is not personally liable to the employees, even though the assignment was prohibited by law and the employees may not have known for whom they were working.[3] If an insolvent person sells his property to a corporation for practically all of the capital stock of the latter, and his creditors attach not only the stock but also the property, the corporation may compromise with the creditors and buy such stock and the creditors'

assets are transferred to a corporation in payment for its stock, and the corporation pays part of the debts of the partnership and becomes insolvent, a member of the partnership who individually gave security for some of the partnership debts cannot claim a lien on the corporate assets in priority to corporate creditors. *Re* Warner, 82 Mich. 624 (1890).

1 Imperial, etc. Co. *v.* Longbottom, 143 Fed. Rep. 483 (1906). An unrecorded mortgagee on property transferred to the corporation in payment for stock cannot claim the property as against subsequent corporate creditors. Besten *v.* People's, etc. Co.'s Assignee, 99 S. W. Rep. 631 (Ky. 1907). Even though a person turns over his merchandise business for stock of a corporation and agrees that the latter will guarantee a certain debt, yet if in the transaction nothing is said about the debt the corporation is not thereafter liable on it. Evans *v.* Johnson, 149 Fed. Rep. 978 (1906). Where partnership assets are transferred to a corporation for stock and fresh money is put into the corporation, and it becomes insolvent, the partnership creditors are not entitled to participate in the assets of the corporation, there having been no actual fraud. Thorpe *v.* Pennock, etc. Co., 99 Minn. 22 (1906). A purchaser of corporate assets may have good title as against the creditors of a firm which had previous thereto turned over such assets to the corporation for stock. National Union Bank *v.* Hollingsworth, 55 S. E. Rep. 809 (N. C. 1906).

2 Reid *v.* Kreling's Sons' Co., 125 Cal. 117 (1899). Where a firm sells its business to a corporation, but the employees are not given actual notice thereof, and the business continues, the firm may be liable for an injury incurred in the course of the business. Goodwin *v.* Smith, 66 S. W. Rep. 179 (Ky. 1902). See also § 243, *supra.*

3 Patton *v.* McDonald, 204 Pa. St. 517 (1903). A corporation organized by the members of a firm to take over its assets is liable for its debts, its stock having been issued in payment for such assets, and it being merely a continuation of the business. Du Vivier & Co. *v.* Gallice, 149 Fed. Rep. 118 (1906). *Cf.* § 243, *supra.* Even though stockholders sell their stock to one person and he takes charge of the property as his own, yet if he continues to do business in the corporate name and the stock is not paid for and is finally turned back, the company is liable for the debts which he has incurred. Albany Mill Co. *v.* Huff Bros., 72 S. W. 820 (Ky. 1903).

interest in the property.[1] Where preferences are not forbidden, an insolvent person may transfer his property to a corporation in exchange for stock of the latter and pledge such stock with a portion of its creditors. The other creditors cannot set aside the transfer as being in fraud of creditors where the corporation owned other property also and was organized in good faith. The creditors, however, may reach any such stock which the debtor has fraudulently disposed of.[2]

1 Sutton *v.* Dudley, 193 Pa. St. 194 (1899). Where an individual who owes a debt transfers property to a corporation, and later the corporation, with the consent of all the stockholders and creditors, gives a bill of sale of certain property to pay such debt, the corporation itself cannot subsequently complain. Quee Drug Co. *v.* Plaut, 55 N. Y. App. Div. 87 (1900). See Whitman *v.* McIntyre, 85 N. E. Rep. 426 (Mass. 1908).

2 Fischer *v.* Campbell, 101 Fed. Rep. 156 (1900). An insolvent individual may transfer his property to a corporation for stock and pledge the stock to one of his creditors. Haring *v.* Hamilton, 107 Wis. 112 (1900). An insolvent partnership may transfer its property to a corporation in exchange for stock and then give the stock to certain of its creditors. Such a transaction is merely a method of giving a preference allowable at common law. Troy *v.* Morse, 22 Wash. 280 (1900). A debtor may legally transfer his property to a corporation in exchange for stock of the latter, and then transfer the stock to one of his creditors. This is merely a preference. Gardner *v.* Haines, 19 So. Dak. 514 (1905). Where preferences by an insolvent debtor are allowed, such insolvent debtor may turn over his property to a corporation in exchange for stock of the latter and may transfer such stock to one of his creditors, it being proved that this was a good business move and that no property was covered up thereby. Scripps *v.* Crawford, 123 Mich. 173 (1900). Where an insolvent person transfers all his property to a corporation in exchange for its stock and then pledges the stock to a few of his creditors, the transfer is a preference within the meaning of the bankruptcy act and may be set aside, and is also illegal at common law where the transfer was intended to place the stock beyond the reach of his creditors. Allen *v.* French, 180 Mass. 487 (1901). A transfer by an insolvent person of all his property to a corporation for stock is not fraudulent as a matter of law, and where it was done with the knowledge of all his creditors, and the stock was then with their knowledge transferred to a person who guaranteed payment of the debts to the extent of thirty-five per cent., a single creditor who stands out for fifty per cent. will not be allowed to set aside the transfer. Kingman & Co. *v.* Mowry, 182 Ill. 256 (1899). But where such assignment was not in good faith a judgment creditor may cause it to be set aside. Hinkley *v.* Reed, 182 Ill. 440 (1899). In the case of First National Bank, etc. *v.* F. C. Trebein Co., 59 Ohio St. 316 (1898), where an insolvent person formed a corporation and transferred all his property to the corporation in exchange for the stock thereof, and then transferred the stock to certain of his creditors as collateral security, the court held that as a court of equity it would set aside the transfer as being fraudulent and also on the ground that the fiction of corporate existence will be disregarded where fraud is involved. See § 663, *supra.*

§ 673. *A corporation taking over all the property of another corporation may be liable for the debts of the latter.*—The general rule undoubtedly is that a corporation which purchases all the property of another corporation is not liable for the debts of the latter.[1]

[1] Gray *v.* National Steamship Co., 115 U. S. 116 (1885). Even though a corporation transfers all its property to another corporation on a contract made prior to incorporation of the latter, yet the latter is not liable unless it accepted the property with knowledge of the contract and upon an express or implied undertaking to carry it out. Holyoke, etc. Co. *v.* United States, etc. Co., 182 Mass. 171 (1902). A company buying the property of another company and paying therefor in stock to the stockholders of the latter is not liable for the debts of the vendor. Hagemann *v.* Southern, etc. R. R., 202 Mo. 249 (1907). A railroad company purchasing the railroad of another company is not liable for the obligations of the latter. Burge *v.* St. Louis, etc. R R., 100 Mo. App. 460 (1903). A railroad company purchasing the railroad of another company under the Ohio statutes is not liable for the debts of the latter, even though the statutes stated that the purchaser should be subject to the "duties, obligations and restrictions" of the vendor. Rice *v.* Norfolk, etc. Ry., 153 Fed. Rep. 497 (1907). A creditor of a dissolved corporation cannot hold liable a new corporation which purchased a portion of the assets, no fraud being shown. Houston, etc. Co. *v.* Nicolini, 96 S. W. Rep. 84 (Tex. 1906). One corporation buying the assets of another is not liable for the torts of the other. Abilene, etc. Co. *v.* Anderson, 91 S. W. Rep. 607 (Tex. 1906). A railroad corporation which purchases the property of another railroad corporation is not liable, upon the dissolution of the latter, for a tort committed by it. Chesapeake, etc. R. R. *v.* Griest, 85 Ky. 619 (1887). *Cf.* Batterson *v.* Chicago, etc. Ry., 53 Mich 125 (1884). See also § 890, *infra.* And, in general, that the new corporation is not liable for the debts of the old, see Ewing *v.* Composite B. S. Co., 169 Mass. 72 (1897); Port Gibson *v* Moore, 21 Miss. 157 (1849); Shaw *v.* Norfolk County R. R., 82 Mass. 407 (1860); Pennsylvania Transp. Co.'s Appeal, 101 Pa. St. 576 (1882); Smith *v.* Chicago, etc. Ry., 18 Wis. 17 (1864); Neff *v.* Wolf River Boom Co., 50 Wis. 585 (1880); Houston, etc. R. R. *v.* Shirley, 54 Tex. 125 (1880); s. c., 24 S. W. Rep. 809 (1894); Commercial Bank *v.* Lockwood, 2 Harr. (Del.) 8 (1835); Menasha *v.* Milwaukee, etc. R. R., 52 Wis. 414 (1881); Lake Erie, etc. Ry. *v.* Griffin, 92 Ind. 487 (1883); Gilman *v.* Sheboygan, etc. R. R., 37 Wis. 317 (1875); Sappington *v.* Little Rock, etc. R. R., 37 Ark. 23 (1881); Cook *v.* Detroit, etc. Ry., 43 Mich. 349 (1880). Where property is to be turned in to a corporation for stock, but work is to be done by the owners on the property before it is so turned in, the corporation is not liable to third persons for such work, the deeds never having been made to it. Rathbun *v.* Snow, 123 N. Y. 343 (1890). See also, on this subject, ch. LII, *infra*, as to the liability of a purchaser of a railroad at a foreclosure sale. Where two banks are consolidated into a third bank, the stock of the new bank being issued in exchange for stock of the old, the new bank is not liable on the debts of either of the old banks. Donnally *v.* Hearndon, 41 W. Va. 519 (1895). A new bank which takes over a part of the assets of another bank is not liable for the debts of the latter, even though the individuals interested in both banks are practically the same. Campbell *v.* Farmers', etc. Bank, 49 Neb. 143 (1896). A purchasing cor-

Nevertheless there are circumstances under which the purchasing corporation is liable for the debts of the old company. Thus, where

poration is not liable unless it has expressly assumed such liability. Fernschild *v.* Yuengling Brewing Co., 15 N. Y. App. Div. 29 (1897); aff'd, 154 N. Y. 667. See 117 N. W. Rep. 467.

A corporation which issues stock in payment for the assets of a partnership is not liable for taxes assessed against the partnership, unless it has assumed the same. Lamkin *v.* Baldwin, etc. Co., 72 Conn. 57 (1899). A company that buys all the assets of another company is not liable for the debts of the latter unless there is an express contract to that effect, it being shown that the latter is able to pay its own debts. Advance, etc. *v.* Penn. etc. Co., 195 Pa. St. 602 (1900). A street railway company which purchases the street railways and property of another company is not bound to honor passes issued by the latter, even though such passes were issued for rights of way. Wallace *v.* Ann Arbor, etc. Ry., 121 Mich. 588 (1899). A telephone company that purchases all the property and assets of another telephone company is not liable for damages for personal injuries due to the negligence of the latter. Chase *v.* Michigan, etc. Co., 121 Mich. 631 (1899). A railroad company is not liable for the debts of a defunct company that started work and abandoned the work, even though an irregular transfer of its assets was made by the latter to the former. Gulf, etc. Ry. *v.* Winder, 26 Tex. Civ. App. 263 (1901). Even though a bank as mortgagee of a glass factory takes possession and undertakes to continue the business in the name of the glass company, yet the bank cannot be held liable on a contract of the latter, inasmuch as the bank had no authority to carry on such business. Louis Bletz & Co. *v.* Bank of Kentucky, 55 S. W. Rep. 697 (Ky. 1900). Even though a New York corporation organizes a West Virginia corporation and transfers to the latter all its property, and the latter is managed by the same parties, yet the latter is not liable on a contract of the old corporation. Goldmark *v.* Magnolia, etc. Co., 44 N. Y. App. Div. 35 (1899); aff'd, 170 N. Y. 579. Even though a person buys all the stock, bonds, and property of a corporation, and a suit is pending against the corporation for negligence, yet he is not liable for a judgment thereon. Tilley *v.* Coykendall, 69 N. Y. App. Div. 92 (1902); aff'd, 172 N. Y. 587. Where a lessee corporation transfers all its property to a new corporation in exchange for the stock of the latter, the latter is liable on the lease. Higgins *v.* California, etc. Co., 122 Cal. 373 (1898). Where a corporation sells all its property to another corporation for stock of the latter, to be given to stockholders of the former, an infant stockholder in the old corporation may hold the latter liable for the value of the stock, after he becomes of age, even though he consented to the transaction and took new stock, which he afterwards returned. White *v.* New Bedford, etc. Corp., 178 Mass. 20 (1901). Where the mortgaged property is burned and the insurance money is paid over to the trustee, and the trustee, with the consent of all the bondholders and in pursuance of an order of the court, pays over the money to the reorganized company on representations that the money will be used to rebuild the buildings, and the reorganized company uses only part of the money for that purpose, a bill in equity to compel the new company to account for the remaining part and to apply it to the rebuilding of the buildings will not lie. Dallett *v.* Staten Island, etc. Co., 61 N. J. Eq. 39 (1901). Where a company takes over the property

the purchasing corporation assumes all liabilities, a creditor of the vendor corporation may in some jurisdictions sue the vendee corporation on his claim;[1] but in jurisdictions where a contract be-

of another company and the president delivers goods in payment of debts of the latter with the knowledge and consent of the officers and directors of the purchasing company, such payments are legal, and the statutes of Pennsylvania where such corporations existed, requiring stockholders' consent to the incurring of debts, do not apply. Curtis *v.* Natalie, etc. Co., 89 N. Y. App. Div. 61 (1903); aff'd, 181 N. Y. 543. Where one corporation in purchasing the stock and property of another corporation, assumes certain specified debts of the latter, it cannot be held liable on a debt not so specified, there being no fraud. Anderson *v.* War, etc. Co., 8 Idaho 789 (1903). Where pending a suit to compel a corporation to remove a public obstruction, the corporation sells all its property to another corporation, the bill should be amended by substituting the latter corporation. Commonwealth *v.* City of Newton, 186 Mass. 286 (1904). Where a corporation issues stock in exchange for stock in another corporation and then takes over the property of the latter, it is liable for the latter's debts, even though it has not expressly assumed the same, and even though the latter is insolvent. Camden, etc. Ry. *v.* Lee, 84 S. W. Rep. 332 (Ky. 1905). Where an insolvent corporation sells all its assets to another corporation for stock of the latter, leaving debts unpaid, a creditor of the selling corporation may hold the purchasing corporation liable. Tacoma, etc. Co. *v.* Western, etc. Ass'n, 37 Wash. 467 (1905).

1 Tecumseh Nat. Bank *v.* Best, 50 Neb. 518 (1897). Where a corporation taking over the property of an individual agrees to pay his debts, his creditors may sue the corporation on such contracts. Cox *v.* Philadelphia, etc. Co., 214 Pa. St. 373 (1906). Where one corporation purchases the entire assets and assumes all the liabilities of another corporation, and gives a bond to pay such liabilities, such bond may be enforced by a creditor of the latter corporation and the suit may be in equity. Dancel *v.* Goodyear, etc. Co., 144 Fed. Rep. 679 (1906). An agreement of a corporation which buys all the property of another, that it will pay the debts of the latter, may be enforced by a creditor of the latter, especially where payment for the property was made by an issue of stock of the former company to the stockholders of the latter company. Barker *v.* Pullman's, etc. Co., 124 Fed. Rep. 555 (1903); aff'd, 134 Fed. Rep. 70. If one company, in buying out another, agrees to pay the debts of the latter, a creditor of the latter may hold the former liable on his claim. Central, etc. Co. *v.* Sprague, etc. Co., 120 Fed. Rep. 925 (1902). Where one street railroad sells all its property to another for stock of the latter, to be distributed among the stockholders of the former, the latter assuming the debts of the former, it is liable for such debts. Howell *v.* Lansing, etc. Co., 146 Mich. 450 (1906). A corporation purchasing all the property of another corporation and in payment therefor issuing its stock to the stockholders of the latter, is liable for the debts of the latter where it has assumed them. Carstens & Earles, Inc. *v.* Hofius, 44 Wash. 456 (1906). A company that absorbs all the assets and assumes all the liabilities of another company is liable on a bond given by the latter. Manny *v.* National, etc. Co., 103 Mo. App. 716 (1904). Where one company buys out another and assumes the debts of the latter, a creditor of the latter company may assign his claim as col-

tween two persons for the benefit of a third cannot be enforced by the latter, a different rule prevails.[1] In New York, a judgment cred-

lateral security; but the pledgee is not bound to institute suit to collect such claim, and is not liable for failure so to do, even though the claim is finally lost. Sampson *v.* Fox, 109 Ala. 662 (1896). A purchasing company may be held liable on the debts of the vendor company where the former expressly agrees in the contract of purchase to pay said debts. Noll *v.* Chattanooga Co., 38 S. W. Rep. 287 (Tenn 1896). Where a *de facto* corporation incurs debts, and subsequently a new corporation legally organized takes over the business and assumes the debts, the creditors of the *de facto* corporation may hold the latter corporation liable. Calumet Paper Co. *v.* Stotts Inv. Co., 96 Iowa, 147 (1895). Where a corporation sells all its property to another corporation in payment for stock of the latter, and the new corporation assumes all the liabilities of the old corporation, a creditor of the old corporation may sue the new corporation on his claim. Friedenwald Co. *v.* Asheville Tobacco Works, 117 N. C. 544 (1895). Even though one corporation assumes all the liabilities of another corporation, the remedy of a creditor to enforce such liability against the former corporation is in equity and not in law. Harvey *v.* Maine, etc. Co., 92 Me. 115 (1898). Where one company buys all the assets and assumes all the liabilities of another, the court may appoint a receiver of the latter to enforce such liabilities against the former. Barber *v.* International Co., 73 Conn. 587 (1901). Where one railroad owns all the stock of another railroad, and takes a transfer of its property, subject to its debts, it is liable for a tort committed by such other railroad. Louisville, etc. Co. *v.* Biddell, 112 Ky. 494 (1902). In Texas, where, after judgment against a corporation, it is dissolved and a new corporation takes over all its assets and assumes all its obligations, the judgment may be enforced against the new corporation. Proctor *v.* San Antonio, etc. Ry., 26 Tex. Civ. App. 148 (1901). Where one company is sold to another, the latter assuming the debts of the former, a creditor of the former may hold the latter liable, and it is no defense that the sale was *ultra vires.* Rehberg *v.* Tontine Surety Co., 131 Mich. 135 (1902). Where an insolvent corporation transfers its assets to a new corporation, which agrees to pay the debts of the former, the liability of the latter may be enforced by creditors of the former corporation. Island City Sav. Bank *v.* Sachtleben, 3 S. W. Rep. 733 (Tex. 1887). Where a reorganized company continues and assumes payment of a liability of the old company, and new advances are made thereunder, the new company is liable thereon. Baker *v.* Harpster, 42 Kan. 511 (1889). Where the assets of a corporation are transferred to a party who agrees to pay the debts, the creditors may enforce the agreement and collect from him. Dimmick *v.* Register, 92 Ala. 458 (1891). Where a corporation is formed to take over the business of a loaning agent, and does so, and carries on the business for five years without any new agreement, it is bound by the terms of the agreement between the agent and his principal. North Am., etc. T. Co. *v.* Colonial, etc. Co., 83 Fed. Rep. 796 (1897). A corporation may give a mortgage to raise an attachment which was levied on land prior to its purchase by the corporation. Leonard, etc. Co. *v.* Bank of America, 86 Fed. Rep. 502 (1898). See 96 Pac. Rep. 172.

1 Even though one company assumes the payment of the bonds of another company, yet this does not

itor of a company whose assets have been transferred to another company in a consolidation, in exchange for stock of the latter, issued to stockholders of the former, may hold the consolidated company liable on his judgment.[1]

It is also a principle of law that a corporation buying all the property of another corporation, and paying therefor in stock of the former corporation issued to the stockholders of the latter corporation, must either pay the obligations of the latter corporation or have the property sold to pay such obligations.[2] A creditor of the old

entitle the holder of such bonds to hold the former company liable by a suit in his own name, the bonds being already out at the time the debt was assumed by the former company. The rule might be different where the former company has assets which in equity belong to the bondholders or where the bondholder is the party interested. National Bank *v.* Grand Lodge, 98 U. S. 123 (1878). Even though by a reorganization plan a new company is to assume certain floating debts of the old company, whose property is purchased at the foreclosure sale, yet the holders of such debts have no claim, either in law or in equity, against the new company. Columbus, etc. R. R. Appeals, 109 Fed. Rep. 177 (1901). Where a railroad is sold to another company, as authorized by statute, the purchaser is not liable for the debts of the vendor, and in the federal courts and many of the state courts, the vendee is not liable to such creditors, even though by the terms of the purchase it assumed such liabilities. Hawkins *v.* Central, etc. Ry., 119 Ga. 159 (1903). Where the debt against a dissolved corporation is outlawed, it cannot be collected by levying on property conveyed by a debtor of the old corporation to a new corporation, which took over the assets of the old one and assumed certain of its debts. Houston, etc. Co. *v.* Stratton, 89 S. W. Rep. 1111 (Tex. 1905).

1 Hurd *v.* N. Y., etc. Co., 167 N. Y. 89 (1901), rev'g 52 N. Y. App. Div. 467. Where a corporation as licensee of patents consolidates with another corporation, the consolidated company, if it continues to manufacture the articles, is liable under the provisions of the license, even for similar articles not manufactured under the patents, the original license contract being to that effect. Wilson *v.* Mechanical, etc. Co., 170 N. Y. 542 (1902). A consolidation differs from a sale by one company to another in that a creditor of one of the consolidated companies may hold the consolidated company liable on his claim. Morrison *v.* American Snuff Co., 79 Miss. 330 (1901). Where one street railway company transfers all its property to another street railway company for bonds and stock of the latter, to be distributed among the bondholders and stockholders of the former, in exchange for their bonds and stock in the former, the purchasing company is liable on the debts of the selling company, the transaction being practically a consolidation. Shadford *v.* Detroit, etc. Ry., 130 Mich. 300 (1902).

2 Grenell *v.* Detroit, etc. Co., 112 Mich. 70 (1897). See also § 672, *supra.* In Massachusetts the remedy of a creditor of a corporation which has sold its assets to another corporation for stock is at law and not in equity. The new corporation is not liable on the debt. Ewing *v.* Composite B. S. Co., 169 Mass. 72 (1897). Where the assets of a company are sold to another company in payment for stock of the latter, which is distributed among the stockholders of the former,

company may sue the new company to charge the assets taken over by it with payment of the old company's debts, and may recover his *pro rata* share of the value thereof.[1] A mere device by which

the latter company is liable for the former company's debts. Swing *v.* American Glucose Co., 123 Ill. App. Rep. 156 (1905). Where a company sells all its property to another company for stock in the latter to be issued to stockholders in the former, this is a consolidation, and the new company is liable on the debts of the old company. Chicago & Joliet, etc. Ry. *v.* Ferguson, 106 Ill. App. Rep. 356 (1903).

1 First Nat. Bank *v.* Chattanooga, etc. Co., 97 Tenn. 308 (1896). A corporation taking over all the property of a partnership assumes its debts to the value of the assets so taken over. Baker, etc. Co. *v.* Hall, 107 N. W. Rep. 117 (Neb. 1906). A judgment creditor of a corporation that has sold all its property to a new corporation to which it is indebted may hold the latter liable in a suit at law, where it is clear that the new corporation is but a continuation of the old one. Douglas, etc. Co. *v.* Over, 69 Neb. 320 (1903). Where a corporation sells all its property, leaving debts unpaid, the creditors may hold the purchaser liable for the value of the property if he took with notice. Clevenger *v.* Galloway & Garrison, 104 S. W. Rep. 914 (Tex. 1907). Where an insolvent corporation sells all its property to another corporation for stock of the latter to be issued to stockholders of the former, the latter corporation is liable for the former's debts to the extent of the value of the property received. Sharples Co. *v.* Harding, etc. Co., 111 N. W. Rep. 783 (Neb. 1907). Where an insolvent corporation causes land owned by it to be conveyed to a new corporation formed by its directors, and in which its directors subscribed for stock, and both corporations pass into the hands of receivers, the subscriptions for stock in the new corporation may be collected for the benefit of creditors of the old corporation.' Butler *v.* Cockrill, 73 Fed. Rep. 945 (1896). A corporation may be liable for the debts of another corporation whose property it takes, to the extent that such property is impressed with a trust. In this case all the property of an insolvent company was leased to another company. Chicago, etc. Ry. *v.* Third Nat. Bank, 134 U. S. 276 (1890). Where railroad property purchased at foreclosure sale was transferred by the purchaser to a corporation for the bonds and stock of the latter, the New York court of appeals held that such corporation "paid no value, and held the property subject to any equitable lien to which it was subject in the hands of its grantors." Vilas *v.* Page, 106 N. Y. 439, 465 (1887). In some cases the creditors of the old company may follow its property into the hands of a new company to which the property is sold by an ordinary sale. Marshall *v.* Western, etc. R. R., 92 N. C. 322 (1885); Western N. C. R. R. *v.* Rollins, 82 N. C. 523 (1880); Young *v.* Rollins, 85 N. C. 485 (1881), involving a receiver. A creditor holding an unpaid promissory note cannot by bill in equity bring in the directors to hold them liable for false representations, and also claim that the company was not duly incorporated, and also bring in a subsequent corporation that took all the assets of the first, and also bring in those persons who finally obtained such assets—all in one bill brought to collect the debt. Jefferson Nat. Bank *v.* Texas Inv. Co., 74 Tex. 421 (1889). Where a company leases all its property to another, the stockholders in both companies being the same, a mechanic's lien good against the latter is good also against the former. Hatcher *v.*

corporate property is sold under an execution, is purchased by a person interested in the corporation, and then transferred to a new corporation having the same stockholders as the old one, is void as against creditors of the first corporation. They may hold the new corporation liable to the extent of the value of the property so conveyed.[1] A foreclosure which is brought about by the stockholders for the purpose of buying in the property and reorganizing the property so as to protect the mortgage bondholders and also the stockholders, but to cut off the claims of unsecured creditors, and particularly to cut off a guaranty on the bonds of another corporation, is illegal, and if such facts are proved the foreclosure sale will be set aside.[2] Where the officers of a corporation in their individual

United Leasing Co., 75 Fed. Rep. 368 (1896). A new corporation taking the assets of an old corporation is liable to creditors of the latter to the extent of the property so taken. Brum *v.* Merchants' Mut. Ins. Co., 16 Fed. Rep. 140 (1883); Hibernia Ins. Co. *v.* New Orleans Transp. Co., 13 Fed. Rep. 516 (1882); Hibernia Ins. Co. *v.* St. Louis, etc. Co., 10 Fed. Rep. 596 (1882). For a case where the stockholders of the new corporation gave a bond to pay the debts of the old one, see Planters' Ins. Co. *v.* Wicks, 4 S. W. Rep. 172 (Tenn. 1887). Where a corporation sells all its property to another corporation in exchange for stock of the latter, a creditor of the former may hold the latter liable to the extent of the value of the property so turned over. United States, etc. Co. *v.* Isaacs, 23 Ind. App. 533 (1899).

1 Hancock *v.* Holbrook, 40 La. Ann. 53 (1888). See also Railroad *v.* Howard, 7 Wall. 392 (1868). Where the officers and stockholders of one corporation form another, and convey all the property of the former to it in fraud of creditors, the latter will be regarded as a continuation of the former, and a court of equity will hold the assets of the latter liable for a debt of the former, though there has been no recovery of judgment for the debt. Blanc *v.* Paymaster Min. Co., 95 Cal. 524 (1892). A sale of one railroad to another may be in fraud of creditors of the former, and even a subsequent foreclosure may be in pursuance of the same scheme. A suit against it may be at law and the questions submitted to a jury. Houston, etc. Ry. *v.* Shirley, 24 S. W. Rep. 809 (Tex. 1894). In Angle *v.* Chicago, etc. Ry., 151 U. S. 1 (1894), a contractor was harassed and prevented from completing his contract by the company, which had passed under the control of another company that was seeking to get a land grant that had been given conditionally to the former company. The contractor was ruined, the road not completed, and the second company got the land grant by a subsequent legislative act. The contractor got judgment against the first company, and then filed a bill against the second company to reach the land, charging conspiracy, bribery, and fraud. The court, overruling the decision below, held that a demurrer to the bill was not good. See also §§ 674, 890, *infra*. A reorganized company which has purchased the property at judicial sales is not liable in a suit at law for the old company's debts, even though in equity it might be liable if there has been fraud. Armour *v.* E. Bement's Sons, 123 Fed. Rep. 56 (1903).

2 Louisville, etc. Ry. *v.* Louisville Trust Co., 174 U. S. 674 (1899), the court saying (p. 683): "No such pro-

capacity took part in a transaction before the corporation was formed, whereby a business was taken over by the corporation on an agreement that title should not pass until payment was made, the corporation takes with notice of the facts.[1] Where a person owning all the stock of a corporation sells it under circumstances which induce the purchaser to believe that the former has no claim against the corporation, he may be enjoined from enforcing any such claim.[2] The subject of "dummy" corporations is considered elsewhere.[3] Sometimes the statutes of the state make the purchasing corporation liable, especially in cases of consolidation.[4]

ceedings can be rightfully carried to consummation which recognize and preserve an interest in the stockholders without also recognizing and preserving the interests, not merely of the mortgagee, but of every creditor of the corporation. In other words, if the bondholder wishes to foreclose and exclude inferior lienholders or general unsecured creditors and stockholders he may do so, but a foreclosure which attempts to preserve any interest or right of the mortgagor in the property after the sale must necessarily secure and preserve the prior rights of general creditors thereof. This is based on the familiar rule that the stockholders' interest in the property is subordinate to the rights of creditors; first of secured and then of unsecured creditors. And any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation." Where corporate property is sold on foreclosure and a new corporation is organized, which then purchases the property, the latter is not liable for the debts of the old corporation, even though it has the same members. Allen *v.* North Des Moines Church, 127 Iowa 96 (1905).

1 Adams *v.* Roscoe, etc. Co., 159 N. Y. 176 (1899). Where one of the organizers of the corporation, who is also its president, sells goods to it for stock, the corporation is protected in its title, even though it turns out that he held part of the goods to sell on commission, but if he retains the stock and the company is dissolved, it is bound to respect the rights of the owner of the goods in distributing its assets. Wyeth *v.* Renz-Bowles Co., 66 S. W. Rep. 825 (Ky. 1902).

2 Given *v.* Times-Republican, etc. Co., 114 Fed. Rep. 92 (1902).

3 See §§ 663, 664, *supra.*

4 See cases in § 897, *infra*, relative to consolidation; also Indianola R. R. *v.* Fryer, 56 Tex. 609 (1882); Louisville, etc. Ry. *v.* Boney, 117 Ind. 501 (1888); Indianapolis, etc. R. R. *v.* Jones, 29 Ind. 465 (1868); Columbus, etc. Ry. *v.* Powell, 40 Ind. 37 (1872); Montgomery, etc. R. R. *v.* Boring, 51 Ga. 582 (1874); Thompson *v.* Abbott, 61 Mo. 176 (1875), where the property of the old was given by the legislature to the new corporation—a municipal case. See also Rome, etc. R. R. *v.* Ontario, etc R. R., 16 Hun, 445 (1879). Where the consolidated company is by statute liable for the debts of the old company, a creditor of one of the latter who has the right to demand stock in exchange may demand the same of the consolidated company and hold it liable in damages if it refuses. John Hancock, etc. Co. *v.* Worcester, etc. R. R., 149 Mass. 214 (1889). A creditor of an old corporation may follow its property into the hands of a consolidated company to

Similar rules to the above prevail as to liability of a corporation that issues stock in payment for the property of an insolvent individual or copartnership. A corporation that has taken over the property of a partnership is not liable for the debts of the latter unless there was an express contract assuming such liability, or the transaction was a mere continuation of the partnership.[1] A cor-

which it was transferred, stock being therefor issued to the old stockholders. Martin *v.* Zellerbach, 38 Cal. 300 (1869).

1 Austin *v.* Tecumseh Nat. Bank, 49 Neb. 412 (1896). *Cf.* Reed Bros. Co. *v.* First Nat. Bank, 46 Neb. 168 (1895). See § 890, *infra*. A corporation to which an insolvent firm has transferred their property for stock is not liable on the debts of such individuals unless it has expressly assumed or has ratified or adopted the same. Hart, etc. *v.* Coryell, 8 Kan. App. 496 (1898). Where a creditor of an individual consents to his transferring his property to a corporation for stock, which the creditor then takes as collateral security, such creditor cannot hold the corporation liable on the debt even though the corporation afterward voluntarily gave a note and a mortgage to secure the same. State, etc. *v.* Shapleigh, etc. Co., 147 Mo. 366 (1898). A corporation to which all of a partnership's assets have been transferred for stock is not liable on a debt incurred by a member of the firm in his own behalf, even though the corporate name was illegally signed to the note. National, etc. *v.* Hollingsworth, 135 N. C. 556 (1904). A corporation is not liable for the debts of a copartnership whose assets it takes over in exchange for its stock where a part of its stock was issued to an outsider for cash to carry on the business. Baker, etc. Co. *v.* Hall, 111 N. W. Rep. 129 (Neb. 1907), rev'g previous decision in 107 N. W. Rep. 117. Even though an insolvent person transfers his property to a corporation for stock of the latter and distributes it among his creditors and the corporation then fails, his creditors cannot file their claims against such corporation. *Re* Alleman, etc. Co., 158 Fed. Rep. 119 (1907). A corporation to which an insolvent individual transfers all his property in exchange for stock of the corporation is not liable on a chattel mortgage which it gives to one of the creditors of such individual, the corporation not having assumed the debt. Durlacher *v.* Frazer, 8 Wyo. 58 (1898).

There are decisions, however, to the contrary as follows: Where a partnership incorporates a company and transfers to that company all the firm's assets in exchange for stock, the corporation is liable for the debts of the partnership. Such transaction is not a purchase, but simply a change in the mode of doing business. Andres *v.* Morgan, 62 Ohio St. 236 (1900). Where an insolvent firm purchases goods on credit by false representations and then transfers its assets to a corporation without consideration, the vendor may follow the proceeds of the goods into the hands of the corporation. Sheffield *v.* Mitchell, 31 N. Y. App. Div. 266 (1898). Under the facts in Breman, etc. Bank *v.* Branch, etc. Co., 104 Mo. 425 (1891), it was held that a corporation organized by a business man, and to which he had conveyed all his property, was liable on his note, although it had not assumed any of his debts. See also Fort Worth Pub. Co. *v.* Hitson, 80 Tex. 216 (1891). Where a partnership turns itself into a corporation, the latter is not a *bona fide* holder of notes owned by the former. McElwee Mfg. Co. *v.* Trowbridge, 62

poration taking over the business of a partnership may assume any contract of the latter, but the assumption of one contract does not prove the assumption of other contracts. The assumption of such a contract may arise by the corporation proceeding to live up to it and carry it out.[1] Where a company after buying out another company continues business in the name of the latter and incurs debts, the former is liable therefor.[2]

§ 674. *Rights and liabilities of mortgagees of a corporation that purchases property and issues stock in payment therefor.*—Where a corporation transfers all its property to another corporation, and the latter company immediately gives a mortgage on all the property, a judgment creditor of the former company may cause the sale and the mortgage to be set aside as a fraud upon his rights, and the property may be subjected to the payment of his debt.[3]

Hun, 471 (1891). A corporation taking all the assets of a partnership under an agreement with the partners that it would pay the liabilities to the extent of the assets cannot be made liable on a debt due one of the partners until it is ascertained that the assets exceed the liabilities and until it has agreed to pay the liabilities. Adams *v.* Empire, etc. Co., 4 N. Y. Supp. 738 (1889). As regards the power of the corporation to assume the obligations of the copartnership, see McLellan *v.* Detroit File Works, 56 Mich. 579 (1885). A corporation may be liable for the debts of the partnership where it has placed such liabilities on its books as a part of the corporate liabilities, and upon becoming insolvent the corporation may give a preference to such liabilities. Shufeldt *v.* Smith, 139 Mo. 367 (1897).

1 Hall *v.* Herter, 83 Hun, 19 (1894). A corporation succeeding a firm may, by carrying out a contract of the firm, assume the obligation thereof. Hall *v.* Herter, 90 Hun, 280 (1895); aff'd, 157 N. Y. 694. Where a firm is turned into a corporation, the latter may assume a contract of the former for a purchase of lumber, by adopting it through its manager. Pratt *v.* Oshkosh Match Co., 89 Wis. 406 (1895). Where the corporation assumes the debts of the partnership which it buys out, its liability is not released by the fact that the partnership subsequently gives notes for such debts. Johnston *v.* Gumbel, 19 S. Rep. 100 (Miss. 1895).

2 Taylor Co. *v.* Gulf Land, etc. Co., 44 S. Rep. 187 (La. 1907).

3 And a receiver will be appointed. Cole *v.* Millerton Iron Co., 133 N. Y. 164 (1892). Where a creditor of a vendor corporation accepts bonds of the vendee corporation in settlement of his claim, he cannot sue to set aside the sale and the mortgage, on the ground of fraud, unless the trustee of the mortgage is made a party. United, etc. Co. *v.* Hess, 159 Fed. Rep. 889 (1908). A corporate creditor may attack a transfer of all the corporate property to another corporation, even though the latter agrees to pay the debts of the former. A trustee of a mortgage given by the vendee company on the property is not *bona fide* when the officers of the two companies are the same and the trustee knew thereof. The bondholders are chargeable with notice of facts known to the trustee. Cole *v.* Millerton Iron Co., 59 Hun, 217 (1891). Bondholders who took with notice that the property was received by the corporation from another corporation in payment for stock, and that the latter corporation was in debt, cannot hold as

Where a corporation issues stock for property it is not a *bona fide* purchaser of that property.[1] But a claim against one company, which is assumed by another company upon the latter company buying out the former, is not to be paid out of the assets of the latter company in preference to a mortgage upon all of its property.[2]

In case property is sold to the corporation for shares of stock, and the corporation issues a mortgage on the property and refuses to deliver the stock, the claim of the vendor for damages does not have priority over the mortgage.[3]

Where a stockholder of a vendor corporation sets aside the sale of the railroad as *ultra vires,* a mortgage given by the vendee corporation is void. The bondholders are, however, entitled to enforce payment from any other property owned by the vendee.[4]

A mortgage by a consolidated railroad may not take precedence over the unsecured debts of the constituent companies, and by statute the consolidated company may be liable for those debts, unless the articles of consolidation provide otherwise.[5] Although a corpora-

against such creditors. Blair *v.* St. Louis, etc. R. R., 22 Fed. Rep. 36 (1884). Where a corporation conveys all its property to another corporation in payment for its stock, the latter corporation agreeing to pay all the debts of the former, a mortgagee of the latter company takes precedence over the judgment of a creditor of the former company, such judgment being subsequent to the mortgage. Blair *v.* St. Louis, etc. R. R., 25 Fed. Rep. 684 (1885); aff'd, 133 U. S. 534. But *contra,* if the mortgagee took with actual knowledge. Blair *v.* St. Louis, etc. R. R., 24 Fed. Rep. 148 (1885). A creditor of a corporation owning an uncompleted railroad cannot claim a lien thereon prior to that of the mortgage of a subsequent corporation which purchased the road, when there never was any record evidence of any lien and the subsequent corporation had no actual notice of the claim. Blair *v.* St. Louis, etc. R. R., 27 Fed. Rep. 176 (1886); aff'd, 133 U. S. 534. A sale of one railroad to another may be in fraud of creditors of the former, and even a subsequent foreclosure may be in pursuance of the same scheme. A suit against it may be at law and the question submitted to a jury. Houston, etc. Ry. *v.* Shirley, 24 S. W. Rep. 809 (Tex. 1894). Where the property of an insolvent corporation is sold to another corporation without consideration, and the latter issues mortgage bonds the creditors of the former may attack such bonds. Bramblet *v.* Commonwealth, etc. Co., 83 S. W. Rep. 599 (Ky. 1904).

1 Rogers *v.* New York, etc. Land Co., 134 N. Y. 197 (1892). *Cf.* § 727 *infra,* on notice, and § 890, *infra.*

2 Fogg *v.* Blair, 133 U. S. 534 (1890). See also § 860, *infra.*

3 Farmers', etc. Co. *v.* Toledo, etc. R. R., 54 Fed. Rep. 759 (1893).

4 Knoxville *v.* Knoxville, etc. R. R., 22 Fed. Rep. 758 (1884).

5 Compton *v.* Jesup, 167 U. S. 1 (1897). *Cf.* Tysen *v.* Wabash Ry., 15 Fed. Rep. 763 (1883); but see Wabash, etc. Ry. *v.* Ham, 114 U. S. 587 (1885). Where the United States court has held that the unsecured bonds of a railroad issued before consolidation with another railroad are not an equitable lien on the railroad of the former, prior in right to mortgage bonds issued by the consolidated

tion sells all its property to an individual for purchase-money mortgage bonds, and distributes these bonds among its stockholders without paying the creditors, nevertheless a *bona fide* purchaser of such bonds is protected as against the corporate creditors.[1]

Where an insolvent corporation gives a mortgage to secure bonds and insists that its creditors shall accept the bonds in payment of its debts or else have recourse to the equity of redemption, the mortgage is illegal, and a suit to foreclose may be contested by a receiver of the corporation.[2]

road (Wabash, etc. Ry. *v.* Ham, 114 U. S. 587), and a state court has held directly to the contrary (Compton *v.* Wabash, etc. Ry., 45 Ohio St. 592), one of the holders of such bonds cannot after a foreclosure in the United States Court maintain a suit in the state court to obtain such priority. His remedy is in the United States court, where that court reserved jurisdiction over the property for the protection of the purchaser at foreclosure sale. Wabash R. R. *v.* Adelbert College, 208 U. S. 38 (1908), approving Compton *v.* Jesup, 68 Fed. Rep. 263 (1895). The case Compton *v.* Wabash, etc. Ry., 45 Ohio St. 592 (1888), passed upon the same bonds, and it was held that these bonds constituted a lien on the property of the old company, and were prior in right to the mortgage bonds of the consolidated company; refusing to follow Wabash, etc. Ry. *v.* Ham, 114 U. S. 587 (1885). General creditors of a road that is consolidated with another have no equitable lien on the bonds issued by the consolidated company. Hervey *v.* Illinois Mid. Ry., 28 Fed. Rep. 169 (1884). Mortgage bonds issued in exchange for notes held by a former company must be clearly and fully explained in a foreclosure suit based thereon. Central Trust Co. *v.* Worcester Cycle Mfg. Co., 90 Fed. Rep. 584 (1898).

1 A former decree in a court of equity against the trustee of the mortgage in regard to the matter does not bind the bondholders, although a suit at law against the trustee would have bound them. Lebeck *v.* Fort Payne Bank, 115 Ala. 447 (1897). Where a municipality is the vendor of land to a corporation and brings suit to set aside the transfer as fraudulent and illegal, and joins the three trustees of a mortgage of the corporation as parties defendant and serves them by publication, and, two of the trustees having died, causes successors to be appointed by the court, and obtains decrees against the corporation and the trustees of the mortgage canceling their title to the land, the decree is effective; and even though the mortgage is afterwards foreclosed, the purchaser at such sale takes no title to such land, he having waited thirty years before attacking such decree. Bump *v.* Butler County, 93 Fed. Rep. 290 (1899). On the other hand, where a municipality delays for thirty years in complaining of fraud and illegality whereby it conveyed land to a corporation, the court will not grant it any relief. Rummel *v.* Butler County, 93 Fed. Rep. 304 (1899).

2 Jenkins *v.* John Good, etc. Co., 56 N. Y. App. Div. 573 (1900); aff'd, 168 N. Y. 679. An insolvent New Jersey corporation cannot, as against some of its creditors, issue mortgage bonds to other creditors. Skirm *v.* Eastern, etc. Co., 57 N. J. Eq. 179 (1898). It is a disposal of property for the purpose of hindering and delaying creditors, within the meaning of the second section of the statute of frauds, for an insolvent firm to mortgage all their property to a trustee and take the bonds secured by that mortgage,

Even though an insolvent partnership is turned into a corporation, and bonds of the corporation are given to a creditor of the partnership for his debt, yet such bonds may be legal.[1]

§§ 675-677. *Consolidations, leases, and sales of railroads.*—This subject is considered elsewhere.[2]

§ 678. *A corporation cannot be a partner in a partnership.*—This is an old principle of law, but it is subject to exceptions. It is held to be an *ultra vires* act, because the stockholders are entitled to have their directors conduct the business without sharing that power with a partner.[3] But if a partnership has been formed with an individual, the latter cannot throw the business into statutory insolvency proceedings;[4] and the corporation cannot avoid the payment of a liability which the partnership has incurred;[5] nor can an

even though they take the bonds to turn over to their creditors. But the act is voidable only as to those creditors who object and contest the matter. National Bank *v.* Sprague, 21 N. J. Eq. 530 (1870).

1 Seligman *v.* Prince, [1895] 2 Ch. 617. Where a corporation is in debt, and in order to enable it to borrow money the chief stockholder, who is also in debt, transfers valuable property to the corporation, and then the corporation gives a mortgage upon all its property, including the property so transferred, a *bona fide* holder of the bonds is protected as against a creditor of the stockholder. King *v.* Holland T. Co., 8 N. Y. App. Div. 112 (1896). In the case of Badger *v.* Sutton, 30 N. Y. App. Div. 294 (1898), where an insolvent person and corporation had transferred their property to another corporation and had taken back purchase-money mortgage bonds, the court set the transaction aside at the instance of creditors of the former.

2 See §§ 892-897, *infra.*

3 "It is a violation of law for corporations to enter into a partnership," and their charters may be forfeited for the offense. People *v.* North River, etc. Co., 121 N. Y. 582, 623 (1890). A contract between two companies, by which one is to name four of the six directors of the other (and is also to sell the stock of the latter, carry out its contracts, and pay dividends on its stock), is illegal. James *v.* Eve, L. R. 6 H. L. 335 (1873).

4 Whittenton Mills *v.* Upton, 76 Mass. 582 (1858).

5 Catskill Bank *v.* Gray, 14 Barb. 471 (1852). *Contra*, Gunn *v.* Central R. R. etc. Co., 74 Ga. 509 (1885), where a railroad was held not liable for injuries to a passenger sustained while traveling upon a boat operated by the road and an individual as partners. But see Block *v.* Fitchburg R. R., 139 Mass. 308 (1885). Even though a national bank takes an interest in a partnership in payment of a debt, yet it cannot be held liable as a partner. It is liable only for its proportionate part of the debts. Merchants', etc. Bank *v.* Wehrman, 69 Ohio St. 160 (1903). *Cf.* Merchants' Nat'l Bk. *v.* Wehrman, 202 U. S. 295 (1906). Even though a street railway company cannot become a member of a partnership, yet if it takes part in improving a park and is to have a part of the proceeds it may be liable for such improvements. Breinig *v.* Sparrow, 39 Ind. App. 455 (1907). A corporation and a person to whom it has agreed to sell its property may be liable as partners to creditors of the former. Cleveland Paper Co. *v.* Courier Co., 67 Mich. 152 (1887). A corporation cannot avoid liability for the debt of a

obligation to the corporation be repudiated on that ground.[1] The cash which a corporation has invested in a copartnership as a partner cannot be recovered back by the corporation after the insolvency of the partnership, as against creditors of the partnership, even though the corporation had no power to so invest.[2] If the corporation has but one stockholder, he may make it a partner in a partnership.[3] Sometimes the relationship is held to be that of principal and agent instead of partnership.[4] Where a corporation has been a

firm, in which firm it is a member, on the ground that it had no power to become a partner. Cameron *v.* First, etc. Bank, 34 S. W. Rep. 178 (Tex. 1896). Under the New York statutes bonds may be issued to take up past-due notes, and where the business of a partnership and of a corporation is carried on as one institution, such bonds are valid, even though some of the notes so taken up grew out of the business of the partnership, but were indorsed by the corporation. Matter of Snyder, 29 N. Y. Misc. Rep. 1 (1899). A corporation as a member of a copartnership may be liable on a note given by said copartnership and indorsed by the corporation. Johnson *v.* Weed, etc. Co., 103 Wis. 291 (1899). *Cf.* 111 S. W. Rep. 636.

1 French *v.* Donohue, 29 Minn. 111 (1882). A bank cannot refuse to repay a deposit on the ground that it was made by a partnership between an individual and a corporation. Willey *v.* Crocker, etc. Bank, 72 Pac. Rep. 832 (Cal. 1903); s. c., 141 Cal. 508. A partnership consisting of a corporation and an individual may collect damages for breach of a contract for sale of goods, inasmuch as the buyer is estopped from setting up that the partnership was illegal. Huguenot Mills *v.* George F. Jempson & Co., 68 S. C., 363 (1904). A corporation may enforce an accounting in a partnership of which it is a member. Standard Oil Co. *v.* Scofield, 16 Abb. N. Cas. 372 (1885). Where in an *ultra vires* contract two railroads are operated as one, and more of the income is used to repair one railroad than the other, the latter may sue the former for reimbursement. Nashua, etc. R. R. *v.* Boston, etc. R. R., 164 Mass. 222 (1895). Where a national bank forms a partnership to operate a mill, it may recover moneys loaned by the bank to the partnership. Although the manager of the mill is vice-president of the bank, yet the bank is not liable for his mismanagement. The bank as a partner is, however, chargeable with notice of a rule of its other partner, a joint-stock association, that no money should be borrowed except by the board of directors of the latter. Cameron *v.* First Nat. Bank, 4 Tex. Civ. App. 309 (1893); s. c., 34 S. W. Rep. 178. A party receiving work and materials from a partnership consisting of a corporation and an individual cannot defend against the price on the ground that the corporation had no right to enter a partnership. Wilson *v.* Carter, etc. Co., 46 W. Va. 469 (1899). A firm consisting of an individual and a foreign corporation which is not authorized to do business in the state cannot enforce a contract in the state. Harris *v.* Columbia, etc. Co., 108 Tenn. 245 (1901).

2 Wallerstein *v.* Ervin, 112 Fed. Rep. 124 (1901). Where a corporation has entered into a copartnership which becomes insolvent it cannot, as against other creditors, file claims as a creditor of such copartnership on the ground that the copartnership was *ultra vires*. *In re* Ervin, 109 Fed. Rep. 135 (1901).

3 Allen *v.* Woonsocket Co., 11 R. I. 288 (1876).

4 Marine Bank *v.* Ogden, 29 Ill. 248 (1862). In Holmes *v.* Old Colony R.

partner in a partnership, it must account to the other partners, even though such partnership was illegal.[1] The corporation also may enforce the provisions of the contract.[2] A corporation that has entered into a partnership for a certain period of time cannot recover damages for the failure of the other party to continue the partnership during that time.[3] There have been many dicta to the effect

R., 71 Mass. 58 (1855), where the corporation shared in the profits only, no partnership was held to exist. A lease whereby the lessee is to pay the operating expense and the interest on the debt and the cost of betterments, and is then to pay one-half of the balance to the lessor, is not a copartnership, inasmuch as the lessor is not to pay any losses. South Carolina, etc. R. R. *v.* Augusta, etc. R. R., 107 Ga. 164 (1899). Even though a corporation in renting premises is to receive a proportion of the gross receipts in excess of a specified rental, yet this is not a partnership and is legal. Nantasket, etc. Co. *v.* Shea, 182 Mass. 147 (1902). A corporation by the action of its board of directors and consent of all its stockholders may agree that a certain percentage of its profits shall be paid annually to a person for services already rendered by him. In a suit by him to enforce such agreement and asking an injunction against any sales of stock, except with notice of such agreement, stockholders are necessary parties defendant. Such an agreement is not an exclusion of future boards of directors from the management of the company. Dupignac *v.* Bernstrom, 76 N. Y. App. Div. 105 (1902). While a corporation cannot be a partner, yet it may share profits in a contract on which it makes advances. L. J. Mestier & Co. *v.* A. Chevalier, etc. Co., 108 La. 562 (1901). A mining corporation may at common law lease its property for five years for a rental, payable in a certain portion of the product of the mine. A stockholder cannot complain, even though the contract be an error of judgment. Hennessy *v.* Muhleman, 40 N. Y. App. Div. 175 (1899). Even though a corporation, as lessee of an opera house, contracts with the manager, giving him an interest in profits, this is not a partnership and is not *ultra vires.* Markowitz *v.* Greenwall, etc. Co., 75 S. W. Rep. 74 (Tex. 1903). A corporation which has entered into a contract with a copartnership by which each is entitled to a certain portion of the gross profits of the other, cannot defend against the contract on the ground that it was *ultra vires.* Fechteler *v.* Palm Bros., 133 Fed. Rep. 462 (1904).

1 Boyd *v.* American, etc. Co., 182 Pa. St. 206 (1897). Where all the creditors, including a corporation, form a partnership to dispose of the assets, and the assets are so disposed of, the corporation cannot defend against a bill for an accounting on the ground that it was *ultra vires* for it to enter the partnership. Kelly *v.* Biddle, 180 Mass. 147 (1901). A corporation cannot be a partner, and hence where two corporations carry on the business jointly in an assumed name the assets belong one-half to each. Geurinck *v.* Alcott, 66 Ohio St. 94 (1902).

2 A contract whereby a manufacturing corporation and all of its stockholders agree to sell a certain proportion of the capital stock of said company, and to substitute two persons nominated by the vendee as directors in such corporation, is not presumed to be *ultra vires*, and a provision in such contract that the purchaser will carry on the business and divide profits every six months may be enforced by the corporation. Rider Life Raft Co. *v.* Roach, 97 N. Y. 378 (1884).

3 Sabine, etc. Co. *v.* Bancroft, 16 Tex. Civ. App. 170 (1897). A mere allegation that one company is liable

that a corporation cannot be a partner;[1] and the question has arisen indirectly in many cases involving railroad traffic and pooling contracts,[2] and in still other cases where illegal combinations in restraint of trade have been made;[3] but there are few authorities bearing directly on the subject.[4] Where three companies join in the execution of debentures creating a lien on their property, each will be required to pay such part as it received, although such debentures are *ultra vires*.[5] A corporation is not liable for the debts of a copartnership, even though it has acquired all its property.[6]

§ 679. ***A corporation cannot be an executor or an administrator or a trustee, unless specially authorized by statute.***—The duties of the office are personal and incapable of being delegated to an agent. Since a corporation acts only through agents, it cannot assume the duties of an executor.[7] A person who makes a note to a corporation as administrator, however, cannot defeat it by alleging that

for the debts of another on the ground that they are partners is an insufficient allegation. White *v.* Pecos, etc. Co., 18 Tex. Civ. App. 634 (1898).

1 New York, etc. Canal Co. *v.* Fulton Bank, 7 Wend. 412 (1831). *Cf.* 1 Lindley, Partn., p. 86.

2 See ch. LIII, *infra.* Where two railroads are jointly operating another road they are jointly liable for negligence thereon and it is no defense that the corporation cannot be a partner. Harrill *v.* South Carolina, etc. R. R., 135 N. C. 601 (1904).

3 Ch. XXIX, *supra.*

4 A stage company may be a co-owner of a stage line with an individual. Calvert *v.* Idaho Stage Co., 25 Oreg. 412 (1894). In State *v.* Port Royal, etc. Ry., 79 Fed. Rep. 397 (1897), a lease of a railroad seems to have been owned by a corporation and an individual as partners. A corporation owning waterworks outside of a city may agree to furnish water to one inside the city, the general distribution of the water to be under the joint control of two agents, each corporation appointing one, and the profits to be divided equally. San Diego Water Co. *v.* San Diego Flume Co., 108 Cal. 549 (1895). A corporation may enter into a land speculation with an individual, the profits and losses to be divided equally, if the corporation is to have entire control of the business. Bates *v.* Coronado Beach Co., 109 Cal. 160 (1895). Where a railroad company is interested in the construction of a connecting line, it is liable for the services of an attorney employed by it in connection therewith. St. Louis, etc. R. R. *v.* Kirkpatrick, 52 Kan. 104 (1893).

5 *Re* Johnston, etc. Co. Ltd., [1904] 2 Ch. 234. A trust company authorized to buy and sell securities may join with a railroad in signing a note for the benefit of the railroad company which it is financing, especially where all the stockholders ratify the transaction. First Nat. Bank, etc. *v.* Guardian T. Co., 187 Mo. 494 (1905).

6 Culberson *v.* Alabama, etc. Co., 127 Ga. 599 (1907). See also § 673, *supra.*

7 Georgetown College *v.* Browne, 34 Md. 450 (1871), where it was also held that a corporation will not be allowed, as in England, to designate a person to administer with the will annexed. See also *Re* Thompson, 33 Barb. 334 (1861).

the corporation was not authorized to act as such.[1] The charter of the corporation may, however, expressly authorize it to act as executor or trustee. But where the statutes of a state provide that no foreign corporation shall transact business which a domestic corporation cannot transact, and domestic corporations are not allowed to act as executors, a foreign corporation cannot act as such in the state.[2] In England where individuals and a corporation are named as executors, the practice is to appoint the individuals without the corporation or the corporation without the individuals.[3] An officer of a corporation is not entitled to claim administratorship even though the corporation is a creditor of an estate and a statute states that a creditor may be entitled to letters of administration.[4]

As to trusts the rule is not so rigid. The old rule that corporations could not take property in trust for the use of others is now obsolete.[5] A corporation may be a trustee to hold property in trust for purposes within the corporate power.[6] If a corporation be incompetent to act as trustee, the devise or grant will not thereby become void; a court of equity will appoint a proper trustee to carry out and execute the trust.[7] It is no defense to an action by a bondholder to reach a sinking fund that the corporation holding the fund had no charter right to act as custodian, and that such custodian had illegally guaranteed the bonds.[8] *Quo warranto* proceedings do not lie to test the right of a private corporation to act as trustee for

1 Union, etc. Co. *v.* Wright, 58 S. W. Rep. 755 (Tenn. 1900).

2 Farmers', etc. Co. *v.* Smith, 74 Conn. 625 (1902). In California by statute certain corporations may act as executors. Kilborn *v.* Title, etc. Co., 89 Pac. Rep. 985. (Cal. 1907).

3 In the Goods of Martin, 90 L. T. Rep. 264 (1904).

4 *Re* Owens' Estate, 30 Utah, 351 (1906).

5 Vidal *v.* Girard, 2 How. 127, 187 (1844), where Mr. Justice Story said: "Where the corporation has a legal capacity to take real or personal estate, there it may take and hold it upon trust in the same manner and to the same extent as a private person may do;" Chapin *v.* Winchester School Dist. 35 N. H. 445 (1857), holding that a corporation may be trustee of a charity if consistent with the object of its creation. See also § 694, *infra;* Phillips Academy *v.* King, 12 Mass. 546 (1815), holding that a corporation aggregate may be a trustee; Perry, Trusts, § 42 *et seq.;* Robertson *v.* Bullions, 11 N. Y. 243 (1854), a religious society. *Re* Howe, 1 Paige, 214 (1828), holds that while corporations cannot be trustees in matters in which they have no interest, yet if property be devised or granted to a corporation upon trust, partly for itself and partly for another, it may execute the trust. One mission society corporation may take property in trust for another mission society corporation. Sheldon *v.* Chappell, 47 Hun, 59 (1888).

6 White *v.* Rice, 112 Mich. 403 (1897).

7 Vidal *v.* Girard, 2 How. 127, 187 (1844); Chapin *v.* Winchester School Dist., 35 N. H. 445 (1857).

8 Central, etc. Co. *v.* Farmers', etc. Co., 116 Fed. Rep. 700 (1901); aff'd, 114 Fed. Rep. 263.

certain shares of its own stock which a stockholder has placed in trust.[1]

§ 680. *Stockholder's right to prevent the corporation from undertaking a new business.*—It is *ultra vires* of a corporation to undertake to carry on a business which is not fairly within the scope of the business described in its charter. When such an attempt is made on the part of the directors or a majority of the stockholders, a dissenting stockholder may insist upon the corporate business being confined to the limits of the corporate charter; and he may enjoin or set aside any acts which do not conform to those limits. Thus, a corporation formed to manufacture iron cannot go into the flour and mill business.[2] And a corporation to build and operate a summer hotel has no power to divide its property into lots and sell them.[3] A national bank which is a creditor of an insolvent manufacturing company has no power to join in a reorganization plan by which it turns over its claim to a new corporation and takes stock of the new corporation in payment therefor, and hence if the new corporation fails the bank is not liable as a stockholder on a statutory double liability attaching to such stock.[4] A national bank which has taken as security for a debt and then acquired shares of stock in an unincorporated association, formed for speculative purposes, is not liable on such stock, its acquisition having been *ultra vires.*[5] It is a violation of the interstate commerce act for a railroad company engaged in interstate commerce to buy and sell coal at prices which do not net the railroad the cost of purchase and the cost of delivery and the published freight rates.[6] A natural-gas company may not have power to engage in manufacturing artificial gas, even though the natural gas has given out.[7] A cottonseed-oil company, even though it has power to make fertilizers in connection with a cottonseed mill, has no power to buy and sell other kinds of fertilizers, and hence notes given for the purchase price are void, but it is liable for the value of the fertilizers actually purchased and received and sold by it.[8] Where a canal is sold to a private manufacturing corporation and a bill of equity is filed by a person to restrain such corporation from charging illegal tolls and excluding boats from the

1 State *v.* Higby Co., 130 Iowa, 69 (1906).

2 Cherokee Iron Co. *v.* Jones, 52 Ga. 276 (1874). See also § 681, *infra.*

3 Stacy *v.* Glen, etc. Co., 223 Ill. 546 (1906).

4 First National Bank *v.* Converse, 200 U. S. 425 (1906).

5 Merchants' National Bank *v.* Wehrmann, 202 U. S. 295 (1906).

6 New York, etc. R. R. *v.* Interstate, etc., 200 U. S. 361 (1906).

7 Consumers', etc. Co. *v.* Quinby, 137 Fed. Rep. 882 (1905).

8 Richmond, etc. Co. *v.* Farmers', etc. Co., 126 Fed. Rep. 712 (1903).

canal, the corporation cannot claim that its purchase was *ultra vires*.[1] A national bank may be liable for losses on purchases and sales of stock by its cashier made with its consent and for its benefit, where it has received large profits therefrom.[2] A lumber company may be liable on its bond that a contractor will complete a building for which the company furnishes the lumber.[3] Even though a railroad company has no power to carry on commercial telegraph business, yet if it does so it is liable for failure to deliver a message.[4] Although a lumber company has no charter power to insure its employees against accidents, yet if it does make such a contract it cannot repudiate the same when sued thereon.[5] A corporation receiving goods *ultra vires* to sell on commission is nevertheless liable for breach of contract as to the price of the sale.[6]

An iron and steel manufacturing company has no power to operate a public or private warehouse. Hence warehouse receipts issued by the corporation on its own property are not protected like the ordinary warehouse receipts, and corporate creditors who hold such receipts are not protected thereby, and the transaction may not amount to a pledge.[7]

A bank sued as bailee for a loss of a special deposit cannot set up *ultra vires*.[8]

A bank cashier cannot buy boots and shoes for another person in the name of the bank.[9]

A party with whom an iron company contracts to deliver ice cannot recover damages for a breach of the contract.[10]

A warehouse company will not be allowed to set up *ultra vires* as a defense to notes given by it in payment for grain, the articles of incorporation having provided therefor, although probably illegally so.[11]

A land company must pay for services rendered in organizing other companies to rent and locate on the land of the former.[12]

Where a bank carries on a mercantile business without the charter

1 New York, etc. Co. *v.* Consolidated, etc. Co., 178 N. Y. 167 (1904).

2 National Bank, etc. *v.* Fridenberg, 206 Pa. St. 243 (1903).

3 Central Lumber Co. *v.* Kelter, 201 Ill. 503 (1903).

4 Arkansas, etc. Ry. *v.* Stroude, 77 Ark. 109 (1905).

5 Arkadelphia, etc. Co. *v.* Posey, 74 Ark. 377 (1905).

6 Union Hardware Co. *v.* Plume, etc. Co., 58 Conn. 219 (1889).

7 Franklin Nat. Bank *v.* Whitehead, 149 Ind. 560 (1898).

8 First Nat. Bank *v.* Strang, 138 Ill. 347 (1891); Pattison *v.* Syracuse Nat. Bank, 80 N. Y. 82 (1880).

9 North Star, etc. Co. *v.* Stebbins, 2 S. D. 74 (1891).

10 Simmons *v.* Troy Ironworks, 92 Ala. 427 (1890).

11 Carson City Sav. Bank *v.* Carson City Elev. Co., 90 Mich. 550 (1892).

12 Schurr *v.* New York, etc. Co., 18 N. Y. Supp. 454 (1892).

right to do so, and fails, the creditors of the bank in its legitimate business will be preferred over the creditors in the mercantile business.[1]

After a land company has purchased a stock of goods and sold them, it cannot defeat an action for the price of the sale to it by the defense of *ultra vires.* The contract has been executed.[2]

A manufacturing corporation cannot enforce a contract of sale of oil to it, which it bought to resell.[3]

Where a manufacturing corporation enters into a contract with a municipality to build conduits, such contract is *ultra vires,* and for a breach thereof by the municipality before the contract is carried out the company cannot collect damages.[4]

Although an educational institution is operating a ferry without power so to do, yet, if a person is injured by the ferry, the institution is liable in damages.[5]

A corporation organized to manufacture railway cars has no power to lay out a town around its works and build twenty-two hundred homes to lease to its employees, to build and run a hotel and saloon, and also a theater, a gas plant, a system of water-works and a brick plant, and to own and run a farm for supplies to sell and for its employees, and to own stock in other corporations manufacturing and selling bar iron and railroad spikes; but may erect an office building containing more space than it requires at the time, and may purchase more real estate than it actually requires at the time, and may supply liquor to passengers on its cars, and may sell surplus steam power.[6]

§ 681. *Miscellaneous ultra vires acts—Enforcement of ultra vires contracts.*—Where a contract is not on its face beyond the powers of a corporation, it is presumed that the corporation has power to make the contract.[7] A judgment on an *ultra vires* contract may be impeached to the same extent that the contract itself might have been impeached.[8] A contract whereby a manufacturing corporation and all of its stockholders agreed to sell a certain proportion of the

1 State *v.* Bank of Hemingford, 58 Neb. 818 (1899).

2 Sherman, etc. Co. *v.* Morris, 43 Kan. 282 (1890).

3 Bosshardt, etc. Co. *v.* Crescent Oil Co., 171 Pa. St. 109 (1895).

4 Safety, etc. Co. *v.* Baltimore, 74 Fed. Rep. 363 (1896).

5 Nims *v.* Mount Hermon Boys' School, 160 Mass. 177 (1893).

6 The state may bring *quo warranto* proceedings to forfeit the charter. It is no defense that the usurpations had continued for many years to the knowledge of the state, or that a legislative committee had reported that the real estate was properly taxed. People *v.* Pullman's Palace Car Co., 175 Ill. 125 (1898).

7 Choctaw, etc. R. R. *v.* Bond, 160 Fed. Rep. 403 (1908).

8 Great, etc. Ry. *v.* Charlebois, [1899] A. C. 114.

capital stock of said company and to substitute two persons nominated by the vendee as directors in such corporation is not presumed to be *ultra vires,* and a provision in such contract that the purchaser will carry on the business and divide profits every six months may be enforced by the corporation.[1] Even though a note given by one insurance company to purchase the business of another insurance company is not legal, yet if the assets of the corporation that issued the note are used to take it up, the money cannot be recovered back.[2] Although a department store corporation furnishes a dentist, as a part of its business, without chartered right so to do and in violation of a statute regulating dentistry, it cannot set up this defense in a suit against it for malpractice.[3] Even though a corporation is selling its product below cost, in order to force another corporation to combine with it, yet a stockholder in the former cannot enjoin such sales, where neither of the corporations has a natural monopoly, and no bad faith or palpably bad judgment is shown.[4] Minority stockholders may maintain a bill in equity to cancel a lease which their corporation has made of its property with a view to establishing an illegal monopoly.[5]

In a suit by a lessee to enjoin the lessor from taking possession of the property for an alleged breach of the lease, the lessee cannot set up that the lease was *ultra vires,* at the same time retaining the past benefits of the lease.[6] A contract of a corporation is legal if it is not expressly prohibited, and if it has "a natural and reasonable tendency to aid in the accomplishment of the objects for which the corporation was created." [7]

A mercantile or manufacturing company may loan its surplus funds temporarily when not needed in the business.[8] Where three companies join in the execution of debentures creating a lien on their property, each will be required to pay such part as it received, al-

1 Rider Life Raft Co. *v.* Roach, 97 N. Y. 378 (1884).

2 McClure *v.* Trask, 161 N. Y. 82 (1899).

3 Hannon *v.* Siegel-Cooper Co., 167 N. Y. 244 (1901).

4 Trimble *v.* American, etc. Co., 61 N. J. Eq. 340 (1901). *Mandamus* will not be granted to allow a stockholder to examine the books of the company where such stockholder owns only one-thirteenth of one per cent. of the preferred stock, and his reason for examining the books is that he believes the company is selling its product at less than cost by reason of competition, and that consequently he has received no dividends, it not being shown that the market price of the stock has been decreased. Matter of Pierson, 28 N. Y. Misc. Rep. 726 (1899); aff'd, 44 N. Y. App. Div. 215.

5 Shawnee, etc. Co. *v.* Anderson, 209 U. S. 423 (1908).

6 Pittsburgh, etc. R. R. *v.* Altoona, etc. R. R., 196 Pa. St. 452 (1900).

7 Colorado, etc. Co. *v.* American, etc. Co., 97 Fed. Rep. 843 (1899).

8 Garrison, etc. Co. *v.* Stanley, 133 Iowa, 57 (1907).

though such debentures are *ultra vires.*[1] A corporation cannot take out a license to practice medicine,[2] but may contract to furnish medical assistance.[3] An agreement of a national bank that it will pay all checks of a person is not enforceable by a party who cashes such checks relying on such agreement, it appearing that the bank had no funds of the former to meet such checks. This is an *ultra vires* contract of guaranty.[4] Where the statutes in existence at the time of incorporation provide for the extension of corporate charters, a stockholder cannot prevent the corporation from extending its existence in accordance with such statutes.[5] The board of directors of an insurance company have no power to employ an agent on a basis which will give the agent an interest in premiums for ten years, and certainly an executive committee has no such power.[6] But a contract with an insurance agent whereby he has an interest in all policies placed by him is not an interference with the discretion of future boards of directors.[7] The board of directors of a hotel company may in anticipation of the completion of the hotel make a ten year contract with a manager.[8] The board of directors of an insurance company have no power to employ a person for life.[9] But the directors of a trading company may pension a retiring officer or servant.[10] There being nothing in the English statutes requiring directors, it is legal for an English corporation to have no directors, but to have managers, and another corporation may be one of the directors or may be one of the managers.[11] A stockholder in a hotel company cannot enjoin the managers from leasing a part of the property for other purposes, there being sufficient accommodation left for the hotel.[12] It has been held that a stockholder cannot enjoin his corporation from paying money to a

1 *Re* Johnston, etc. Co. Ltd., [1904] 2 Ch. 234.

2 State, etc. Inst. *v.* State, 103 N. W. Rep. 1078 (Neb. 1905).

3 State, etc. Inst. *v.* Platner, 103 N. W. Rep. 1079 (Neb. 1905).

4 Bowen *v.* Needles, etc. Bank, 94 Fed. Rep. 925 (1899).

5 Smith *v.* Eastwood, etc. Co., 58 N. J. Eq. 331 (1899).

6 Caldwell *v.* Mutual, etc. Assoc., 53 N. Y. App. Div. 245 (1900).

7 Schrimplin *v.* Farmers', etc. Ass'n, 123 Iowa, 102 (1904).

8 Brooklyn Heights, etc. Co. *v.* Kurtz, 115 N. Y. App. Div. 74 (1906). An executive committee has no power to make a contract appointing a sole selling agent for five years and giving him six per cent. on all goods sold by him or any one else. Moreover, such a contract is unilateral and not binding when the agent does not agree to sell any goods. Commercial, etc. Co. *v.* Northampton, etc. Co., 115 N. Y. App. Div. 388 (1906); aff'd, 190 N. Y. 1.

9 Carney *v.* New York, etc. Co., 162 N. Y. 453 (1900).

10 Normandy *v.* Ind. etc. Co. Ltd., 97 L. T. Rep. 872 (1907).

11 *Re* Bulawayo, etc. Co. Ltd., 97 L. T. Rep. 752 (1907).

12 Simpson *v.* Westminster, etc. Co., 8 H. L. Cas. 712 (1860).

rival company to induce the latter to discontinue business.[1] But any misapplication or waste of the property of a corporation may be remedied by a member thereof.[2] A manufacturing corporation has no power to insure the life of its president, even though his management is very essential to the corporate success, and hence a stockholder may enjoin payment of the premiums.[3] It is illegal for the directors or a majority of the stockholders to give away the assets of the corporation for the promotion of other enterprises.[4] Never-

1 Leslie *v.* Lorillard, 110 N. Y. 519 (1888).

2 Armstrong *v.* Church Soc., 13 Grant Ch. (U. C.) 552 (1867).

3 Victor *v.* Louise Cotton Mills, 61 S. E. Rep. 648 (N. C. 1908).

4 See § 64, *supra*, and §§ 775, 909, *infra*. Back pay cannot be voted to the directors. It is an illegal gift. See § 657, *supra*. But an educational institution may donate money to the construction of a railroad. Louisville, etc. R. R. *v.* St. Rose Literary Soc., 91 Ky. 395 (1891). A town-site corporation may give away certain lots and give a sum of money to a party who, in consideration thereof, agrees to remove a barn, etc., to another location. Sherman, etc. Co. *v.* Russell, 46 Kan. 382 (1891); Sherman, etc. Co. *v.* Fletcher, 46 Kan. 524 (1891). A railroad cannot be held liable on its contract to pay for the examination of mines of which the railroad is the outlet. George *v.* Nevada Cent. R. R., 22 Nev. 228 (1894). But directors may compromise corporate claims. Frankfort Bank *v.* Johnson, 24 Me. 490 (1844), and § 750, *infra*. Directors cannot legally pay out money which is not owed. Salem Bank *v.* Gloucester Bank, 17 Mass. 1, 30 (1820). Directors should not use corporate funds to sue for a libel on themselves as directors; but where the stockholders were informed of the payment it will not be disturbed. Studdert *v.* Grosvenor, L. R. 33 Ch. D. 528 (1886); overruled on another point in Peel *v.* London, etc. Ry., 95 L. T. Rep. 897 (1906). The money of a city cannot be used to buy a gold chain for the mayor. Attorney-General *v.* Batley, 26 L. T. Rep. 392 (1872). Nor to give extra pay to a clerk. *Ex parte* Mellish, 8 L. T. Rep. 47 (1863). Nor can lodge funds be given to outside charitable purposes. Polar Star Lodge *v.* Polar Star Lodge, 16 La. Ann. 53 (1861). Where a stockholders' meeting has recommended that a week's extra pay, as a gratuity to the workmen of a manufacturing corporation, be given, and the directors give it, a dissenting stockholder cannot hold the directors liable therefor. Hampson *v.* Price's, etc. Co., 45 L. J. (Ch.) 437 (1876); Clarke *v.* Imperial Gas Light & C. Co., 4 B. & Ad. 315 (1832), upholding a grant of an annuity to a disabled clerk. A bank may make a gift to the children of a deceased superintendent. Henderson *v.* Bank of Australasia, L. R. 40 Ch. D. 170 (1888). As against its creditors, a corporation cannot give away any part of its assets. Mason *v.* Fischer, etc. Co., 21 S. Rep. 5 (Miss. 1896). Where the directors have been paid for their services, majority stockholders on the winding up cannot vote the sum of £7,800 to them as a gratuity as against the dissent of a minority stockholder. Stroud *v.* Royal, etc., 89 L. T. Rep. 243 (1903). An incorporated volunteer fire department which has been supplanted by a regular organized municipal fire department has no power to put its property in trust for charitable purposes. The property must be divided among existing members. Hopkins *v.* Crossley, 132 Mich. 612 (1903).

theless a note given by an improvement company to adjust a contract by which it had agreed to give a right of way, terminals, and a bonus to a street railway may be enforced.[1] Although it is *ultra vires* for an insurance company to contribute to political campaign expenses, it is not a criminal act, and hence an officer who acts as intermediary is not criminally liable.[2] An improvement company having wide powers may give a part of its stock to a railway company, in order to have the road built to the property of the improvement company. A stockholder who has voted therefor cannot afterwards complain.[3] A street railroad may donate money to a baseball park.[4] And a land-improvement company may agree to pay one-third of the expense of a bridge in the public highway.[5] A corporation organized to improve an office building may donate funds to secure the location of a stock exchange near by.[6] A bank has no power to make a donation to a paper mill.[7] It is legal for the directors to send out proxies printed at the expense of the company and to enclose postage stamps paid for by the company, even though the proxies named were named by them.[8] A stockholder may enjoin any act on the part of the state which is in violation of the charter which it granted to the corporation. It was to enjoin a tax by the state under such circumstances that the case of Dodge *v.* Woolsey[9] arose.

1 Llano Imp. etc. Co. *v.* Pacific Imp. Co., 66 Fed. Rep. 526 (1895).

2 People *v.* Moss, 113 N. Y. App. Div. 329 (1906); aff'd, 187 N. Y. 410. A mining company has no power to donate funds for political purposes. McConnell *v.* Combination, etc. Co., 30 Mont. 239 (1904).

3 McGeorge *v.* Big Stone Gap Imp. Co., 57 Fed. Rep. 262 (1893). A business corporation may donate money to secure the location of a postoffice near its place of business. B. S. Green Co. *v.* Blodgett, 159 Ill. 169 (1895).

4 Temple, etc. Ry. *v.* Hellman, 103 Cal. 634 (1894).

5 Fort Worth City Co. *v.* Smith Bridge Co., 151 U. S. 294 (1894). The directors may regulate the rates and may give away free passes within reasonable limits. Hasson *v.* Venango Bridge Co., 1 Pa. Dist. 521 (1892). A land company may agree with a town to aid in the construction of a bridge which will enable a street railway to be built to its property. Board of Trustees *v.* Piedmont, etc. Co., 134 N. C. 41 (1903).

6 Merchants', etc. Co. *v.* Chicago, etc. Co., 210 Ill. 26 (1904).

7 Robertson *v.* Buffalo, etc. Bank, 40 Neb. 235 (1894).

8 Peel *v.* London, etc. Ry., 95 L. T. Rep. 897 (1906); overruling Studdert *v.* Grosvenor, 33 Ch. Div. 528.

9 18 How. 331 (1855). The court, however, refused to sustain a stockholder's action to enjoin the corporation from paying a license tax imposed by the United States government in the case of Corbus *v.* Alaska, etc. Co., 187 U. S. 455 (1903). Stockholders may enjoin the company from discounting paper usuriously and in a manner contrary to its charter, *i. e.*, without the paper being passed on by the directors. The injunction lies on the ground that the charter is endangered. Manderson *v.* Commercial Bank, 28 Pa. St. 379 (1857).

Even though a national bank buys bonds which it has no power to buy, and agrees to sell back to the vendor at a certain price, yet it cannot set up a plea of *ultra vires* when it is sued by the vendor for refusal to resell.[1] Even if a navigation company purchases a hotel property *ultra vires*, yet its lessee cannot refuse to pay the rent on that ground, nor can bondsmen for the payment of such rent defend on that ground.[2]

A stockholder in a company organized to purchase a certain mine may enjoin the company from purchasing a mine in another country, even though the certificate of incorporation contains some general powers.[3]

Even though a railroad is giving a lower rate to one customer than to another, yet a stockholder cannot maintain a suit of injunction to compel the party to pay what he should have paid. While the act is illegal, it is not *ultra vires*, and as to the illegal act it is for the corporation to decide whether or not it will sue.[4]

A national bank has power to take a lease of land and erect an office building thereon for its own use and for the purpose of renting what it does not need.[5]

A corporation may be liable on its agreement to give a percentage of its profits to a manufacturer of certain machinery, other corporations having also agreed to do the same.[6]

A savings bank and trust company cannot be held liable for losses on speculations in cotton, although it represented that its orders were for responsible customers.[7]

The contract of a railroad company not to oppose the passage of a law giving land to another corporation, the land to be divided subsequently, is illegal and not enforceable.[8]

Many instances and examples of what acts and contracts of a railroad corporation are *ultra vires* are given elsewhere.[9]

Where the lessee of a car-company plant repudiates the lease on

1 Logan County Bank *v.* Townsend, 139 U. S. 67 (1891); s. c., 3 S. W. Rep. 122 (Ky. 1887).

2 Nantasket, etc. Co. *v.* Shea, 182 Mass. 147 (1902).

3 Stephens *v.* Mysore, etc. Co., [1902] 1 Ch. 745.

4 Anderson *v.* Midland Ry., [1902] 1 Ch. 369.

5 Brown *v.* Schleier, 118 Fed. Rep. 981 (1902), holding also that a receiver in a national bank cannot maintain a suit to recover back from the lessor of premises to the bank the rent and cost of improvements, on the ground that the lease was *ultra vires*, especially where the lease has been in existence for ten years; aff'd, 194 U. S. 18.

6 Good *v.* Daland, 121 N. Y. 1 (1890).

7 Jemison *v.* Citizens' Sav. Bank, 122 N. Y. 135 (1890); s. c., 44 Hun, 412.

8 Chippewa, etc. Ry. *v.* Chicago, etc. Ry., 75 Wis. 224 (1889).

9 See § 909, *infra*.

the ground of *ultra vires* and refuses to pay rent, and the court holds that it cannot be compelled to pay rent, the lessor company may compel the lessee to pay for the property so taken, including the value of the contracts taken over.[1]

Where one railroad company agrees to expend certain money on another railroad, and the repayment of the money is guaranteed by a third person, such third person cannot repudiate the guaranty after the money has been expended, on the ground that the act was *ultra vires.*[2] A business corporation cannot defeat an accommodation note if all the stockholders assented thereto and there are no creditors.[3] The implied powers of a corporation are not limited to those which are indispensably necessary but include those which are appropriate, convenient and suitable for carrying out the express powers.[4]

Many examples and illustrations of *ultra vires* acts and *intra vires* acts are given in the notes hereto.[5]

1 In Pullman's P. C. Co. *v.* Central Transp. Co., 171 U. S. 138 (1898), the court held that, where a lease of property was *ultra vires* and void, the only compensation for the actual use would be for the tangible property, and not for the good-will, patents, and contracts which expired during the lease. Accordingly, where the stipulated rental was $264,000 a year, the lower court allowed for use the value of the capital stock of the lessor, inasmuch as such value had been consumed in connection with the lease, and such value was fixed at upwards of $2,500,000 and interest, but the supreme court reduced the compensation to $727,000 and interest, being the actual value of the tangible property.

2 Alexandria, etc. R. R. *v.* Johnson, 58 Kan. 175 (1897).

3 Perkins *v.* Trinity, etc. Co., 69 N. J. Eq. 723 (1905), the court saying: "To permit stockholders of corporations to unanimously make a disposition of the corporate property where no one else's rights are in any way prejudiced, and afterwards to repudiate their action upon the ground that it was beyond the power of the fictional body to do the act, could serve no useful purpose, and would be merely available in aid of fraud. See also § 774, *infra.* A corporation may file a bill in equity to enjoin the foreclosure of a mortgage securing bonds, which have been issued to the stockholders as a dividend illegally, and to compel the surrender of the bonds for cancellation, it appearing that no other rights have intervened. Gunnison, etc. Co. *v.* Whitaker, 91 Fed. Rep. 191 (1898). *Cf.* § 546, *supra,* and 126 N. Y. App. Div. 142.

4 Flaherty *v.* Portland, etc. Soc., 99 Me. 253 (1904).

5 In Safety, etc. Co. *v.* Mayor, 74 Fed. Rep. 363, 370 (1896), the court said in regard to *ultra vires* acts: "It is evident that no general principle can be laid down whereby, with absolute certainty, it can be determined that many transactions are or are not among the incidents to the business of a corporation authorized by its charter. The answer to the question must depend upon the facts of each particular case." See cases in § 909.

Federal Courts: See the cases at the end of this section. It is no defense to a suit by a corporation that the latter acquired the claim *ultra vires.* Peru, etc. Co. *v.* Harker, 144 Fed. Rep. 673 (1906). A corporation in buying property may agree to pay therefor by paying an annual sum to the vendor during his life. Burnes

Out of the various cases set forth in this chapter a few general rules may be clearly drawn and stated. First, there is no clearly-

v. Burnes, 137 Fed. Rep. 781 (1905). The board of directors may at the expense of the corporation publish and also issue to the stockholders notice of a proposed scheme of consolidation or for an exchange of the stock for stock in another corporation, even though the plan is not consummated. Rascover *v.* American, etc. Co., 135 Fed. Rep. 341 (1905). A contract between a corporation and all its stockholders cannot be attacked by the corporation or its receiver, and can be attacked only by creditors who have been actually defrauded thereby. Great Western, etc. Co. *v.* Harris, 128 Fed. Rep. 321 (1903); aff'd, 198 U. S. 561. Even though the charter of a corporation limits the amount of property which it may receive, yet this is for the benefit of the public, and hence the heirs of a testator cannot object that he has given to the corporation more property than it is entitled to receive. Brigham *v.* Peter, etc. Hospital, 126 Fed. Rep. 796 (1903); aff'd, 134 Fed. Rep. 513. A receiver cannot have a contract of a corporation set aside as *ultra vires* and cannot recover back payments already made thereon, especially where the contract was carried out by the corporation for several years, and was then canceled by mutual agreement before the receiver was appointed, the contract in this case being a ninety-nine year lease of real estate to a bank, upon which real estate the bank erected a building for its own use and for rental. Brown *v.* Schleier, 112 Fed. Rep. 577 (1901); aff'd, 194 U. S. 18. A corporation formed to publish a paper in a particular trade may publish a directory of that particular trade. Jewelers', etc. *v.* Jacobs, 109 Fed. Rep. 509 (1901). A stockholder in a corporation cannot maintain a bill to enjoin the payment by the corporation of the tax imposed by act of congress upon such corporation for doing business in Alaska. Corbus *v.* Alaska, etc. Co., 99 Fed. Rep. 334 (1899); aff'd, 187 U. S. 455. A bank which as pledgee causes by its statements a party to purchase the stock held in pledge may be held liable in damages if such statements were false. Hindman *v.* First Nat. Bank, etc., 98 Fed. Rep. 562 (1899). A state bank has no power to purchase stock in a national bank as an investment, and hence is not liable on such stock in case the national bank becomes insolvent. Schofield *v.* Goodrich, etc. Co., 98 Fed. Rep. 271 (1899). A national bank has power to purchase the assets and assume the liabilities of another national bank. Scofield *v.* State Nat. Bank, etc., 97 Fed. Rep. 282 (1899). Although a hardware corporation has no power to become a stockholder in and borrower from a building association, yet if it does so it cannot repudiate a mortgage which it gave in connection with the transaction. Bowman *v.* Foster, etc. Co., 94 Fed. Rep. 592 (1899). A stockholder may enjoin the corporation from obeying an illegal order of railroad commissioners of a state requiring shippers to pay a war revenue stamp tax. Dinsmore *v.* Southern, etc. Co., 92 Fed. Rep. 714 (1899); rev'd on another point in 102 Fed. Rep. 794. A stockholder in a railroad corporation that has taken a lease from another railroad corporation cannot object thereto on the ground that the lessor had no power originally to acquire and own the railroad. Rogers *v.* Nashville, etc. Ry., 91 Fed. Rep. 299 (1898). Under the statute authorizing corporations for any lawful "business" or "pursuit," a corporation may be formed to guarantee the bonds of an educational institution, and at any rate the stock-

defined principle of law that determines whether a particular act is *ultra vires* or *intra vires.* The courts are becoming more liberal, and

holders in such corporation cannot question the power of the corporation to make such guaranty. Maxwell *v.* Akin, 89 Fed. Rep. 178 (1898). Even though a contract by which one railroad operates another is *ultra vires,* and even though the operating road by another *ultra vires* contract consents to a mortgage being placed upon the other road, and agrees to protect the latter by paying the interest if necessary, nevertheless, in case of a default and foreclosure, the operating road cannot claim a lien for betterments in priority to such mortgage. Terre Haute & I. R. R. *v.* Harrison, 88 Fed. Rep. 913 (1898). Even though it may be *ultra vires* for a national bank to take charge of securities and collect and reinvest the proceeds, yet the bank must account for the same. Emmerling *v.* First Nat. Bank, etc., 97 Fed. Rep. 739 (1899). A national bank may give a bond to secure funds deposited with it. State of Nebraska *v.* First Nat. Bank, 88 Fed. Rep. 947 (1898). A national bank owning stock in a savings bank may defeat the statutory liability attached thereto by a plea of *ultra vires.* California Bank *v.* Kennedy, 167 U. S. 362 (1897). *Cf.* Citizens' State Bank *v.* Hawkins, 71 Fed. Rep. 369 (1896) (this decision was qualified in East St. Louis, etc. Ry. *v.* Jarvis, 92 Fed. Rep. 744), and Cooper Ins. Co. *v.* Hawkins, 71 Fed. Rep. 372 (1896). Notes given by a lumber manufacturing corporation to pay for stock in a bank cannot be enforced. Sumner *v.* Marcy, 3 Woodb. & M. 105 (1847); s. c., 23 Fed. Cas. 384. A corporation is presumed to have power to purchase a patent whose use pertains to the business indicated by the name of the corporation. Dorsey, etc. Co. *v.* Marsh, 6 Fish. Pat. Cas. 387 (1873); s. c., 7 Fed. Cas. 939. In Germania, etc. Co. *v.* Boynton, 71 Fed Rep. 797 (1896), it was held that even though every stockholder and director acquiesces in corporate bonds being issued to secure the private debt of an officer, yet that a party receiving such bonds with notice could not enforce them. A national bank may agree that a person going security on an attachment bond will be protected by the bank, although the bond is not given for the benefit of the bank. Seeber *v.* Commercial Nat. Bank, 77 Fed. Rep. 957 (1897).

Alabama: A mining company is not liable for the price of goods which it purchases to carry on an *ultra vires* mercantile business. Chewacla Lime Works *v.* Dismukes, 87 Ala. 344 (1889). Where a lime and limestone corporation engages in the mercantile business, it is not liable for the price of goods sold and delivered to it. Chewacla Lime Works *v.* Dismukes, 87 Ala. 344 (1889).

Arkansas: A town-site company that owns a hotel is liable on a contract of employment where it has received the benefit of the services. Western, etc. Co. *v.* Caplinger, 110 S. W. Rep. 1039 (Ark. 1908). A defense that a contract was illegal cannot be raised for the first time on appeal. Simon *v.* Calfee, 80 Ark. 65 (1906). A railroad company cannot defeat a suit for rent on a lease which it has entered into by setting up the defense that the lessor corporation had no power to make the lease. White River, etc. Ry. *v.* Star, etc. Co., 77 Ark. 128 (1905). An insurance company canot defend against a policy of insurance on the ground that it was *ultra vires.* Minneapolis, etc. Co. *v.* Norman, 74 Ark. 190 (1905).

California: Vandall *v.* South San Francisco Dock Co., 40 Cal. 83 (1870), holding that a corporation empowered to buy, *improve,* etc., real estate may

many acts which fifty years ago would have been held to be *ultra vires* would now be held to be *intra vires.* The courts have gradually enlarged the *implied* powers of ordinary corporations, until now such corporations may do almost anything that an individual may do,

appropriate a portion of its funds to a railroad in consideration of lower rates and more frequent trains. Where an improvement company engages in the hotel business, it cannot repudiate the liabilities of an innkeeper on the ground that the hotel business was beyond its powers. Magee *v.* Pacific Imp. Co., 98 Cal. 678 (1893). A mortgagor of land to a national bank cannot defend against it on the ground that the bank had no power to take the mortgage. Camp *v.* Land, 122 Cal. 167 (1898).

Colorado: Minority stockholders may complain when the majority hold stockholders' meetings out of the state, keep no office or books in the state, appropriate treasury stock, etc. Jones *v.* Pearl Min. Co., 20 Colo. 417 (1894). An improvement company has no power to purchase a cause of action for damages to land, by reason of a public improvement, even though prior thereto it had purchased the land itself, and if it sues the city for such damages the defense of *ultra vires* is good. City of Pueblo *v.* Shutt Inv. Co., 28 Col. 524 (1901).

Dakota: A party who loans money to a corporation, knowing that the money is to be used by the company to buy shares of its own capital stock, cannot collect his debt, the act being *ultra vires.* Adams, etc. Co. *v.* Deyette, 8 S. D. 119 (1895).

Georgia: A guarantee by a paving company that the pavement will be good for ten years cannot be enjoined at the instance of a stockholder where the pavement has been completed. Fisher *v.* Georgia, etc. Co., 121 Ga. 621 (1905). A bank which buys in a manufactory on an execution sale, in order to protect itself, may carry on the business and is liable for debts incurred thereby. Reynolds *v.* Simpson, 74 Ga. 454 (1885). A cotton ginning company cannot defend against its note in *bona fide* hands, given by the company to purchase an ice machine, especially where there is no attempt to rescind. Towers, etc. Co. *v.* Inman, 96 Ga. 506 (1895). Where one corporation sells its property to another, and, after part payment is made, the president of the vendee turns back the property, but the vendee corporation sues for the return of the property, such vendee corporation cannot afterwards claim that the transaction was *ultra vires.* Steele Lumber Co. *v.* Laurens Lumber Co., 98 Ga. 329 (1896). Where a corporation sues on notes which it has purchased, the defense of *ultra vires* is not sufficient. The answer must be more specific. Hart *v.* Phenix, etc. Co., 113 Ga. 859 (1901).

Illinois: A state has no right to enjoin a railroad from discontinuing the operation of its elevators as public warehouses where it has no power to act as a public warehouseman. People *v.* Illinois, etc. Co., 84 N. E. Rep. 368 (Ill. 1908). A brewing corporation may foreclose a mortgage to secure a loan which it has made to enable a borrower to erect a saloon to sell the company's beer. Kraft *v.* West Side, etc. Co., 219 Ill. 205 (1905). *Assumpsit* is the proper remedy for a corporation to recover money paid to a person in pursuance of an *ultra vires* contract. Leigh *v.* American, etc. Co., 205 Ill. 147 (1903). A building corporation being sued for breach of its contract to keep property insured cannot set up that it had no power to insure. Chicago Bldg. Soc. *v.* Crowell, 65 Ill. 453 (1872). A bank may establish a savings department and may pay interest on the savings deposits, and may assign in trust cer-

provided the state and the stockholders and creditors do not object. In the case of railroads the courts are more strict. The public are interested in the acts and operations of railroads. Hence, ordinarily, the courts will not sustain the acts of railroads in selling, leasing, or

tain securities to secure such deposits. Ward *v.* Johnson, 95 Ill. 215 (1880). Having enjoyed the benefits of a contract, a corporation cannot refuse payment of the amount due on the plea of *ultra vires.* So held where a brewing company took a lease of a saloon. Heims Brewing Co. *v.* Flannery, 137 Ill. 309 (1891). Inasmuch as a national bank cannot transact business until authorized so to do by the comptroller of the currency, a lease made before such consent is void, and the only recovery can be for use and occupation. McCormick *v.* Market Nat. Bank, 162 Ill. 100 (1896). A building association having statutory power to purchase land on which it has a lien has no power to purchase land upon which it has no lien, and hence the association cannot be held liable for a deficiency in the foreclosure of a mortgage which rested upon such property, when purchased by the association and which the association assumed, it being shown also that the transaction had not been authorized by the board of directors, but that on the contrary they repudiated it. National, etc. Assoc. *v.* Home, etc. Bank, 181 Ill. 35 (1899). A corporation organized to carry on the brewing business and to manufacture and sell soda water may rent a place for a "saloon," inasmuch as such "saloon" may be to sell soda water only. Brewer, etc. Co. *v.* Boddie, 181 Ill. 622 (1899). A brewing company cannot become surety on an appeal bond, even though thereby it continues to sell beer to the appealing party. The company is not liable. Best, etc. Co. *v.* Klassen, 185 Ill. 37 (1900). The plea of *ultra vires* may be interposed in a collateral proceeding only when the corporation has performed an act which it is not under any circumstances authorized to perform, even in part. Rector *v.* Hartford Deposit Co., 190 Ill. 380 (1901). A second mortgagee cannot complain that the first mortgage has been purchased *ultra vires* by a corporation. Daniels *v.* Belvidere, etc. Assoc., 193 Ill. 181 (1901). A water-power corporation organized under a special act of the legislature by which the various owners of riparian rights and of the dam and of the water-power therefrom became interested in such company, no stock being issued, but each owner of water-power being entitled to one vote, cannot maintain suit against a city for diverting the water where the title to the water rights was not vested in the corporation, the business of the corporation being to maintain the dam and raceways and preserve the water-power, the expense being paid by assessment. Elgin, etc. Co. *v.* City of Elgin, 194 Ill. 476 (1902). A company organized to deal in pneumatic bells is not liable for the price of mica washers delivered to it on its contract to pay for the same. Chicago, etc. Co. *v.* Jones, etc. Co., 91 Ill. App. 547 (1899).

Indiana: Even though a person loaning money on the bonds and mortgage of a corporation knows that the money is to be used for an *ultra vires* purpose, yet he may enforce the same. Wright *v.* Hughes, 119 Ind. 324 (1889). Where a lumber company becomes surety on the bond of a contractor against mechanics' liens on a building which he is about to build and for which the company is to furnish the lumber, the defense of *ultra* vires is not good. G. F. Wittmer, etc. Co. *v.* Rice, 23 Ind. App. 586 (1900). See also §§ 774, 775, *infra.* A person loaning money to a corporation on

mortgaging their property, or engaging in any outside business, unless the public assent through the legislature. But as to the ordinary private corporation the rules of *ultra vires* have been greatly relaxed.

Second, the decision in any particular case turns largely on the

its note may collect it, even though he knew the money was to be used for an *ultra vires* purpose, provided he did not take part in such use, and such use was not made a condition of the loan. Marion, etc. Co. *v.* Crescent, etc. Co., 27 Ind. App. 451 (1901).

Iowa: Where the charter of an insurance company authorizes it to insure against burglary, and it does so, it cannot defend against a loss on the ground that such insurance was *ultra vires*. Bankers', etc. Co. *v.* First Nat. Bank, 131 Iowa, 456 (1906). An *ultra vires* act cannot be set aside by a stockholder unless it works a substantial injury, where it cannot be set aside by the corporation itself. Wisconsin Lumber Co. *v.* Greene, etc. Co., 127 Iowa, 350 (1904). When the corporation sues on a contract assigned to it, its want of power to take the assignment must be proved by the defendant. Wardner, etc. Co. *v.* Jack, 82 Iowa, 435 (1891). Where the statute requires gas and electric-light franchises to be voted on by the people, an electric-light company is not liable in damages for failure to supply the number of lights called for by its contract with the city, where the people had not voted on the franchise. Even though the city had paid for lights furnished, this is the rule. Keokuk *v.* Ft. Wayne Elec. Co., 90 Iowa, 67 (1894). A mutual insurance company cannot take insurance from a stockholder on a premium paid. In case of a loss the company may defend on that ground. *In re* Mutual, etc. Ins. Co., 107 Iowa, 143 (1899). An insurance company cannot defend against a policy on the ground that the assessments called for by the policy were lower than was allowed by the charter of the company. Watts *v.* Equitable, etc. Assoc., 111 Iowa, 90 (1900).

Kansas: Ultra vires cannot be proved under a plea of the general issue. Royal Fraternal Union *v.* Crosier, 70 Kan. 85 (1904). A townsite company may be liable for the contract of its general agent with a store-keeper guaranteeing that a railroad would be constructed to the town site within a certain time. Arkansas Valley, etc. Co. *v.* Lincoln, 56 Kan. 145 (1895). A foreign corporation authorized by its charter to do certain business, may transact that business in another state, even though the statutes of such state do not authorize incorporation for that purpose, the purpose itself being legal. Haskins *v.* Kelly, 93 Pac. Rep. 605 (Kan. 1908). An opera house company which has taken stock in a building association, in order to obtain a loan, cannot repudiate the loan on the ground that it was not authorized to take such stock. Blue, etc. Co. *v.* Mercantile, etc. Assoc., 53 Pac. Rep. 761 (Kan. 1898). In the case of City of Kansas City *v.* Wyandotte, etc. Co., 9 Kan. App. 325 (1900), the court said: "The plea of *ultra vires*, when interposed for or against a corporation, ought not to be permitted to prevail when it would not advance justice," and the court applied this rule to the defense of a city against a gas bill. A corporation organized to do a real estate business may act as agent in taking charge of real estate, collecting rents, etc. Neosho, etc. Co. *v.* Hannum, 10 Kan. App. 499 (1900).

Kentucky: Even though a manufacturing company has no charter power to manufacture brushes, yet if it buys machinery and stock for that purpose it cannot refuse to pay the price. Albin Co. *v.* Commonwealth, 108 S. W. Rep. 299 (Ky. 1908). Warehouse re-

questions of who is complaining; against whom the complaint is made; and what relief is sought. The stockholder's action is looked upon most favorably if he is not guilty of delay. But an action by the state to enjoin the act or to forfeit franchises is an unusual,

ceipts issued by a glass manufacturing company do not create a lien on the property mentioned in the receipts. Bell, etc. Co. *v.* Kentucky, etc. Co., 48 S. W. Rep. 440 (Ky. 1898); s. c., 106 Ky. 7. A gas company organized to carry on business under a specified contract with a city has power to accept a new franchise in lieu thereof. Keith *v.* Johnson, 109 Ky. 421 (1900). A corporation cannot hold its agent liable for money which it paid him to buy articles which it had no power to buy, the goods having been delivered. Louisville, etc. Co. *v.* Stewart, 70 S. W. Rep. 285 (Ky. 1902).

Louisiana: Even though a corporation acts as auctioneer illegally, yet it cannot refuse to pay over to a customer money received by it on a sale of goods. Lyon, etc. Co. *v.* Stern, etc., 110 La. 473 (1903). The state may enjoin a foreign railroad company from carrying on the warehouse business, except so far as the same is incidental to the railroad business, the charter of such company not including warehouse business as a business in itself. State *v.* Southern, etc. Co., 52 La. Ann. 1822 (1900).

Maryland: In the case Maryland Trust Co. *v.* National Mechanics' Bank, 102 Md. 608 (1906), the court held that an *ultra vires* act is not necessarily an illegal act and will often be upheld by the courts. A contract by a packet company to pay for harbor improvements is *ultra vires* and not enforceable. Abbott *v.* Baltimore, etc. Co., 1 Md. Ch. 542 (1850).

Massachusetts: A corporation organized to manufacture and sell printing presses may, in making a sale, agree not to sell similar presses to any one else. New York, etc. Co. *v.* Kidder, etc. Co., 192 Mass. 391 (1906). A publishing corporation in selling its business may sell the use of its name. Lothrop, etc. Co. *v.* Lothrop, etc. Co., 191 Mass. 353 (1906). City Hotel *v.* Dickinson, 72 Mass. 586 (1856), holds that a hotel company may let a part of its building for shops. A ferry company having a surplus boat may rent it. Brown *v.* Winnisimmet Co., 93 Mass. 326 (1865). A company engaged in manufacturing and selling glass may purchase glass in order to keep up its stock. Lyndeborough Glass Co. *v.* Massachusetts Glass Co., 111 Mass. 315 (1873). In Dupee *v.* Boston Water Power Co., 114 Mass. 37 (1873), the sale by the company of surplus land, receiving in payment stock of the corporation itself, was upheld as against a dissenting stockholder's action. A bank which has bought in property on a foreclosure sale, with a secret agreement that it will hold the property in trust for certain purposes, cannot repudiate the trust on the ground that it is *ultra vires.* Whitney *v.* Leominster Sav. Bank, 141 Mass. 85 (1886). A manufacturing corporation which runs a store and sells goods may collect for goods thus sold, though the sales were made by its undisclosed agent. Slater Woollen Co. *v.* Lamb, 143 Mass. 420 (1887); Chester Glass Co. *v.* Dewey, 16 Mass. 94 (1819). Stockholders cannot enjoin an *intra vires* act on the ground that it was promised that the corporation would not enter into that act. Converse *v.* Hood, 149 Mass. 471 (1889). Although the charter of a water-works company limits the amount of property which it may hold, yet, if it holds a greater amount, a municipality cannot condemn the property on the basis of the charter limit. Only the state can object that the company

extraordinary, and somewhat harsh remedy, and is not favored by the courts. So, also, an action by the corporation itself, or by the party

holds more property than is allowed by law. West Springfield *v.* West Springfield Aqueduct Co., 167 Mass. 128 (1896). The general incorporating law of Massachusetts, which does not allow incorporation for manufacturing liquor, does not prevent incorporation for selling liquor, and hence a foreign corporation may sell liquor in that state. Enterprise, etc. Co. *v.* Grimes, 173 Mass. 252 (1899).

Michigan: A person who has taken from a corporation an exclusive right to manufacture under a patent, and has so manufactured, cannot defeat an action for the royalties agreed upon for the goods already manufactured by alleging that the contract was *ultra vires.* Hall Mfg. Co. *v.* American, etc. Co., 48 Mich. 331 (1882). A person having sold and partly delivered an article to a corporation which the corporation had no right to purchase may refuse to complete delivery, and may sue for the part delivered. Day *v.* Spiral, etc. Co., 57 Mich. 146 (1885). A subscriber or donator of money to a factory cannot prevent its moving away if it is a losing enterprise. Ayres *v.* Dutton, 87 Mich. 528 (1891). A corporation that has purchased a judgment and collected it cannot refuse to pay the vendor of the judgment on the ground of *ultra vires.* Clement, etc. Co. *v.* Michigan, etc. Co., 110 Mich. 458 (1896). Where a corporation organized to do a jewelry business is really a scheme to carry on an illegal and fraudulent investment business, a person defrauded may file a bill in equity to hold the corporation and its officers and stockholders personally liable and enjoin them from disposing of the assets and for discovery. Edwards *v.* Michigan, etc. Co., 132 Mich. 1 (1902).

Minnesota: The admission that a contract was executed by a corporation is an admission that the corporation had power to make it, and the officer had power to sign it. Bausman *v.* Credit Guarantee Co., 47 Minn. 377 (1891). A corporation organized to improve a river for driving logs cannot itself drive logs or collect therefor. Northwestern, etc. Co. *v.* O'Brien, 75 Minn. 335 (1899).

Mississippi: A corporation may offer a reward for the detection of criminals who have committed a crime against it. Norwood, etc. Co. *v.* Andrews, 71 Miss. 641 (1894). Although two cotton compress companies have agreed to consolidate, and have put their property in the hands of a governing committee to manage until a new charter is obtained, yet either corporation may withdraw from the arrangement, it being *ultra vires.* Greenville, etc. Co. *v.* Planters', etc. Co., 70 Miss. 669 (1893). A loan in excess of the amount allowed by charter may nevertheless be collected. Fargason *v.* Oxford, etc. Co., 78 Miss. 65 (1900).

Missouri: With the consent of all the stockholders the officers of a manufacturing company may use fuel owned by the corporation if creditors are not injured. Jorndt *v.* Reuter, etc. Co., 112 Mo. App. 341 (1905). The maker of a note to a corporation cannot defend on the ground that the corporation had no power to take it. Russell *v.* Cassidy, 108 Mo. App. 577 (1904). A coal mining and transporting corporation may purchase and use a steamboat for transporting coal. Callaway, etc. Co. *v.* Clark, 32 Mo. 305 (1862). A contract to convey land for purposes of speculation to a company in consideration of a certain location of a railroad was held unenforceable as against public policy. Pacific R. R. *v.* Seely, 45 Mo. 212 (1870). See also § 650, *supra.* A private party seeking to enjoin a corporation from using public property

contracted with, to repudiate an *ultra vires* act is not favored by the courts. Such an action is an attempt by a party to evade the con-

which the city has leased to such corporation cannot set up that the lessee corporation is acting *ultra vires*. Only the state or the stockholders can raise that objection. Belcher, etc. Co. *v.* St. Louis, etc. Co., 101 Mo. 192 (1890). It is *ultra vires* for a bank to allow an overdraft. Market Street Bank *v.* Stump, 2 Mo. App. 545 (1876). A pledge is not illegal though it secures a greater amount than the pledgee bank is entitled to loan to one person. McClintock *v.* Central Bank, etc., 120 Mo. 127 (1894). A trust company authorized to accept deposits and pay interest thereon has no power to accept deposits without paying interest thereon. State *v.* Lincoln Trust Co., 144 Mo. 562 (1898).

Montana: Even though a "trust" has purchased stock in a corporation, yet another stockholder cannot maintain a suit in equity to have such stock forfeited to the corporation itself. His remedy is to compel the corporation to abandon any illegal contract or connection. Hence, the mere fact that the Amalgamated Copper Company, a New Jersey corporation, has acquired a majority of the stock of a Montana copper company, as well as of other companies, is not sufficient to enable a minority stockholder in a Montana company to obtain an injunction against the voting of such stock or the paying of dividends thereon, or the directors acting as such. MacGinniss *v.* Boston, etc. Co., 29 Mont. 428 (1904). A corporation having a claim against another corporation may purchase a lien on the property of the latter corporation in order to protect its claim. Mahoney *v.* Butte Hardware Co., 19 Mont. 377 (1897).

Nebraska: A brewing corporation may become surety on a liquor dealer's bond. Horst *v.* Lewis, 103 N. W. Rep. 460 (Neb. 1905). A general denial does not raise the defense of *ultra vires*. Citizens' State Bank *v.* Pence, 59 Neb. 579 (1900).

New Jersey: If a national bank seeks to compete with a savings institution the latter may object thereto. Barrett *v.* Bloomfield Sav. Inst., 64 N. J. Eq. 425 (1903), holding also that a depositor in a savings bank may maintain a bill in equity to prevent dissolution thereof, where the purpose is to turn over the business to a trust company. While it is true that a stockholder may enjoin his company from proceeding with its business, if the objects thereof have become unattainable or illegal, yet an unconstitutional statute in Indiana forbidding the piping of natural gas to places outside of the state does not justify the suit of a stockholder in a New Jersey construction company to enjoin his company from proceeding to construct a pipe line from Indiana to Chicago. Benedict *v.* Columbus Const. Co., 49 N. J. Eq. 23 (1891). A stockholder may enjoin the company from removing the plant from the state, where the charter provides for the manufacturing to be done in the state. Stickle *v.* Liberty, etc. Co., 32 Atl. Rep. 708 (N. J. 1895). The fact that a charter authorizes a corporation to do business at a certain place outside of the state does not prevent its doing business in other states. Meredith *v.* New Jersey, etc. Co., 59 N. J. Eq. 257 (1899); aff'd, 60 N. J. Eq. 445 (1900). In a suit to enjoin a corporation from engaging in *ultra vires* business the articles of incorporation should be alleged in part at least. Trimble *v.* American, etc. Co., 61 N. J. Eq. 340 (1901). A minority stockholder cannot enjoin the company from issuing its stock in payment for the stock of other similar companies on the

tract by means of principles of law which both parties have violated or waived the benefit of. The court is not swift to grant relief in such cases.

ground that the price to be paid is excessive and that three of the directors are interested as stockholders in the other companies, where he does not prove that the price is excessive, and it appears that the stockholders will have to approve the transaction before the directors can issue the stock, and it appears also that the plaintiff owns but a very small amount of stock. Geer *v.* Amalgamated, etc. Co., 61 N. J. Eq. 364 (1901).

New York: The expense of printing and sending out a proxy and a statement of questions in dispute cannot be collected from the company, even though it was sent out by a majority of the board of directors. Lawyers', etc. Co. *v.* Consolidated, etc. Co., 187 N. Y. 395 (1907), holding, however, that the expense of printing notices of a special stockholders' meeting may be paid by the company. Under a denial by a corporation that it executed a contract, it may show that the president was not authorized to sign its name thereto, nor the secretary to attach its seal thereto. Quackenboss *v.* Globe & Rutgers, etc. Co., 106 N. Y. App. Div. 466 (1905). Where there are but two stockholders in a corporation one may contract with the other that certain profits shall belong to the latter. Giveen *v.* Gans, 91 N. Y. App. Div. 37 (1904); aff'd, 181 N. Y. 538. Where a corporation issues its stock in payment of a debt and guarantees certain dividends thereon, and afterwards repudiates the guarantee as *ultra vires*, the stockholder may return the stock and sue for the money he paid therefor. McVity *v.* Albro Co., 90 N. Y. App. Div. 109 (1904); aff'd, 180 N. Y. 554. In order to raise the question of *ultra vires* in regard to a foreign corporation, the foreign statute must be pleaded in order to bring up the powers conferred by such statute. Mason *v.* Standard, etc. Co., 85 N. Y. App. Div. 520 (1903). A lease between two Maine corporations executed in Maine and covering property in Maine, cannot be enforced in New York if it could not be enforced in Maine on account of being *ultra vires*. Bath Gas Light Co. *v.* Rowland, 84 N. Y. App. Div. 563 (1903); aff'd, 178 N. Y. 631. It is within the power of a bank to receive special deposits of bonds, etc., for safe-keeping, gratuitously and for mere accommodation, and the bank is liable for their loss by gross negligence. Pattison *v.* Syracuse Nat. Bank, 80 N. Y. 82 (1880). A corporation and stockholders agreed to turn over to defendant and others the control, but the latter were to account for rafts built. *Held*, they could not set up *ultra vires*. Each of the defendants is liable for all as to accounting. Rider Life Raft Co. *v.* Roach, 97 N. Y. 378 (1884). A lock company sued for the price of locks sold to it by a company incorporated to manufacture firearms cannot defeat the suit by setting up that the latter corporation had no power to manufacture such articles. Whitney Arms Co. *v.* Barlow, 63 N. Y. 62 (1875). One director may enjoin other directors from using corporate funds to buy liabilities of an insolvent competing concern for the purpose of suing thereon, and from paying money to prevent the rival concern getting its work done. Colles *v.* Trow, etc. Co., 11 Hun, 397 (1877). A manufacturing corporation selling a store with a guaranty of the continued patronage of its employees, or else a fixed sum as indemnity, is liable thereon. De Groff *v.* American Linen T. Co., 21 N. Y. 124 (1860). A smelting cor-

Third, if a contract or act is *ultra vires,* and has not yet been performed, either the corporation or the party contracted with may re-

poration may purchase smelting works. Moss *v.* Averell, 10 N. Y. 449 (1853). Persons who with a corporation jointly purchase property cannot defend against the price by alleging that it was *ultra vires* of the corporation to purchase. State *v.* Woram, 6 Hill, 33 (1843). In Lafond *v.* Deems, 81 N. Y. 507 (1880), a voluntary benevolent association, having been compelled to hire more room than it needed, was held to have power to fit up and let the portion not required. Temple Grove Seminary *v.* Cramer, 98 N. Y. 121 (1885), holds that a seminary of learning may let its building as a boarding-house during the summer vacation. A rural cemetery company may sell a large number of its lots although the vendee intends to resell them. Palmer *v.* Cypress Hill Cemetery, 122 N. Y. 429 (1890). A corporation organized to act as a broker in buying and selling grain is subject to the same rule as regards gambling contracts that individuals are. Peck *v.* Doran, etc. Co., 57 Hun, 343 (1890). Power to manufacture and sell goods does not give power to buy and sell goods. People *v.* Campbell, 144 N. Y. 166 (1894), a taxation case. Even if the agreement of a building association with a member is *ultra vires* in that the association agrees to pay more than it ought, yet if the member has carried out his part of the contract and made full payments, he is entitled to the amount the association has agreed to pay, the latter being "estopped from asserting its own wrong and cannot be excused from payment upon the plea that the contract was beyond its power." Vought *v.* Eastern Bldg. etc. Assoc., 172 N. Y. 508 (1902). A receiver of a savings bank may enforce a bond given to it by an individual agreeing to pay to the bank a certain sum if it would continue business, which the bank did. Hurd *v.* Kelly, 78 N. Y. 588 (1879), aff'g 17 Hun, 327 (1879). A manufacturing corporation borrowing bonds in order to use them as collateral to a loan is liable to the owner for their return. Beckwith *v.* Rochester Iron, etc. Co., 12 N. Y. Week. Dig. 528 (1881). A brewery company may guarantee the rent of a saloon-keeper who buys his beer of the company. Koehler & Co. *v.* Reinheimer, 26 N. Y. App. Div. 1 (1898). An indorser of a corporate note cannot set up that such note is *ultra vires.* Donohoe *v.* Meeker, 35 N. Y. App. Div. 43 (1898). A mining company has no power to furnish the play and performers for a theatre, and a contract to that effect cannot be enforced, even though all the stockholders, except the owner of four shares, assent thereto. Broadway, etc. Co. *v.* Dessau Co., 45 N. Y. App. Div. 475 (1899). A corporation is bound by its superintendent's employment of an undertaker to bury an employee killed in the employ of the company. Noll *v.* Archer-Pancoast Co., 60 N. Y. App. Div. 414 (1901). *Ultra vires* is an affirmative defense and must be pleaded. Keating *v.* American, etc. Co., 62 N. Y. App. Div. 501 (1901). The defense of *ultra vires* is not good unless pleaded. Hess *v.* Sloane, 66 N. Y. App. Div. 522 (1901); aff'd, 173 N. Y. 616. Where the president of a bank is acting as the agent of a person and sells to the latter securities of the bank by means of false representations, the bank is liable, even though the purchaser did not know that the sale was in behalf of the bank. Carr *v.* National Bank & L. Co., 167 N. Y. 375 (1901). In general see also p. 2072, *sub.*

North Carolina: The decision in Lewis *v.* Clyde S. S. Co., 131 N. C. 652, was reviewed on a petition for

fuse to complete the contract. No damages can be collected for such refusal. So, also, if the contract has been partly performed, and the

rehearing in 132 N. C. 904 (1903), and a new trial granted, but the court still held that *ultra vires* must be pleaded in order to be a good defense. Gruber *v.* Washington, etc. R. R., 92 N. C. 1 (1885), holds that a lumber company, in providing transportation for its product, could, as incidental to its business, carry the goods of others and also passengers.

Ohio: A corporation in acquiring the assets of a partnership may acquire a cause of action which the latter has against another corporation for negligence and may enforce such cause of action, even though it would have had no power to buy it separately from the other property. Central, etc. Co. *v.* Capital, etc. Co., 60 Ohio St. 96 (1899). A college need not obtain an amendment to its charter in order to add a new subject to its curriculum. State *v.* Hygeia, etc. College, 60 Ohio St. 122 (1899).

Oregon: A hardware company is liable for lime purchased, even though it was not organized for the purpose of dealing in that commodity. *Re* Pendleton, etc. Co., 24 Oreg. 330 (1893). A corporation may by its charter be given the power to act as an attorney in fact, and it may execute a deed as such attorney. Killingsworth *v.* Portland Trust Co., 18 Oreg. 351 (1890). A lumber manufacturing company may take an assignment of a judgment and bring suit thereon. Capital, etc. Co. *v.* Learned, 36 Oreg. 544 (1899).

Pennsylvania: A contractor who has assigned his contract to a corporation, which latter then proceeds to carry it out, is not personally liable to the employees, even though the assignment was prohibited by law and the employees may not have known for whom they were working. Patton *v.* McDonald, 204 Pa. St. 517 (1903). A stockholder may enjoin his company from doing acts forbidden by statute. Sparhawk *v.* Union Pass. Ry., 54 Pa. St. 401, 452 (1867). A corporation with power to own land and promote settlement may build saw-mills and erect a hotel. Watts's Appeal, 78 Pa. St. 370 (1875). A corporation with power to manufacture and supply gas may deal in gas appliances. Malone *v.* Lancaster, etc. Co., 182 Pa. St. 309 (1897). A corporation has no right to change the grade of its road as fixed by its charter when such change would place it in a different category under the statutes relative to railroads. Western, etc. Ry. *v.* Buffalo, etc. Ry., 193 Pa. St. 127 (1899). In a suit by a bridge company against a street railway for tolls, in accordance with a contract, the street railway cannot set up that all the stock of the bridge company has been purchased by the city and that the purchase was *ultra vires*. Monongahela, etc. Co. *v.* Pittsburg, etc. Co., 196 Pa. St. 25 (1900).

South Carolina: A building association which has obtained a subscription on an *ultra vires* agreement as to repayment is liable in a suit at law for the money so paid to it. Williamson *v.* Eastern, etc. Assoc., 54 S. C. 582 (1899).

Tennessee: A manufacturing company is liable for goods purchased by a store owned by it. Searight *v.* Payne, 6 Lea (Tenn.), 283 (1880), aff'g 2 Tenn. Ch. 175, where an iron furnace company ran a store. Where an insurance company has issued a policy which is not authorized by its charter, the policy cannot be enforced by the party who is insured. The court said in a dictum that his remedy is a suit in disaffirmance and for an accounting. Miller *v.* Insurance Co., 92 Tenn. 167 (1893). Even though an ice company purchases,

unperformed part is separable from the rest, either party may refuse to complete. But where one party has completely performed

without power so to do, beer from a brewing company, and even though it passes into a receiver's hands, yet the latter may file a petition asking in the alternative to be allowed the price, or, if the contract is disaffirmed, the value thereof. Tennessee Ice Co. *v.* Raine, 107 Tenn. 151 (1901). In this case the court said that all the authorities hold that a corporation obtaining the benefits of an *ultra vires* contract is estopped from defending against the contract on the ground that it is *ultra vires*, but that while in many of the states the corporation cannot prevent recovery on the contract according to its terms, yet that in other states the recovery is on a *quantum meruit* or on a *quantum valebat.*

Texas: A national bank cannot certify a check payable if a building contract is not performed, there being no money to respond to the check. Fidelity, etc. Co. *v.* National Bank, etc., 106 S. W. 782 (Tex. 1908). In suing to enforce a corporate contract it is not necessary to allege that the contract was within its powers. San Antonio, etc. Co. *v.* Josey, 91 S. W. Rep. 598 (Tex. 1906). The maker of a note cannot set up that the payee corporation discounted it *ultra vires.* Logan *v.* Texas, etc. Assoc., 8 Tex. Civ. App. 490 (1894). Where a corporation has taken a lease of a wharf from a city, it cannot avoid the payment of rental, after using the premises, on the ground of *ultra vires.* Corpus Christi *v.* Central, etc. Co., 8 Tex. Civ. App. 94 (1894). Where a bank has agreed to see that a vendor of feed is paid, the vendee being a depositor in the bank, and an arrangement having been made between him and the bank for such payment, the bank cannot avoid payment on the ground that its agreement was *ultra vires.* First Nat. Bank *v.* Greenville, etc. Co., 24 Tex. Civ. App. (1901). In Texas it is held that where a corporate contract is executed, and the corporation has received the benefits of it, the corporation cannot invoke its want of power as a defense to the contract. Continental, etc. Assoc. *v.* Masonic, etc. Co., 26 Tex. Civ. App. 139 (1901).

Vermont: A manufacturing company is liable for goods purchased by a store owned by it. Dauchy *v.* Brown, 24 Vt. 197 (1852). As regards the charter or corporate power to confer a degree, see Townshend *v.* Gray, 62 Vt. 373 (1890).

Virginia: A dry-dock company may, if necessary for its business, erect a breakwater and bulkhead and fill in the space. Newport, etc. Co. *v.* Jones, 105 Va. 503 (1906).

Washington: A lumber company may become surety on a building contractor's bond where it is customary for such companies so to do in order to obtain business. Wheeler, etc. Co. *v.* Everett Land Co., 14 Wash. 630 (1896). Where a corporation dealing in other goods buys clothing and uses the same to fill certain orders, it cannot then recover back the purchase price. Graton, etc. Co. *v.* Redelsheimer, 28 Wash. 370 (1902).

Wisconsin: Where a national bank completes a construction contract which has been assigned to the bank, it may collect the contract price thereof. Security, etc. Bank *v.* St. Croix, etc. Co., 117 Wis. 211 (1903). Where an insolvent creamery corporation is indebted to a bank, and the bank takes over the business and operates the creamery, agreeing to pay the patrons the entire proceeds of the product less a commission, it cannot refuse to pay over on the ground that the contract is *ultra vires.* Emigh *v.* Earling, 115 N. W. Rep. 128 (Wis. 1908). Where a river packet com-

and carried out its part of the contract, the other party cannot refuse to perform, while at the same time retaining the benefits of performance by the first named party.[1]

pany purchases grain and pays partly therefor, it may recover back the money paid, but not damages for refusal of vendor to deliver. Northwestern, etc. Co. *v.* Shaw, 37 Wis. 655 (1875). A corporation formed to make and sell beer may guarantee the rent of a customer. Winterfield *v.* Cream City B. Co., 96 Wis. 239 (1897). "The doctrine of *ultra vires* cannot be invoked by a corporation for the purpose of escaping a burden resulting from a contract so far executed that the corporation has received the benefit thereof. That most wholesome doctrine is well established." Bullon *v.* Milwaukee, etc. Co., 109 Wis. 41 (1901). Forfeiture of a water-works grant from the city will not be decreed except in a clear case and where no other punishment will adequately remedy the mischief. City of Ashland *v.* Ashland, etc. Co., 110 Wis. 94 (1901). See 116 N. W. Rep. 900.

England: A suit by a copper trading company for damages against a person who had refused to accept iron which he had agreed to purchase of the plaintiff fails. Copper Miners *v.* Fox, 16 Q. B. 229 (1851). In Simpson *v.* Westminster, etc. Co., 8 H. L. Cas. 712 (1860), a lease by a hotel company of part of its building during its completion was held valid. A company formed to work a patent may purchase it. Leifchild's Case, L. R. 1 Eq. 231 (1865). Brokers employed by directors to sell property of the corporation cannot recover damages from the directors for a failure of sale due to the vendee alleging that the directors had no power to sell, it being proved by the directors that they did have such power. Wilson *v.* Miers, 10 C. B. (N. S.) 348 (1861). Where a stockholder institutes a suit to remedy a wrong to the corporation, and while it is pending new directors are elected and they proceed to carry on the suit at the corporate expense, any dissenting stockholder may enjoin such use of the corporate funds. To allow it would be to prejudice the suit. Kernaghan *v.* Williams, L. R. 6 Eq. 228 (1868). The organization of a company to carry on the lottery business in foreign countries was held legal in Macnee *v.* Persian Corp., L. R. 44 Ch. D. 306 (1890). A corporation which holds stock in another corporation may agree to surrender a part of such stock in order to enable the latter company to proceed with its business, and such surrender is not *ultra vires.* Thompson *v.* Trustees, etc. Corp., [1895] 2 Ch. 454. Where a company has to give a bond, and the bond is given by a director, the company is liable to him. Southern Counties Dep. Bank *v.* Boaler, 73 L. T. Rep. 155 (1895). A corporation is a "person," within the meaning of a statute rendering persons liable for misrepresenting the responsibility of another party. Hirst *v.* West, etc. Co., [1901] 2 K. B. 560.

Canada: A company receiving a deposit *ultra vires* is nevertheless bound to repay it. Walmsley *v.* Rent Guarantee Co., 29 Grant Ch. (Can.) 484 (1881).

1 Speaking of *ultra vires* acts, the New York court of appeals said: "As artificial creations, they have no powers or faculties except those with which they were endowed when created; and when, as is frequently the case, they act in excess of their powers, the question will be, Is the act prohibited as prejudicial to some public interest, or is it an act not unlawful in that sense, but prejudicial to the stockholders? The rule, however, is well settled that the plea

The courts differ widely in their decisions on the enforceability of *ultra vires* contracts. The New York court of appeals, in a series of consistent and ably-reasoned decisions, has established the rule in that state that an *ultra vires* contract is enforceable if there has been part performance and the stockholders have not objected and the creditors have not been injured.[1] The New York court says that "that kind of plunder which holds on to the property, but pleads the doctrine of *ultra vires* against the obligation to pay for it, has no recognition or support in the law of this state." [2]

Practically the same conclusion has been reached in Massachusetts [3] and Wisconsin.[4]

In the federal courts, on the contrary, the old rule against *ultra vires* contracts is upheld in all its rigor and applied with all its severity. The tendency of modern jurisprudence to relax on that subject finds no favor in the federal courts.[5] Even in the federal courts,

of *ultra vires* should not prevail when it would not advance justice, but on the contrary would accomplish legal wrong." Leslie *v.* Lorillard, 110 N. Y. 519 (1888). See also discussion in Camden, etc. R. R. *v.* May's Landing, etc. R. R., 48 N. J. L. 530 (1886); Martin *v.* Niagara, etc. Co., 122 N. Y. 165 (1890).

1 Whitney Arms Co. *v.* Barlow, 63 N. Y. 62 (1875); Martin *v.* Niagara, etc. Co., 122 N. Y. 165 (1890); Bath Gas Light Co. *v.* Claffy, 151 N. Y. 24, 29–34, 37 (1896), per Andrews, Ch. J., reviewing many cases, discussing the subject in an able and exhaustive manner, and holding that past-due rent may be recovered on an *ultra vires* lease.

2 Seymour *v.* Spring Forest Cem. Assoc., 144 N. Y. 333, 341 (1895); s. c., 157 N. Y. 697. Quoted and approved in Watts Mercantile Co. *v.* Buchanan, 46 S. Rep. 66 (Miss. 1908). An article on the legal effect of an *ultra vires* lease is found in 14 Harvard Law Rep., p. 332 (1901).

3 Chief Justice Bigelow, in Brown *v.* Winnisimmet Co., 93 Mass. 326, 334 (1865), said: "We know of no rule or principle by which an act creating a corporation for certain specific objects, or to carry on a particular trade or business, is to be strictly construed as prohibitory of all other dealings or transactions not coming within the exact scope of those designated." In Nims *v.* Mount Hermon Boys' School, 160 Mass. 177 (1893), the court said that an *ultra vires* contract not yet executed will not be enforced by the courts; but, "on the other hand, courts have frequently held that while such contracts, considered merely as contracts, are invalid, they involve no such element of moral or legal wrong as to forbid their enforcement, if there has been such action under them as to work injustice if they are set aside. Courts have been astute to discover something in the nature of an equitable estoppel against one who, after entering into such a contract, and inducing a change of condition by another party, attempts to avoid the contract by a plea of *ultra vires*. It is said that such a plea will not avail when to allow it would work injustice and accomplish legal wrong." The court, however, declined to pass upon this principle of law.

4 The old rule of *ultra vires* has been changed so that now only the state or a party interested in the corporation can complain. Farwell Co. *v.* Wolf, 96 Wis. 10 (1897).

5 "The doctrine of *ultra vires*, by

however, if property or services have been received by a corporation *ultra vires*, a suit based on *quantum meruit* will lie.[1]

which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void, and will not support an action, rests, as this court has often recognized and affirmed, upon three distinct grounds: the obligation of any one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subject to risks which they have never undertaken; and, above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law." McCormick *v.* Market Bank, 165 U. S. 538, 549 (1897). See also the cases in the notes *supra*. "A railroad corporation, unless authorized by its act of incorporation or by other statutes so to do, has no power to guarantee the bonds of another corporation; and such a guaranty, or any contract to give one, if not authorized by statute, is beyond the scope of the powers of the corporation, and strictly *ultra vires*, unlawful and void, and incapable of being made good by ratification or estoppel." Louisville, etc. Ry. *v.* Louisville Trust Co., 174 U. S. 552, 567 (1899). In Salt Lake City *v.* Hollister, 118 U. S. 263 (1886), the court said that in cases of *ultra vires* contracts, upon which corporations could not be sued, "the courts have gone a long way to enable parties who had parted with money and property on the faith of such a contract to obtain justice by recovery of the property or the money specifically, or as money had and received to the plaintiff's use." In a dictum in Jacksonville, etc. Nav. Co. *v.* Hooper, 160 U. S. 514, 524 (1896), the court emphasized the statement that no estoppel or part performance can sustain a contract that is forbidden by a charter or is contrary to public policy. See also Oregon Ry. etc. Co. *v.* Oregonian Ry., 130 U. S. 1 (1889); Pennsylvania R. R. *v.* Keokuk, etc. Co., 131 U. S. 371, 384, 389 (1889). "Every public grant of property, or of privileges or franchises, if ambiguous, is to be construed against the grantee and in favor of the public," and especially so as regards corporations organized under general laws. Central Transp. Co. *v.* Pullman's Palace Car Co., 139 U. S. 24, 49 (1891). A national bank which has taken as security for a debt and then acquired shares of stock in an unincorporated association, formed for speculative purposes, is not liable on said stock, its acquisition having been *ultra vires*. Merchants' National Bank *v.* Wehrmann, 202 U. S. 295 (1906). A national bank which is a creditor of an insolvent manufacturing company has no power to join in a reorganization plan by which it turns over its claim to a new corporation and takes stock of the new corporation in payment therefor, and hence if the new corporation fails the bank is not liable as a stockholder on a statutory double liability attaching to such stock. First National Bank *v.* Converse, 200 U. S. 425 (1906). Where a New York building association has agreed to return a member's money on a specified date, it cannot set up that the agreement is *ultra vires* when sued therefor. Eastern Building Ass'n *v.* Williamson, 189 U. S. 122 (1903). The rule that the charter of a corporation is to be construed strictly against the grantee does not apply to a case where the corporation seeks to repudiate contracts whereof it has enjoyed the benefits, or where such contracts are attacked by creditors after the corporation becomes insolvent. Tod *v.* Kentucky Union Land Co., 57 Fed. Rep. 47 (1893); rev'd on another point in Marbury *v.* Kentucky, etc. Co., 62 Fed. Rep. 335 (1894).

1 Richmond, etc. Co. *v.* Farmers', etc. Co., 126 Fed. Rep. 712 (1903).

§ 682. *Personal liability of the directors and officers for ultra vires acts.*—There can be no doubt that, if the directors or officers of a company do acts clearly beyond their power, whereby loss ensues to the company, or dispose of its property or pay away its money without authority, they may be required to make good the loss out of their private estates.[1] Directors and officers have been held personally liable for libel published by the company;[2] for infringement of trade-mark;[3] for loaning money in violation of the charter;[4] for exacting illegal rebates from a railroad;[5] for

1 North Hudson, etc. Assoc. *v.* Childs, 82 Wis. 460 (1892), citing Thompson, Liab. Off. 375, § 16; Joint Stock Discount Co. *v.* Brown, L. R. 8 Eq. 381 (1869); *Re* Exchange Banking Co., L. R. 21 Ch. D. 519 (1882); Franklin F. Ins. Co. *v.* Jenkins, 3 Wend. 130 (1829). See also the cases in § 702, *infra.*

2 See § 15*b*, *supra.*

3 A director who votes in favor of a resolution that the agents of a company manufacture and sell an infringing article is liable personally for such infringement, even though he acted in good faith and did not know that an infringement would be the result. National, etc. Co. *v.* Leland, 94 Fed. Rep. 502 (1899). An officer is not personally liable for an infringement by the corporation, unless it is insolvent or it is a mere dummy to protect others. Loomis, etc. Co. *v.* Manhattan, etc. Co., 117 Fed. Rep. 325 (1902). The directors of a corporation may be included as parties defendant in a bill against the corporation for infringement of a trade-mark. They may be held liable so far as they took part in the infringement. Armstrong *v.* Savannah Soap Works, 53 Fed. Rep. 124

4 See § 690, *infra.* Where directors of an insurance company loan its money in violation of statutory requirements, its receiver may hold them liable therefor. New Haven T. Co. *v.* Doherty, 75 Conn. 555 (1903). A director who does not attend a meeting is not liable for a loan made to an officer in violation of the charter. Thomas *v.* Penniman, 66 Atl. Rep. 291 (Md. 1907). A national bank may hold its officers liable for making loans to an individual in excess of ten per cent. of the capital stock and also for making other loans in violation of the statutes, and such suit may be in equity where the transactions are complicated. The statute of limitations does not begin to run until such officers have gone out of office. National Bank, etc. *v.* Wade, 84 Fed. Rep. 10 (1897). A stockholder in a bank may sue to compel the president to restore $45,000 which he caused the bank to loan without security, the money being used to pay a debt due to the president himself. Wickersham *v.* Crittenden, 93 Cal. 17 (1892).

5 Where a corporation secures a rebate from a railroad company, not only on shipments made by it, but on shipments made by other parties, the active agents of such corporation receiving such moneys may be held personally liable to other shippers for such money. The court said that inasmuch as the company "was organized by the promoters, the defendants, simply for the purpose of consummating the illegal agreement, and shielding themselves from the consequences of receiving the illegal exactions made under it, the act of incorporating can be of no avail to them as a defense." Brundred *v.* Rice, 49 Ohio St. 640 (1892).

false representations;[1] for borrowing in excess of the company's

(1892); St. Louis Stamping Co. *v.* Quinby, 5 Ban. & Ard. 275 (1880); Goodyear *v.* Phelps, 3 Blatchf. 91 (1853); s. c., 10 Fed. Cas. 711; Smith *v.* Standard, etc. Co., 19 Fed. Rep. 826 (1883); Nichols *v.* Pearce, 7 Blatchf. 5 (1869); s. c., 18 Fed. Cas. 204. The directors and officers of a corporation which has infringed upon a patent cannot be held personally liable for the profits of such infringement. Mergenthaler, etc. Co. *v.* Ridder, 65 Fed. Rep. 853 (1895), reviewing the cases. A general agent of an infringing company is personally liable. Cramer *v.* Fry, 68 Fed. Rep. 201 (1895). A judgment against a corporation as to the infringement of a patent is not binding on the stockholders in subsequent suits against them, even though they were present at the trial and testified. Wilgus *v.* Germain, 72 Fed. Rep. 773 (1896). The officers, stockholders, and agents of a corporation may be enjoined from infringing a patent, even though the corporation itself is not within the jurisdiction of the court. Edison, etc. Co. *v.* Packard Elec. Co., 61 Fed. Rep. 1002 (1893), holding also that they are liable personally.

1 See chs. IX and XX, *supra.* Individuals who own several railroads and consolidate them and issue bonds thereon, with a false and fraudulent statement that the bonds cover certain timber lands, are liable personally to the bondholders. O'Beirne *v.* Bullis, 158 N. Y. 466 (1899). A person who buys stock in a national bank relying on a report of the condition of the bank signed by directors, in accordance with the acts of congress, may hold the directors so signing the report personally liable in damages if it transpire that the report was absolutely false and that the stock was worthless, but he cannot hold liable the directors who did not sign the report. Gerner *v.* Mosher, 58 Neb. 135 (1899). See also Stuart *v.* Bank of Staplehurst, 57 Neb. 569 (1899). Where the president of a bank has been held liable in damages for deceit in inducing a person to purchase stock from the bank, he cannot compel the bank to reimburse him, on the ground that the bank had obtained the benefit of the act. Trimble *v.* Exchange Bank, 62 S. W. Rep. 1027 (Ky. 1901). A stockholder may hold the directors liable for false representations inducing him to loan money to the company where they told him that the company was solvent, when in fact it was insolvent, and they knew it so to be. Kinkler *v.* Junica, 84 Tex. 116 (1892). A director may buy stock from a stockholder at less than its real value, and there is no fraud in the fact that the director knew the real value while the stockholder did not. Crowell *v.* Jackson, 53 N. J. L. 656 (1891). See also § 320, *supra.* A stockholder cannot hold a director liable for the stock becoming worthless by reason of the fact that the director and others sold their stock, amounting to three-fourths of the stock, to the Cotton Seed Oil Trust, and that the trust then dissolved the corporation by a three-fourths vote as allowed by statute, although the director as such voted for the dissolution. Trisconi *v.* Winship, 43 La. Ann. 45 (1891). For a complaint seeking to hold national bank directors liable for the loss of money deposited, the deposit being induced by erroneous and fraudulent advertisements and reports as to the condition of the bank, see Prescott *v.* Haughey, 65 Fed. Rep. 653 (1895). A depositor, suing the directors of a bank for false statements inducing him to deposit in the bank, must allege that but for such statements he would have withdrawn his deposit before the failure. Brady *v.* Evans, 78 Fed. Rep. 558 (1897). Where a stockholder receives an offer for his stock and is persuaded not to sell by

power;[1] for accepting bills without authority;[2] or contracting for the corporation when they had no authority so to do.[3] They may be liable for maintaining a nuisance.[4] In an early and important case Chancellor Walworth sustained a stockholder's action to hold the corporate directors liable for corporate funds lost by speculation in the stocks of other corporations.[5] Where a bank holds stock as collateral, and on sale purchases the same, the stock being in a coal company, it should sell the stock within a reasonable time. If it continues to hold it and a large loss results, the president is personally liable.[6] Directors who waste the funds of the company in purchasing the worthless stock of another corporation, are personally liable to a receiver for the amount so expended.[7] The directors may be liable for causing the railroad company to purchase the stock of another railroad company, but the six years' statute of limitations is a bar to a stockholder's suit to hold them liable, no fraud being alleged.[8] The directors are personally liable where they advance corporate funds to the vendee of stock of the company in order to enable him to purchase the stock.[9]

Directors who knowingly authorize the issue of watered stock are

fraudulent representations of a director, he may hold the latter liable in damages. Rothmiller *v.* Stein, 143 N. Y. 581 (1894).

1 See ch. XLVI, *infra*.

2 See ch. XLVI, *infra*.

3 An officer who signs the corporate name to a contract to bear part of the expense of a suit is personally liable therefor if he had no authority so to do. Solomon *v.* Penoyar, 89 Mich 11 (1891). Officers incur no personal liability when avowedly contracting on behalf of the company. Beeson *v.* Lang, 85 Pa. St. 197 (1877).

4 See § 15*b*, *supra*. Persons who are maintaining a nuisance in the way of a dam continue to remain liable if they sell it to a corporation which continues to maintain it, they being officers of the corporation. Karns *v.* Allen, 115 N. W. Rep. 357 (Wis. 1908). The directors of a corporation organized to deal in hardware, merchandise, and powder are personally liable for damages due to an explosion of powder illegally stored in its warehouse, even though the directors did not know of the same, it being shown that if they had exercised ordinary diligence they would have known of it. Cameron *v.* Kenyon-Connell, etc. Co., 22 Mont. 312 (1899).

5 Robinson *v.* Smith, 3 Paige, Ch. 222 (1832). See also Combination Trust Co. *v.* Weed, 2 Fed. Rep. 24 (1880); Hardon *v.* Newton, 14 Blatchf. 376 (1878); s. c., 11 Fed. Cas. 500; Smith *v.* Rathbun, 22 Hun, 150 (1880). *Cf.* Land Credit Co. *v.* Fermoy, L. R. 5 Ch. App. 763 (1870), rev'g L. R. 8 Eq. 7, where some of the directors used corporate funds to "rig the market," *i. e.* to purchase and thereby sustain the market price of the stock. Officers are liable for losses due to speculating in grain. Hingston *v.* Montgomery, 97 S. W. Rep. 202 (Mo. 1906).

6 Stone *v.* Rottman, 183 Mo. 552 (1904).

7 Bowers *v.* Male, 186 N. Y. 28 (1906).

8 Whitwam *v.* Watkin, 78 L. T. Rep. 188 (1898).

9 Green *v.* Hedenberg, 159 Ill. 489

liable therefor to the company,[1] but they are not liable to corporate creditors who are not injured or defrauded thereby, it appearing that the corporate assets were not decreased by the transaction.[2] Directors are not personally liable for damages due to negligence on the part of the corporation.[3] A director is not liable for failure to institute legal proceedings to set aside the *ultra vires* acts of other directors.[4] The directors of a national bank may be liable for money spent by the bank in operating a mill in which the bank had an interest.[5] Where the directors, upon an increase of the capital stock, issue a part of the stock for worthless notes, the directors, upon the bank becoming insolvent, are liable to the receiver for the par value of such stock, unless they can show the stock could not have been otherwise issued or sold.[6] Where the directors of a business corporation accept paper in its name for accommodation, they are personally

(1896). Where the treasurer uses the funds of the corporation to pay for stock in the corporation itself, which he and other stockholders have purchased, he may be compelled, upon corporate insolvency, to refund the money, even though he took the funds from the treasury with the consent of all the stockholders. *Re* Brockway Mfg. Co., 89 Me. 121 (1896).

1 London Trust Co. *v.* MacKenzie, 68 L. T. Rep. 380 (1893), the court saying, however: "If, acting fairly, honestly, and reasonably, directors mistake the legal powers of the company, they may not be made answerable; but if they in fact know, or with due care ought to have known, that the acts done are beyond the powers of the company, then, if they do those acts even in the honest belief of necessity in the interests of the company, they take the risk of the consequences." Where the directors issue stock to a mining expert at ninety cents on the dollar in consideration of an examination and report by him, they are liable to the company for the remaining ten cents on the dollar, but not for surplus value which the stock afterwards acquired. Hirsche *v.* Sims, [1894] A. C. 654.

2 Great Western, etc. Co. *v.* Harris, 128 Fed. Rep. 321 (1903); aff'd, 198 U. S. 561. See also ch. III, *supra.*

3 Demarest *v.* Flack, 128 N. Y. 205 (1891). A director is not personally liable for the negligence of the corporation in the construction of a building where he did not personally take part, even though it is alleged that an incompetent man was put in charge. Henry *v.* Brackenridge Lumber Co., 48 La. Ann. 950 (1896). See also § 724, *infra.* The directors of amusement company are not personally liable, although they are a committee having charge of the construction of a general stand that falls and injures a person. Van Antwerp *v.* Linton, 89 Hun, 417 (1895); aff'd, 157 N. Y. 716. The directors are not personally liable for damages due to the negligence of a person employed by them to give a fireworks exhibition for the corporation. Bianki *v.* Greater, etc. Co., 92 N. W. Rep. 615 (Neb. 1902).

4 *Re* Lands Allotment Co., [1894] 1 Ch. 616.

5 Cockrill *v.* Abeles, 86 Fed. Rep. 505 (1898).

6 Cockrill *v.* Abeles, 86 Fed. Rep. 505 (1898). Even though the stockholders of a bank assent to notes being accepted in payment of subscriptions, yet a receiver may hold the directors liable therefor. Coddington *v.* Canaday, 157 Ind. 243 (1901).

liable for payments made or liabilities incurred on such paper.[1] And where an officer causes a manufacturing company to indorse, for accommodation, the note of a party, all of whose goods it purchases, he is not personally liable to the former company unless it is proved that the directors and stockholders were ignorant thereof and hence did not acquiesce therein.[2] The directors are not personally liable for errors of judgment.[3] But the stockholders may sue the directors for gross mismanagement and for damages where fraudulent mortgages have been placed by them on the corporate property.[4] The president executing an ordinary guaranty in the name of the corporation without authority is personally liable thereon.[5] But where a bank has no power to make a guaranty, the officer signing the bank's name to such guaranty is not personally liable thereon.[6] A corporate agent who signs the corporate name to a note without authority is liable personally thereon.[7] An officer making a corporation note without authority is personally liable thereon.[8] The directors are not personally liable for attorney fees for services rendered in a voluntary dissolution of the company.[9] A director is not personally liable in damages to a property owner over whose premises the company's road runs without warrant.[10]

Various instances of the liability of directors and stockholders are given in the notes below.[11]

1 Hutchinson *v.* Sutton Mfg. Co., 57 Fed. Rep. 998 (1893). A corporate officer who issues its notes as an accommodation, a small commission being paid to him, is liable to the corporation therefor. Shepard *v.* Morgan, 123 N. Y. App. Div. 128 (1908).

2 Willard *v.* Holmes, 142 N. Y. 492 (1894).

3 Symmes *v.* Union Trust Co., 60 Fed. Rep. 830 (1894).

4 Landis *v.* Sea Isle, etc. Co., 53 N. J. Eq. 654 (1895).

5 Nelligan *v.* Campbell, 20 N. Y. Supp. 234 (1892).

6 Thilmany *v.* Iowa, etc. Co., 108 Iowa, 357 (1899).

7 Frankland *v.* Johnson, 147 Ill. 520 (1893). Where the president of a bank performs an act which he had no power to perform, he does not bind the bank, neither is he personally liable where he made no misrepresentations. First Nat. Bank *v.* Commercial Nat. Bank, 87 S. W. Rep. 1032 (Tex. 1905).

8 Miller *v.* Reynolds, 92 Hun, 400 (1895). Where two of the officers of a corporation employ a broker to sell its assets at a certain price, and he finds a purchaser, they are liable for his commissions, if the corporation does not accept the price. Norman *v.* Hopper, 38 Wash. 415 (1905).

9 Drew *v.* Longwell, 81 Hun, 144 (1894). Directors are not personally liable for a lawyer's fees in a suit which he defends for a corporation. Davis *v.* Trimble, 76 Ark. 115 (1905). The oral agreement of the president of a corporation to pay the attorney's fees and expenses of a person who is negotiating for a contract with the corporation is enforceable against the president personally. Manary *v.* Runyon, 43 Ore. 495 (1903).

10 Lamming *v.* Galusha, 81 Hun, 247 (1894); aff'd, 151 N. Y. 648, where it was also claimed that the incorporation had been insufficient.

11 A stockholder cannot secure a transfer from the corporation to him-

But directors are not liable for honest mistakes as to the legal ex-

self of the property of the corporation so as to deprive a corporate creditor of the payment of his debt. Where he does so through legal proceedings fraudulently and by conspiracy, the property may be reached. Angle *v.* Chicago, etc. Ry., 151 U. S. 1 (1894). The agreement of a corporation on selling its property not to engage in the same business, does not prevent one of its officers and stockholders engaging in that business, and the stockholders are not individually liable or subject to an injunction because of unfair competition practiced by the corporation. Hall's, etc. Co *v.* Herring, etc. Co., 146 Fed. Rep. 37 (1906). Officers of a trust company who mingle with the funds of the company moneys which they collect under instructions to remit to the owner are personally liable therefor. Sweet *v.* Montpelier, etc. Co., 73 Kan. 47 (1906). Where money is converted by a corporation, not only is the corporation liable, but the officers and agents participating in the act are personally liable. Sweet *v.* Montpelier, etc. Co., 69 Kan. 641 (1904). Directors are personally liable on a corporate note which they induced the holder to purchase by false representations, and the proceeds of which they took. Daniel *v.* Glidden, 38 Wash. 556 (1905). The president and cashier of a bank are not personally liable even though as officers they refuse to cash a check which is drawn on the bank and should have been paid. Penney *v.* Bryant, 70 Neb. 127 (1903). Where the officers of an insurance company represent that it has authority to take a certain policy and a loss occurs, and the company repudiates the policy on the ground of want of power, they may be held liable. Harris-Emery Co. *v.* Pitcairn, 122 Iowa 595 (1904). A director's liability at common law in a national bank for mismanagement or misfeasance can be recovered only by the bank or for the benefit of all stockholders. Yates *v.* Jones Nat. Bank, 105 N. W. Rep. 287 (Neb. 1905). The directors of a banking corporation are not liable to its creditors for violation or neglect of duty, there being no deceit. Hart *v.* Hanson, 14 N. Dak. 570 (1895). Directors of a national bank are at common law liable for false reports to any party injured thereby. Yates *v.* Jones Nat. Bank, 105 N. W. Rep. 287 (Neb. 1905). The treasurer may be liable in an action for fraud and deceit to a purchaser of stock who bought relying on false statements made by him to the public as to profits. Keeler *v.* Seaman, 47 N. Y. Misc. Rep. 292 (1905). The fact that coupons are payable in the order of their numbers and only from money as it comes in, does not render the bonds or coupons illegal, and the officers are not personally liable therefor. Vokes *v.* Eaton, 119 Ky. 913 (1905). A manager may be liable for money embezzled by the secretary where the manager continued him in office after he was aware of the facts. Johnson *v.* Stoughton, etc. Co., 118 Wis. 438 (1903). Where the statute provides for raising funds for a mutual insurance company by assessments, the bond of the directors to advance $100,000 to the company as needed is *ultra vires* and unenforceable. Goss *v.* Peters, 98 Mich. 112 (1893). In Beach *v.* Cooper, 72 Cal. 99 (1887), in a stockholder's suit to hold officers liable for paying $315,000 for a few months' loan of $140,000, the court held that the act was not a fraud *per se*, and that it was possible that the directors might explain it. See § 738, *infra*. A consignor of goods to a corporation to sell cannot hold the directors of the corporation personally liable for conversion where the consignor knew that the corporation had disposed of the property and he had acquiesced in such sale. Bird-

tent of their authority;[1] nor are they liable to the company for an

sell, etc. Co. *v.* Oglevee, 187 Ill. 149 (1900). A statutory liability of stockholders in corporations, except manufacturing corporations, does not apply to a manufacturing corporation, even though it has engaged in a non-manufacturing business without authority from its charter. Senour, etc. Co. *v.* Church, etc. Co., 81 Minn. 294 (1900). Where the directors of a corporation sell out its assets in consideration of a person paying the debts, and the latter organizes a new corporation and gives to the old directors stock in the new corporation equal to their stock in the old, but does not give anything to the other stockholders of the old corporation, the directors and the person so purchasing the assets are liable to the old corporation for the value of the stock so given to the directors. A pledgee of the stock of the old corporation may bring suit for that purpose. Smith *v.* Smith, etc. Co., 125 Mich. 234 (1900). Even though the statute requiring banks loaning on real estate to loan not above fifty per cent. of their value, yet the directors are not personally liable because on foreclosure sale less than fifty per cent. is realized. The value may have depreciated. Colorado Savings Bank *v.* Evans, 12 Colo. App. Div. 334 (1898). Where all the assets of a corporation are transferred for stock of another corporation and such stock is sold by trustees of the former to pay its debts, the fact that one of the trustees subsequently buys a portion of the stock does not render him liable for such debts. Wing *v.* Charleroi, etc. Co., 112 Fed. Rep. 817 (1902). An officer of a corporation may be personally liable for funds of a trust estate which are received by him for the corporation after he knows that the corporation is insolvent. Anderson *v.* Daley, 38 N. Y. App. Div. 505 (1899). *De facto* officers are not personally liable on a corporate note issued by their authority. Potwin *v.* Greenewald, 123 Ill. App. Rep. 34 (1905). A Montana statute rendering directors liable for corporate debts if they fail to file a specified report applies to foreign as well as domestic corporations. Nelson *v.* Bank of Fergus County, 157 Fed. Rep. 161 (1907). As to a suit against the company and also an employee for negligence, see Burch *v.* Caden Stone Co., 93 Fed. Rep. 181 (1899). A suit by a stockholder against the directors to hold them liable for violating the national bank act must be for the benefit of the corporation. Zinn *v.* Baxter, 65 Ohio St. 341 (1901). Directors are not liable to creditors for mismanagement unless actual fraud is shown. Wilson *v.* Stevens, 129 Ala. 630 (1901). The power of a private corporation to acquire land cannot be questioned by the grantor of land to the corporation, and moreover, even if the rule were otherwise, an agent who bought for the corporation as agent would not be personally liable. Ray *v.* Foster, 53 S. W. Rep. 54 (Tex. 1899). In Louisiana it is held that where a corporation organized to build railroads and carry on a plantation business carries on a store to supply its employees with merchandise, its stockholders are personally liable as to the merchandise business—that being *ultra vires.* Lehman *v.* Knapp, 48 La. Ann. 1148 (1896). In Powell *v.* Murray, 3 N. Y. App. Div. 273 (1896); aff'd, 157 N. Y. 717, where a company, formed to manufacture electric appliances and plant, issued stock in payment for a license to sell the product of a foreign corporation, it was held that the parties so receiving the stock were liable thereon, under the

1 Beattie *v.* Ebury, L. R. 7 Ch. App. 777 (1872), and L. R. 7 H. L. 102. See also § 702, *infra.*

ultra vires act which the company has ratified.[1] The New York court of appeals has said: "The officers of a corporation who are

New York statute, as not being paid-up stock, such contract being *ultra vires*. An officer of a construction company who induces a party to buy stock owned by the company is not personally liable on the contract of the company to allow interest on installments paid on such stock in advance. Hetfield *v.* Addicks, 154 Pa. St. 1 (1893). Directors are personally liable for losses of a corporation on account of unreasonable credit extended to another corporation in which the directors are interested. Stahn *v.* Catawba Mills, 53 S. C. 519 (1898). Where a mining company is practically reorganized by selling out to a new and larger company having the same directors, and the stock is sold to the public, if the prospectus discloses all the facts excepting the amount of property, which one of the directors made as a stockholder in the former company, he is not liable to the new company for such property as a promoter thereof, although it might have been ground for rescinding the contract of purchase. *Re* Lady Forrest, etc., [1901] 1 Ch. 582. In Minnesota by statute directors who participate in an *ultra vires* act are liable for all debts thereafter contracted, even though they go out of office. Citizens' State Bank *v.* Story, etc. Co., 84 Minn. 408 (1901). A suit in a state court against the officers of a national bank on the ground that they had violated the national bank act is removable to the United States court. Bailey *v.* Mosher, 95 Fed. Rep. 223 (1899). In a suit by creditors to hold directors personally liable for violating the statutes in the conduct of the corporate business, the creditors must clearly set forth the character and existence of the amount they claim. Boston, etc. R. R. *v.* Parr, 104 Fed. Rep. 695 (1900). Where the lease of a street railway has been made, in accordance with the vote of the stockholders and directors, a stockholder cannot hold the directors personally liable for not informing the stockholders of an offer to purchase the property, it not being shown that the offer was from a responsible party or that it would have made any difference in the stockholders' action. Strunk *v.* Owen, 199 Pa. St. 73 (1901). Where the statute renders the officers and stockholders of a foreign corporation liable for doing business in the state without filing a certificate, this does not prevent the company from suing on contracts. The courts will not extend the penalty. Kindel *v.* Beck, etc. Co., 19 Colo. 310 (1893), stating also that a statute which should restrict the right of a foreign corporation to deliver in the state goods manufactured by the company out of the state would be unconstitutional. Where an insolvent corporation turns over all its property to a new corporation formed for that purpose, and the new corporation turns over a portion of its assets to one of the directors of the old corporation without consideration, a creditor of the old corporation may hold the directors personally liable. South Bend, etc. Co. *v.* George, etc. Co., 97 Wis. 230 (1897); s. c., 81 N. W. Rep. 675 (1900). For various other instances of the liability of directors, see § 243. As to checks, see 70 Atl. Rep. 17.

1 "When the directors and officers of a corporation engage in *ultra vires* transactions, and thus cause damage to the corporation, they may be jointly and severally liable for such damage; and when sued for such damage, a subordinate officer cannot establish an absolute defense by showing that his transactions were assented to or even directed by the directors. Directors and officers of corporations are agents of the corporation for which they act, and for their unauthorized transactions they may

sued by stockholders for damages due to carrying on business not authorized by its charter may defend by showing the stockholders' acquiescence in or assent to the business, express or implied."[1] Where a New Jersey corporation illegally practices dentistry in Pennsylvania, and one of its employees does negligent dental work, the directors and officers are personally liable for the damage, it appearing that they knew and assented to the company doing business in Pennsylvania.[2] Directors may be liable where the corporation is but a "dummy," organized for a fraudulent purpose.[3] But one director is not liable for the others.[4] Where trustees, who are bound to wind

be liable to their principal just as the agent of an individual may be liable for the damage caused to his principal by his unauthorized acts. But . . . when the officers of a corporation engage in an *ultra vires* business for the benefit of a corporation, and the corporation has the actual benefit thereof, and when the business is so carried on with the acquiescence of the stockholders that it actually, though illegally, becomes the business of the corporation, it cannot maintain an action against such officers for any damages it has suffered in such business. In other words, a corporation engaged in an *ultra vires* business cannot sue, for damages suffered therein, the agents it employs to carry on the business. The agent of the corporation in such a case would be protected just as the agent of a copartnership would be protected who did business with the express or implied consent of the copartners, which was not authorized by the articles of copartnership." Holmes *v.* Willard, 125 N. Y. 75, 79, 81 (1890).

1 Wormser *v.* Metropolitan Street Ry., 184 N. Y. 83 (1906).

2 Mandeville *v.* Courtright, 142 Fed. Rep. 97 (1905).

3 See §§ 663, 664, *supra*.

4 Although the directors of a company are the agents of the company, and although, as a member of the company, each of the directors is liable for the acts of its agents on the same ground as other members, still, unless a director has done something to make his co-directors his agents in some other sense than this, he is no more liable for their acts than any other stockholder. In this respect directors are like promoters, each being answerable for his own acts, and for the acts of the others so far as he has made them his agents, but no further. Brown *v.* Byers, 16 M. & W. 252 (1847); Heraud *v.* Leaf, 5 C. B. 157 (1847); Bramah *v.* Roberts, 3 Bing. N. Cas. 963 (1837); Londesborough's Case, 4 De G., M. & G. 411 (1854); Walker's Case, 8 De G., M. & G. 607 (1856). See also Weir *v.* Barnett, L. R. 3 Exch. D. 32 (1877); Weir *v.* Bell, L. R. 3 Exch. 238 (1878); Cargill *v.* Bower, L. R. 10 Ch. D. 502 (1878). As to contribution, see § 749, *infra*. Where directors are paid an annual sum as remuneration, they cannot collect for traveling expense in going to and from meetings, but one director is not liable to the company for amounts paid to other directors for such traveling expenses unless he signed the check. Young *v.* Naval, etc. Soc. Ltd., [1905] 1 K. B. 687. Where a corporation authorizes the issue and sale of bonds, without specifying any officer to make the sale, the president is not personally liable for such bonds, even though he turned them over to the vice-president to sell and the vice-president kept the proceeds. Owego, etc. Co. *v.* Boyer, 111 N. Y. App. Div. 140 (1906).

up the affairs of a corporation, sell its property with a covenant that they had authority to sell, they are liable personally if the assignment was void, there being no covenant against personal liability.[1] *De facto* officers are not personally liable on a corporate note issued by their authority.[2]

A receiver may hold liable a director, where upon the consolidation of two companies large sums are used out of the corporate funds to effect the consolidation, and the company becomes insolvent.[3] Where the officers and directors, in conspiracy, resign their offices and substitute other officers who are irresponsible and untrustworthy, in consideration of unlawful payments made to the former directors, and the assets of the corporation are thereby lost, the first named directors are personally responsible for their action, and a receiver of the corporation may hold them liable.[4]

When a contract is made for the corporation, and this fact appears in the contract, but the officer or agent signs the contract, not in the corporate name, but in his own name, he is generally not liable on such contract; but in some instances he has been held liable.[5] Where an officer or agent of a corporation has been instrumental in causing the corporation to commit trespass or any other tort, then such director or officer is personally liable therefor.[6] Again, where a bond on its face recites that it is secured by all the assets of the company, while in fact it is not secured at all, the purchaser thereof may hold the president personally liable, the latter having taken part in the issue of the bonds.[7] The president of an insurance company which has not complied with the law authorizing its organization is liable to policy-holders for false representations to

1 Shannon *v.* Mastin, 108 S. W. Rep. 1116 (Mo. 1908).

2 Potwin *v.* Greenwald, 123 Ill. App. Rep. 34 (1905).

3 Pierson *v.* Cronk, 13 N. Y. Supp. 845 (1890). Where an insolvent insurance company buys out a solvent company, and certain individuals guarantee that the obligations of the latter company will be fulfilled, and the latter company is "wrecked," the guarantors are liable. Mason *v.* Cronk, 125 N. Y. 496 (1891).

4 Bosworth *v.* Allen, 168 N. Y. 157 (1901). Directors of an insurance company who use its money to procure the resignations of the directors of another insurance company and a substitution of new directors are personally liable for money so expended, and the fact that parties receiving the money had repaid a portion of it by way of compromise is no bar to such suit for the balance. A release by the board of directors is no defense. Gilbert *v.* Finch, 72 N. Y. App. Div. 38 (1902); aff'd, 173 N. Y. 455.

5 See ch. XLIII, § 724, *infra.*

6 This subject belongs more properly to treatises on agency and on torts. An agent is liable for aiding the corporation in perpetrating a breach of trust. Attorney-General *v.* Leicester, 7 Beav. 176 (1844).

7 Stickel *v.* Atwood, 25 R. I. 456 (1903).

them by the insurance agents that the company had so complied.[1] The president of an insurance company may be held personally liable for its funds used by him for political purposes and also moneys expended on improvident agency contracts with members of his family, and the complaint may allege that he either caused the expenditure or negligently allowed it, and a suit by the company itself is at law.[2]

In New York it has been held that a stockholder may have a corporate officer arrested for his frauds on the corporation.[3] The president of a corporation obtaining credit for the corporation by false representations is liable personally therefor, and is liable to arrest.[4] A director is not guilty of grand larceny, even though he donates corporate funds for a political purpose.[5] It is a criminal offense for the president of a national bank to discount for the bank the paper of an insolvent corporation of which he is an officer, the intent being to defraud the bank.[6] The president is not guilty of larceny merely because a clerk embezzled funds paid in by a customer.[7] Corporate officers who participate in violating the anti-trust act of congress of July 2, 1890, may be indicted jointly with the corporation, although their acts were separate and done at a different time.[8] Officers of a corporation who obtain money in its

1 Belding *v.* Floyd, 17 Hun, 208 (1879).

2 Mutual, etc. Co. *v.* McCurdy, 118 N. Y. App. Div. 815 and 827 (1907). Where, however, the transactions cover thirteen years, the complaint may be ordered made more definite and certain. Mutual, etc. Co. *v.* McCurdy, 118 N. Y. App. Div. 828 (1907). At the same time the company may maintain a suit in equity to compel him to account for moneys paid out through false and fraudulent bills and vouchers and for unlawful purposes, the details of which the company does not know. Mutual, etc. Co. *v.* McCurdy, 118 N. Y. App. Div. 822 (1907). So also the vice-president, whose duty it was to approve disbursements and who knowingly or negligently allowed illegal payments, is personally liable. Mutual, etc. Co. *v.* Grannis, 118 N. Y. App. Div. 830 (1907).

3 Crook *v.* Jewett, 12 How. Pr. 19 (1854).

4 Phillips *v.* Wortendyke, 31 Hun, 192 (1883). *Cf.* 96 Pac. Rep. 498.

5 People *v.* Moss, 187 N. Y. 410 (1907). Although it is *ultra vires* for an insurance company to contribute to political campaign expenses, it is not a criminal act, and hence an officer who acts as intermediary is not criminally liable. People *v.* Moss, 113 N. Y. App. Div. 329 (1906); aff'd, 187 N. Y. 410.

6 Flickinger *v.* United States, 150 Fed. Rep. 1 (1906). A criminal prosecution of officers of a corporation for using its funds to pay their own debts in violation of the New Hampshire statute was involved in State *v.* Davison, 64 Atl. Rep. 761 (N. H. 1906).

7 State *v.* Carmean, 126 Iowa, 291 (1905).

8 United States *v.* MacAndrews, etc. Co., 149 Fed. Rep. 823 (1906). A criminal prosecution by a government against persons for illegally receiving rebates from a railroad fails if they were merely stockholders in a corporation that received the rebate. United States *v.* Wood, 145 Fed. Rep. 405 (1906).

name, representing that it would be used in speculations and the profits divided by way of dividends, but use the money to pay pretended dividends and keep the balance for their own use, may be convicted of embezzlement and larceny at common law.[1] A vice-president of a foreign corporation may be punished criminally for causing the corporation to sell goods through a peddler without taking out a license.[2] A stockholder who is also general manager of a newspaper corporation is not liable criminally for its criminal advertisement of an illegal lottery, unless he had actual knowledge or notice thereof.[3] The vice-president and general counsel of an insurance company cannot be convicted of larceny for using the corporate funds to settle a claim against the corporation and its president, there being no proof that the company was not liable thereon.[4] In a criminal prosecution against a corporate officer the corporate books are not evidence against him unless it is shown that he had something to do with the books or knowledge of their contents, or some connection with the entries.[5] Criminal liability in connection with the issue or sale of stock is considered elsewhere.[6] In England there is a statute, under which the court has power, on the application of creditors, to direct the official receiver to prosecute criminally a director for alleged offenses as director, such prosecution to be carried on at the expense of the assets of the company.[7] An officer is liable who directs a negro to be excluded from the company's omnibus;[8] or who takes part in an assault;[9] or who carries on a malicious prosecution.[10]

Directors are not liable for commencing business before the capital stock is subscribed for.[11] And even though the directors certify

1 People *v.* Kellogg, 105 N. Y. App. Div. 505 (1905).

2 Crall *v.* Commonwealth, 103 Va. 855 (1905). The court said: "A corporation can act alone through its officers and agents, and where the business itself involves a violation of the law the correct rule is that all who participate in it are liable."

3 People *v.* England, 27 Hun, 139 (1882). See also Green's Brice's Ultra Vires, p. 765. Even though the stockholders of a newspaper company may be held liable criminally for its publication of an illegal liquor advertisement, if they knew of the publication, yet it must be shown that they were stockholders at the time. State *v.* Bass, 101 Me. 481 (1906).

4 People *v.* Burnham, 119 N. Y. App. Div. 302 (1907).

5 People *v.* Burnham, 119 N. Y. App. Div. 302 (1907).

6 See §§ 40, 48, 152, 357, *supra.*

7 *Re* London, etc. Corp. Ltd., [1903] 1 Ch. 728.

8 Peck *v.* Cooper, 112 Ill. 192 (1884); 54 Am. Rep. 231.

9 Brokaw *v.* New Jersey R. R. & T. Co., 32 N. J. L. 328 (1867); Hewett *v.* Swift, 85 Mass. 420 (1862); Moore *v.* Fitchburg R. R., 70 Mass. 465 (1855).

10 Hussey *v.* Norfolk Southern R. R., 98 N. C. 34 (1887).

11 See § 243, *supra.* Where the directors commence business before ten per cent. of the capital is paid in, as required by statute, the directors are

that one-half of the capital stock has been paid in in cash, when in fact it has not been, yet the assignee of the corporation for the benefit of its creditors cannot hold them liable for the part not so paid in.[1] A director is not liable for the acts of the corporation in cutting timber on land not owned by the corporation where the director took no part in the same.[2] Where the board of directors allow an illegal preference to one director they are personally liable to other creditors to the extent of such preference, and even though one of them resigns, the liability continues for the benefit of past as well as future creditors.[3] Directors and officers of a national bank are personally liable for the funds of the bank used by them to develop a mining property owned by the bank, even though the bank originally acquired the mining property legally. The statute of limitations may, however, be a bar to such a suit.[4] Where a national bank and two of the directors are secretly interested in the profit made by selling property to a corporation for stock, the corporation may hold them liable for such profit. The defense of *ultra vires* on the part of the bank is not good.[5] Where an insolvent person forms a corporation for the purpose of conveying all his property to it for stock, an incorporator and director who takes part in the fraud is personally liable therefor, but not a director who had merely constructive notice of the fraud.[6] A director, who takes part

personally liable as agents transacting business without authority from the principal. Trust Co. *v.* Floyd, 47 Ohio St. 525 (1890). *Cf.* § 180, *supra.* In Illinois by statute the directors are personally liable for debts incurred before all "stock named in the articles of incorporation shall be subscribed in good faith." Kent *v.* Clark, 181 Ill. 237 (1899). In the case Bank of De Soto *v.* Reed, 109 S. W. Rep. 256 (Tex. 1908), it was held that the directors were liable to corporate creditors for using the corporate funds to pay losses in the business before incorporation.

1 Hequembourg *v.* Edwards, 155 Mo. 514 (1900).

2 Davenport *v.* Newton, 71 Vt. 11 (1898).

3 Nix *v.* Miller, 26 Colo. 203 (1899). Where a director sells property to the corporation the presumption against him is that it is fraudulent, but there is not the same presumption against the other directors who voted for it. In a stockholder's suit to set the sale aside, the court cannot render a judgment against the directors for the difference between the value of the property and the price paid, unless fraud is proved. Polhemus *v.* Polhemus, 114 N. Y. App. Div. 781 (1906).

4 Cooper *v.* Hill, 94 Fed. Rep. 582 (1899).

5 Zinc, etc. Co. *v.* First, etc. Bank, 103 Wis. 125 (1899).

6 Benton *v.* Minneapolis, etc. Co., 73 Minn. 498 (1898). An unsecured creditor of a solvent corporation that has transferred all its property to another corporation for stock of the latter, and such stock is then sold to pay a mortgage debt, cannot hold the agents of the corporation carrying out the transaction personally liable for misapplication of funds, the transaction having been authorized and directed by the board of directors of the selling corporation. Wing *v.* Charleroi, etc. Co., 112 Fed. Rep. 817 (1902). Even though an insolvent person sells

in disposing of corporate assets in such a way as to deprive corporate creditors of their pay, may be liable to them therefor.[1] Under the statutes of New York where a New Jersey corporation, doing business in New York, pays dividends from the capital stock, a director participating in declaring the dividend is personally liable therefor, and if the corporation refuses to bring the action a stockholder may bring it in behalf of himself and other stockholders.[2] A director in a bank is personally liable to persons who deposit their money in the bank after he knows that it is hopefully insolvent, where he fails to initiate measures to close the business of the bank.[3]

Where the corporation has power to do a certain act, but does not authorize a person or officer to do that act, then the person or officer doing such act is liable personally therefor. He is liable as an unauthorized agent.[4]

all his property to a corporation and the corporation proceeds with the business, yet the directors are not personally liable on the transfer being set aside, where they acted in good faith. *Re* Ely, 82 L. T. Rep. 501 (1900), *cf.* n. 4, p. 2027, *supra*.

1 The directors of an insolvent mutual insurance association, who have money on hand sufficient to pay a fixed benefit liability, and who, instead of doing so, transfer all the assets to another association, are personally liable on such liability. Harvey *v.* Wasson, 74 Kan. 489 (1906). Where the directors in a failing corporation transfer all its assets to another corporation for stock of the latter, which they divide among themselves, the creditors of the former may hold the directors liable and may also hold liable the company that received the property for the value thereof. McIver *v.* Young Hardware Co., 57 S. E. Rep. 169 (N. C. 1907). Directors are not personally liable to creditors of the company for authorizing a transfer of the property of the company to another corporation in payment for stock in such latter corporation. A creditor cannot attack a corporate transfer as *ultra vires*, but can only attack it as fraudulently diverting corporate assets. Force *v.* Age-Herald Co., 136 Ala. 271 (1903). Under the Washington statute the directors are liable to a corporate creditor where they transfer all the property to another corporation and take pay therefor by stock to be issued to the stockholders of the former. Carstens & Earles, Inc. *v.* Hofius, 44 Wash. 456 (1906). Where directors in an insolvent corporation in violation of statute transfer a part of its property to two of their number to pay certain creditors, the receiver may recover from such two directors the value of the property so transferred and if they have already paid some of the debts they will be subrogated to the rights attached to such debts. All of the directors authorizing or participating in the act are liable jointly and severally. Mills *v.* Hendershot, 70 N. J. Eq. 258 (1905).

2 Hutchinson *v.* Stadler, 85 N. Y. App. Div. 424 (1903). See also § 550, *supra.*

3 It is his duty to call a meeting of the directors, or report the condition of things to the state authorities, or instruct the cashier to stop taking deposits, or to warn individual depositors, or, if necessary, make public announcement of the condition of things. Cassidy *v.* Uhlmann, 170 N. Y. 505 (1902).

4 If two directors without authority order a bank to honor the checks of

If the corporation had no charter power to do the act in question, a more difficult question arises. In England it seems that the officer or agent is not liable to the third person.[1] In America he is liable to the company for money so lost.[2] Although the certificate of incorporation fixes the amount of debts which the corporation may incur, yet the directors are not liable for an excess of that amount.[3]

The court may authorize a receiver to sell all the assets to a new company and release the directors of the old company from personal liability to the stockholders where such contract is a fair one, even though some of the stockholders dissent.[4] A statute shortening the statute of limitations applicable to the common-law liability of directors is unconstitutional as to existing liabilities, if the shortened period does not give a reasonable time after it takes effect for

the manager of their corporation and he overdraws, they are personally liable for the overdrafts. Cherry *v.* Colonial Bank, L. R. 3 P. C. 24 (1869). But see Beattie *v.* Ebury, L. R. 7 H. L. 102 (1874), aff'g L. R. 7 Ch. App. 777, and rev'g L. R. 7 Ch. App. 788, n. When the president of the bank, without authority from the directors, sells $6,000 of the bank's paper for $5,500, he is liable to the bank for $500—the real loss. First Nat. Bank *v.* Lucas, 21 Neb. 280 (1887). But a corporate agent executing a security in the corporate name without authority is not guilty of forgery under the New York statute. Mann *v.* People, 15 Hun, 155 (1878); aff'd, People *v.* Mann, 75 N. Y. 484. He is liable, however, in a civil action. See also Underhill *v.* Gibson, 2 N. H. 352 (1821); Weare *v.* Gove, 44 N. H. 196 (1862). As to the liability of officers for trespass, etc., see Thompson, Liab. Officers, p. 489.

1 Eaglesfield *v.* Londonderry, L. R. 4 Ch. D. 693 (1876), aff'd (H. L.) 26 W. R. 540. But see West, etc. Bank *v.* Kitson, L. R. 13 Q. B. D. 360 (1884), where a note was issued; Nicholls *v.* Diamond, 9 Exch. 154 (1853), where an acceptance was made. The secretary is not liable for a representation as to the power of the company to issue debentures which had been issued. Rashdall *v.* Ford, L. R. 2 Eq. 750 (1866). Directors issuing debentures in excess of the amount allowed by statute are personally liable thereon. Weeks *v.* Propert, L. R. 8 C. P. 427 (1873). As to liability of directors to the company for losses due to their *ultra vires* acts, see *Re* Faure, etc. Co., L. R. 40 Ch. D. 141 (1888). A director is liable for money used, *ultra vires*, to buy land. Grimes *v.* Harrison, 26 Beav. 435 (1859).

2 Austin *v.* Daniels, 4 Denio, 299 (1847), where stock was purchased by the company. See also Franklin F. Ins. Co. *v.* Jenkins, 3 Wend. 130 (1829), and cases in chs. XXXIX, XL, *supra*, and ch. XLII, *infra*.

3 Frost Mfg. Co. *v.* Foster, 76 Iowa, 535 (1889). *Cf.* § 760. Where the directors incur debts in excess of the amount allowed by the charter, debts due them are postponed until the other debts are paid, and the directors are legally guilty of fraud as to creditors who did not know of the excessive indebtedness, and hence are personally liable to such creditors. Guenther *v.* Baskett, etc. Co., 52 S. W. Rep. 931 (Ky. 1899).

4 People *v.* Anglo-American, etc. Assoc., 66 N. Y. App. Div. 9 (1901); s. c., 169 N. Y 606.

the commencement of suits on existing causes of action.[1] Stockholders are not personally liable for *ultra vires* acts.[2] Directors who have been obliged to repay money which they and others received for turning over the assets of the company to another company, they having no interest which could legally be the subject of such sale, cannot recover back from such other persons the amount paid by the latter. There can be no contribution among joint tort feasors.[3]

1 Gilbert *v.* Ackerman, 159 N. Y. 118 (1899).

2 Tennessee, etc. Co. *v.* Massey, 56 S. W. Rep. 35 Tenn. (1899). A stockholder is not personally liable for a tort of the corporation in diverting water. Poley *v.* Lacert, 35 Or. 166 (1899). Where a guaranty by a loan and trust company is *ultra vires*, the statutory liability of stockholders cannot be enforced to pay such guaranty, even though the courts of the state where the corporation existed have held that *ultra vires* is no defense where the benefit of the guaranty has been received. Ward *v.* Joslin, 105 Fed. Rep. 224 (1900); aff'd, 186 U. S. 142 (1902). See also § 243, *supra*, as to the liabilty of stockholders.

3 Gilbert *v.* Finch, 173 N. Y. 455 (1903). See also § 749, *infra*.

CHAPTER XLI.

INTRA VIRES ACTS AND CONTRACTS — IN OTHER WORDS, ACTS AND CONTRACTS WHICH ARE WITHIN THE CHARTER POWERS OF THE CORPORATIONS, DIRECTORS, OR STOCKHOLDEES.

§ 683. *Intra vires acts as distinguished from ultra vires acts.*— An *ultra vires* act, as already explained, is an act beyond the express and implied powers of the corporation. An *intra vires* act, on the contrary, is one which is within the express or implied powers either of the board of directors or of the majority of the stockholders in meeting assembled. *Intra vires* acts are frequently spoken of as matters concerning the "internal management" of the corporation. Much confusion has arisen concerning these acts, owing to a failure to recognize clearly the fact that an act is *intra vires* of a corporation if it can be legally carried out *either* by the directors or by the majority of the stockholders.[1] Thus, a stockholder frequently brings suit to enjoin or set aside an act which the majority of the stockholders have power to do, but which the directors have done without power. It is clear that a dissenting stockholder has no right to carry

[1] An act which may be done either by the board of directors or by vote of the stockholders is *intra vires*. Bradbury *v.* Waukegan & Washington Min. Co., 113 Ill. App. Rep. 600 (1904).

such a matter into the courts unless the majority are also opposed to the act, since, if the majority approve of the directors' acts, this amounts to a ratification of the same.

In short, there are three classes of corporate acts herein. First, the stockholder may bring suit to remedy an act which is *ultra vires,* or beyond the powers of both the majority of the stockholders and of the directors.[1] Second, as to acts within the power of the majority of the stockholders, but beyond the power of the directors, a stockholder may sue to enjoin or set them aside when the directors have performed them, and the majority of the stockholders refuse to confirm their action.[2] As to such acts the stockholder cannot sue if the majority confirm the directors in their performance. Third, as to acts within the powers of the directors and performed by them, or within the powers of the majority of the stockholders and performed by the majority, the stockholders cannot complain that they are *ultra vires.* The second and third classes of acts are *intra vires* of the corporation. They are matters of internal arrangement or management, and cannot be controlled or objected to by a minority stockholder, except as stated above.[3] The question of what *intra vires* acts are to be performed by the directors, and what ones can be exercised only by the majority of the stockholders in meeting assembled, is considered elsewhere.[4]

§ 684. *The discretion of the directors or a majority of the stockholders as to acts intra vires cannot be questioned by single stockholders unless fraud is involved.*[5]—This proposition of law is clearly,

1 Chapter XL, *supra,* treats of this subject. See also § 740, *infra.*

2 Exeter, etc. Ry. *v.* Buller, 11 Jur., Part I, 527, 532 (1847), holding also that where such an action has been instituted it will not be defeated by the fact that subsequently the directors obtain control of a majority of the votes. But there must be clear proof that the majority refuse to confirm. Thus, in Bagshaw *v.* Eastern Union Ry., 7 Hare, 114 (1849), aff'd 19 L. J. (Ch.) 410, the court says that Foss *v.* Harbottle, 2 Hare, 461 (1843), decides "that if the act, though it be the act of the directors only, be one which a general meeting of the company could sanction, a bill by some of the shareholders, on behalf of themselves and others, to impeach that act, cannot be sustained, because a general meeting of the company might immediately confirm and give validity to the act of which the bill complains." See also MacDougall *v.* Gardiner, L. R. 1 Ch. D. 13 (1875), and § 662, *supra.* A shareholder cannot enjoin an agreement authorized by the directors that their pay be increased, inasmuch as such agreement will be legal if ratified by a majority in interest of the stockholders. Normandy *v.* Ind. etc. Co. Ltd., 97 L. T. Rep. 872 (1907).

3 See note 5, below.

4 See ch. XLIII, *infra.*

5 Quoted and approved in McMullen *v.* Ritchie, 64 Fed. Rep. 253 (1894). "A stockholder cannot enjoin the execution of a contract *intra vires* unless fraud is shown." Burden *v.* Burden, 159 N. Y. 287, 307 (1899). "Questions

firmly, and very properly established beyond any question.[1] Were the rule otherwise there would be no safety or possibility of carry-

of policy of management, of expediency of contracts or action, of adequacy of consideration not grossly disproportionate, of lawful appropriation of corporate funds to advance corporate interests, are left solely to the honest decision of the directors, if their powers are without limitation and free from restraint. To hold otherwise would be to substitute the judgment and discretion of others in the place of those determined on by the scheme of incorporation." Ellerman *v.* Chicago Junction, etc. Co., 49 N. J. Eq. 217 (1891). Thus, in Bloxam *v.* Metropolitan Ry., L. R. 3 Ch. App. 337 (1868), the court said: "The matters of internal arrangement which are beyond the province of the court were properly admitted to be such as are within the scope of the company's powers." And in Camblos *v.* Philadelphia, etc. R. R., 4 Brewst. 563, 591 (1873); s. c., 4 Fed. Cas. 1089, the court said: "So long as those who manage the corporation keep within the limits of its charter, and commit or propose to commit no breach of their trust, he has no right to complain." In Becher *v.* Wells, etc. Co., 1 Fed. Rep. 276 (1880), it was said: "A court of equity will not interfere with the internal policy of a corporation unless it is manifest that the proposed act is *ultra vires.*" In Bach *v.* Pacific Mail S. S. Co., 12 Abb. Pr. (N. S.) 373 (1872), the court said: "No case can be found where the general management of corporate property has been subject to the restrictions of judicial power, unless, indeed, in the case of a clear violation of express law, or a wide departure from chartered powers." In this case the stockholder objected to the securities in which the corporate funds were being invested. In Walker *v.* Mad River, etc. R. R., 8 Ohio, 38 (1837), it was said by the court: "When acts requiring judgment, science, and professional skill are confided to the discretion of the officers of a corporation, the exercise of that discretion will not be lightly disturbed." See also Tuscaloosa Mfg. Co. *v.* Cox, 68 Ala. 71 (1880). In Ramsey *v.* Erie Ry., 7 Abb. Pr. (N. S.) 156 (1869); s. c., 38 How. Pr. 193, it is said: "When directors are only unwise, or merely extravagant or improvident, or slightly negligent, or merely misjudge in the performance of their duties, the remedy of stockholders is to elect other persons directors in their places." In Bailey *v.* Birkenhead, etc. Ry., 12 Beav. 433 (1850), where a stockholder sought to restrain a call as being unnecessary, the court refused to entertain the suit, and said that it was not for the court "to take upon itself to determine a question which might well and ought to be determined by the shareholders themselves at general meetings." See also Edwards *v.* Shrewsbury, etc. Ry., 2 De G. & Sm. 537 (1849); also § 750, *infra.* A minority stockholder cannot have a receiver appointed on the ground that the corporation, the property of which consists of land, is about to sell a large tract of land at a low price, such price being satisfactory to the majority and no fraud being alleged. Not even the statute in Louisiana authorizing a receiver for gross mismanagement is sufficient. North American, etc. Co. *v.* Watkins, 109 Fed. Rep. 101 (1901). Even though a corporation in competing with another concern is selling its product below cost, yet a stockholder cannot enjoin such sales, there being no bad faith or palpably bad judgment shown.

1 Quoted and approved in Vogeler *v.* Punch, 103 S. W. Rep. 1001 (Mo. 1907) and Theis *v.* Spokane, etc. Co., 95 Pac. Rep. 1074 (Wash. 1908).

ing on business through corporations. There would be suits instituted by dissatisfied stockholders on slight provocation, and sometimes for the very purpose of embarrassing the transaction of business. A partner in a copartnership may prevent action which he disapproves, but corporations are formed very largely to avoid that very danger and disadvantage. The corporate directors, so long as they act within their powers, may use their own discretion as to what ought to be done.[1] Such also is the rule with the majority of the stockholders in meeting assembled. An act *intra vires* and without fraud is an act of internal management, and a minority of the stockholders are powerless to prevent, control, change, or question that act.[2] Thus, a stockholder has no remedy for the mere inefficiency of a director, except to turn him out at the next election of the corporation. Having once been elected, a director is entitled to retain his position, even though he is grossly inefficient. He cannot be removed from his position.[3] But where there are violent internal dissensions in a corporation, and two sets of officers are attempting to act, and the corporate property is endangered, a court of equity will interfere to the extent of preserving the corporate property by a temporary receiver.[4] A court of equity cannot, how-

Trimble *v.* American, etc. Co., 61 N. J. Eq. 340 (1901); Matter of Pierson, 44 N. Y. App. Div. 215 (1899). A court of equity will not enjoin the directors from expending money unless it is *ultra vires* or fraudulent. Taylor & Co. *v.* Southern Pac. Co., 122 Fed. Rep. 147 (1903). A mining corporation may lease its property for rental payable in a certain portion of the product of the mine. A stockholder cannot complain, even though the contract be an error of judgment. Hennessy *v.* Muhleman, 40 N. Y. App. Div. 175 (1899). The minority are subject to the will of the majority acting within the powers of the corporation. Colby *v.* Eq. Trust Co., 124 N. Y. App. Div. 262 (1908); aff'd, 192 N. Y.

Where a corporation has charter authority to retire its preferred stock and issue mortgage bonds in lieu thereof, on a vote of the directors and stockholders, a minority stockholder cannot enjoin such action on the ground that it would be disastrous in its effect on the corporation. Berger *v.* United States Steel Corp., 63 N. J. Eq. 809 (1902). See also Hodge *v.* United States Steel Corp., 64 N. J. Eq. 807 (1903). Where by its charter a corporation has a right to purchase stock in other corporations, the corporation may subscribe for stock in another corporation to be formed to carry on a similar business, and the court will not, at the instance of a stockholder, review the discretion of the directors in making such investment. Rubino *v.* Pressed, etc. Co., 53 Atl. Rep. 1050 (N. J. 1903).

1 Quoted and approved in Theis *v.* Spokane, etc. Co., 95 Pac. Rep. 1074 (Wash. 1908).

2 Quoted and approved in Symmes *v.* Union Trust Co., 60 Fed. Rep. 830 (1894).

3 See § 711, *infra.*

4 Trade Auxiliary Co. *v.* Vickers, L. R. 16 Eq. 303 (1873); Featherstone *v.* Cooke, L. R. 16 Eq. 298, 303 (1873), the court saying: "The court will not interfere with the internal affairs of joint-stock companies unless they

ever, restrain the corporation from proceeding with business and using its funds for that purpose, even though a minority of the stockholders show that sound business discretion and judgment would dictate a different policy.[1] The question of whether a suit by a corporation shall be brought or not is entirely within the discretion of the directors in the absence of fraud.[2] Thus, even though a railroad is giving a lower rate to one customer than to another, yet a stockholder cannot maintain a suit of injunction to compel the party to pay what he should have paid. While the act is illegal, it is not *ultra vires*, and as to the illegal act it is for the corporation to decide whether or not it will sue.[3]

§§ 685–689. ***Borrowing money, issuing bills, notes, and acceptances, coupon bonds, debentures, and mortgages.***—These subjects are fully considered elsewhere.[4]

§ 690. ***Loans by a corporation, and statutes forbidding loans or forbidding the taking of notes or mortgages—Usury.***—A corporation cannot make loans of money unless its regular business ordinarily involves loaning. In most cases the business of a corporation is to invest and use its capital, and not to loan it out. Accordingly, it is well settled that only where the business of the corporation is such as usually involves loaning does the corporation have the right to loan its funds.[5] If not prohibited by statute, a corporation may receive and sell notes or acceptances, if this is naturally

are in a condition in which there is no properly constituted governing body, or there are such dissensions in the governing body that it is impossible to carry on the business with advantage to the parties interested. In such a case the court will interfere, but only for a limited time, and to as small an extent as possible." See also Lawrence *v.* Greenwich F. Ins. Co., 1 Paige, 587 (1829); and § 746, *infra.*

1 Quoted and approved in Theis *v.* Spokane, etc. Co., 95 Pac. Rep. 1074 (Wash. 1908); Fountain Ferry, etc. Co. *v.* Jewell, 8 B. Mon. (Ky.) 140 (1848), the court saying: "The question of expediency, of practicability, of extravagance, or of prudent economy, must be left to be decided by the managers and the corporators." A stockholder may object to corporate acts and contracts which are fraudulent or *ultra vires* or *mala in se.* But all other acts he can correct only by the election of new directors. Leslie *v.* Lorillard, 110 N. Y. 519 (1888).

2 See § 750, *infra.*

3 Anderson *v.* Midland Ry., [1902] 1 Ch. 369 (1901).

4 See chs. XLVI and XLVII, *infra.*

5 1 Daniel, Neg. Inst., § 384. It is legal, however, for a loan and trust company to loan money and take a mortgage as security. Farmers' L. & T. Co. *v.* Perry, 3 Sandf. Ch. 339 (1846); Farmers' L. & T. Co. *v.* Clowes, 3 N. Y. 470 (1850). A plank-road company may loan its funds to a contractor who is constructing the road. Dictum in Madison, etc. Co. *v.* Watertown, etc. Co., 5 Wis. 173 (1856); s. c., 7 Wis. 59. A benevolent association may loan its funds. Western Boatmen's Benev. Assoc. *v.* Kribben, 48 Mo. 37 (1871). A national bank may purchase notes as well as discount them. National Pemberton

connected with its business.[1] But unless specially authorized they cannot make a business of discounting,[2] nor engage in a banking business.[3] A manufacturing corporation has no power to loan its money.[4] A mercantile or manufacturing company may, however,

Bank *v.* Porter, 125 Mass. 333 (1878); Attleborough Nat. Bank *v.* Rogers, 125 Mass. 339 (1878). The discounting of a note by a cement corporation contrary to law, done through the president, is presumed to have been his act and not that of the corporation. Lawrenceville Cement Co. *v.* Parker, 10 N. Y. Supp. 831 (1890). The fact that a manufacturing company extended its business so as to include iron pipe as well as brass, and loaned money, which loans, however, the president was willing to take up, and had owned government bonds, is not sufficient to entitle a stockholder who has acquiesced therein to demand that all profits be paid out in dividends. McNab *v.* McNab, etc. Co., 62 Hun, 18 (1891); aff'd, 133 N. Y. 687. A deposit by a bank in a bank renders the latter liable therefor, though the deposit is made to enable the president of the latter to use it. Eastern Townships Bank *v.* Vermont Nat. Bank, 22 Fed. Rep. 186 (1884). A bank may loan money to its cashier with the consent of the board of directors. Barth *v.* Koetting, 99 Wis. 242 (1898). A trading corporation has power to purchase and endorse bills and notes. Jamieson, etc. *v.* Heim, 43 Wash. 153 (1906).

1 White's Bank *v.* Toledo F. & M. Ins. Co., 12 Ohio St. 601 (1861); Western Cottage Organ Co. *v.* Reddish, 51 Iowa, 55 (1879); Pratt *v.* Short, 79 N. Y. 437 (1880); Clark *v.* Titcomb, 42 Barb. 122 (1864); Buckley *v.* Briggs, 30 Mo. 452 (1860), where it was held that a corporation, though prohibited from dealing in commercial paper, could receive and sell notes given for the sale of its lands; McIntire *v.* Preston, 10 Ill. 48 (1848). And a note received by a corporation will be presumed to have been taken in the course of business. Lucas *v.* Pitney, 27 N. J. L. 221 (1858); Hardy *v.* Merriweather, 14 Ind. 203 (1860); Frye *v.* Tucker, 24 Ill. 180 (1860); Potter *v.* Bank of Ithaca, 5 Hill, 490, 7 Hill, 530 (1844); Suydam *v.* Morris Canal, etc. Co., 6 Hill, 217 (1843); Talman *v.* Rochester City Bank, 18 Barb. 123 (1854); Gee *v.* Alabama, etc. Co., 13 Ala. (N. S.) 579 (1848); Bates *v.* Bank of State, 2 Ala. (N. S.) 451 (1841); Smith *v.* Mississippi, etc. R. R., 14 Miss. 179 (1846); Portland Bank *v.* Storer, 7 Mass. 433 (1811); Northampton Bank *v.* Allen, 10 Mass. 284 (1813); Fleckner *v.* Bank of U. S., 8 Wheat. 338 (1823); Rees *v.* Conococheague Bank, 5 Rand. (Va.) 326 (1827); Payne *v.* Baldwin, 11 Miss. 661 (1844); rev'd, Baldwin *v.* Payne, 6 How. 332 (1848); Akin *v.* Blanchard, 32 Barb. 527 (1860). An insurance company cannot purchase a note for purposes of a set-off. Set-off defeated. Straus *v.* Eagle Ins. Co., 5 Ohio St. 59 (1855).

2 New York F. Ins. Co. *v.* Sturges, 2 Cow. 664 (1824). In Mitchell *v.* Rome R. R., 17 Ga. 574 (1855), it was held that where power is given to "make contracts," a note taken by a corporation is *prima facie* evidence of an authorized contract.

3 State *v.* Granville, etc. Soc., 11 Ohio, 1 (1841); State *v.* Washington Social Lib. Co., 11 Ohio, 96 (1841); *Re* Ohio Life, etc. Co., 9 Ohio, 291 (1839); Blair *v.* Perpetual Ins. Co., 10 Mo. 559 (1847); Sumner *v.* Marcy, 3 Woodb. & M. 105 (1847); s. c., 23 Fed. Cas. 384. See also Central R. R. *v.* Collins, 40 Ga. 582 (1869), and Duncan *v.* Maryland Sav. Inst., 10 Gill & J. (Md.) 299 (1838).

4 Leigh *v.* American, etc. Co., 205 Ill. 147 (1903). Even though the cor-

loan its surplus funds temporarily when not needed in the business.[1] A person who borrows money from a corporation cannot defeat an action for the money by alleging that the corporation had no authority to make the loan. He must pay back the money borrowed.[2]

Although a statute or charter forbids a corporation from loaning more than a certain amount of money, and it actually has loaned more than that amount, yet the borrower cannot avoid payment of any part of the loan.[3] Although a statute requires a bank to loan

poration makes loans *ultra vires*, yet an officer who takes part therein cannot complain. Bixler *v.* Summerfield, 210 Ill. 66 (1904).

1 Garrison, etc. Co. *v.* Stanley, 133 Iowa, 57 (1907).

2 Quoted and approved in Johnson *v.* Mason Lodge, etc. 106 Ky. 838, 846 (1899); Gorrell *v.* Home Life Ins. Co., 63 Fed. Rep. 371 (1894); Head *v.* Cleburne, etc. Assoc., 25 S. W. Rep. 810 (Tex. 1893); Steam Nav. Co. *v.* Weed, 17 Barb. 378, 382, 384 (1853); Union Water Co. *v.* Murphy's Flat Fluming Co., 22 Cal. 620 (1863); Mott *v.* U. S. Trust Co., 19 Barb. 568 (1855); Poock *v.* Lafayette Bldg. Assoc., 71 Ind. 357 (1880), the court saying: "The law may have its reproaches, but this is not one of them." A person borrowing money from a corporation cannot defend against the loan on the ground that the corporation had no power to make it. Noah *v.* German, etc. Assn., 31 Ind. App. 504 (1903). A person making a note to a corporation cannot defeat it by the defense that the company had no power to loan money. Bond *v.* Terrell, etc. Co., 82 Tex. 309 (1891). In Alabama the borrower of the money from the corporation may escape payment. Alabama Grand Lodge *v.* Waddill, 36 Ala. 313 (1860); Chambers *v.* Falkner, 65 Ala. 448 (1880), where Masonic lodges had loaned money. See also dictum in Beach *v.* Fulton Bank, 3 Wend. 573 (1829), where an insurance company made a loan; also the decision in Life & F. Ins. Co. *v.* Mechanic F. Ins. Co., 7 Wend. 31 (1831), denying the right of an insurance company to recover an unsecured loan where its charter authorized loans on bond and mortgage. See also New York Firemen Ins. Co. *v.* Ely, 5 Conn. 560 (1825), where, however, the loan was expressly prohibited. In Waddill *v.* Alabama, etc. R. R., 35 Ala. 323 (1859), an unauthorized loan by a railroad was enforced on the ground that the railroad president made the loan without authority from the directors.

3 Gold Min. Co. *v.* National Bank, 96 U. S. 640 (1877). See also Silver Lake Bank *v.* North, 4 Johns. Ch. 370 (1820); National Bank *v.* Matthews, 98 U. S. 621 (1878); Bly *v.* Second Nat. Bank, 79 Pa. St. 453 (1875); Allen *v.* First Nat. Bank, 23 Ohio St. 97 (1872); Stewart *v.* National Union Bank, 2 Abb. (U. S.) 424 (1869); s. c., 23 Fed. Cas. 68, holding that though the loan may be recovered the franchise of the bank may be forfeited. To same effect, Shoemaker *v.* National Mechanics' Bank, 2 Abb. (U. S.) 416 (1869); s. c., 21 Fed. Cas. 1331; and Union, etc. Co. *v.* Rocky Mountain Nat. Bank, 1 Colo. 531 (1872); Elder *v.* First Nat. Bank, 12 Kan. 238 (1873), holding that a borrower cannot restrain a national bank from negotiating such securities nor compel their return; O'Hare *v.* Second Nat. Bank, 77 Pa. St. 96 (1874), holding that an accidental excess does not make the loan void. Although the statute forbids loans to directors, yet a loan so made is collectible, and securties pledged by the

on bond and mortgage, yet it may recover loans made on drafts or notes.[1] Where directors loan money in violation of the statute, they are liable personally therefor.[2]

A statute which prohibits corporations from discounting notes or bills unless expressly authorized so to do prevents the corporation from collecting a note taken in violation thereof; [3] but this does not

director are subject to the loan, though they were fraudulently obtained by him from others. Bowditch *v.* New England, etc. Ins. Co., 141 Mass. 292 (1886). Where the president causes the corporation to loan him money, in direct violation of the statute, he may be sued for the conversion thereof, although his collateral security has been sold and the whole transaction ratified by the directors. Nellis Co. *v.* Nellis, 62 Hun, 63 (1891). A statute giving a bank a lien on its stock for debts due to the bank from the stockholder is not nullified by another statutory provision prohibiting the bank from loaning money on its stock. Battey *v.* Eureka Bank, 62 Kan. 384 (1901).

1 Allen *v.* Freedman's Sav. etc. Co., 14 Fla. 418 (1874); Mott *v.* U. S. Trust Co., 19 Barb. 568 (1855); Little *v.* O'Brien, 9 Mass. 423 (1812); Mutual Life Ins. Co. *v.* Wilcox, 8 Biss. 203 (1878); s. c., 17 Fed. Cas. 1081; Davis S. M. Co. *v.* Best, 30 Hun, 638 (1883). A loan for two years, instead of one as allowed by statute, is nevertheless enforceable. Germantown, etc. Ins. Co. *v.* Dhein, 43 Wis. 420 (1877). A loan is collectible though for a longer time than allowed, and without the required security, and in excess of the amount allowed by statute. Bond *v.* Central Bank, 2 Ga. 92 (1847).

2 Thompson *v.* Greeley, 107 Mo. 577 (1891); Dodd *v.* Wilkinson, 42 N. J. Eq. 647 (1887); Williams *v.* McDonald, 42 N. J. Eq. 392 (1886). The treasurer and manager, turning in to the corporation a mortgage not worth double the debt owed by him to the corporation, is liable for any loss. Williams *v.* Riley, 34 N. J. Eq. 398 (1881). The case of Williams *v.* McKay, 46 N. J. Eq. 25 (1889), is very full, explicit, and clear in its adjudication and distribution of losses on the president, treasurer, manager, officers, finance committee, secretary, and directors of a savings bank, where those officers, etc., had made instruments contrary to the by-laws, charter, and statutes. See also § 682.

3 New York, etc. Co. *v.* Helmer, 77 N. Y. 64 (1879), applying the New York act against unauthorized banking; Tracy *v.* Talmage, 14 N. Y. 162 (1856); Talmage *v.* Pell, 7 N. Y. 328 (1852); Weed *v.* Snow, 3 McLean, 265 (1843); s. c., 29 Fed. Cas. 572; Leavitt *v.* Palmer, 3 N. Y. 19 (1849) (a certificate of deposit), and Hayden *v.* Davis, 3 McLean, 276 (1843); s. c., 11 Fed. Cas. 898 (an acceptance); Swift *v.* Beers, 3 Denio, 70 (1846); Tylee *v.* Yates, 3 Barb. 222 (1848); aff'd, 17 Barb. 404, holding also that an assignment of securities for their payment is also void, and transfers no title to the assignees; White *v.* Franklin Bank, 39 Mass. 181 (1839), holding that, while a time deposit is within the prohibition, the money may be recovered in an action brought before the time has expired. See also Slark *v.* Highgate Archway Co., 5 Taunt. 792 (1814); Wigan *v.* Fowler, 1 Starkie, 459 (1816); Broughton *v.* Manchester, etc. Water-works, 3 B. & Ald. 1 (1819); Dockery *v.* Miller, 9 Humph. (Tenn.) 731 (1849); Ohio Life, etc. Co. *v.* Merchants', Ins. etc. Co., 11 Humph. (Tenn.) 1 (1850); Root *v.* Wallace, 4 McLean, 8 (1845); s. c., 20 Fed. Cas. 1167, holding that an indorsee may recover from the indorser of a note void for this illegality the consideration paid for it; State *v.* Urbana, etc. Co., 14 Ohio, 6

prevent the corporation from collecting the amount due. It may disregard the note and sue on the loan itself.[1]

(1846), holding that receiving a deposit of money is not a violation of a charter restriction upon the exercise of banking powers; New York Firemen Ins. Co. *v.* Ely, 5 Conn. 560 (1825), where a corporation was not allowed to recover upon a note because its charter prohibited it from doing a banking business; Farmers' L. & T. Co. *v.* Perry, 3 Sandf. Ch. 339 (1846), and Green *v.* Seymour, 3 Sandf. Ch. 285 (1846), where the same principle was applied to mortgages issued in violation of statutory prohibition; Safford *v.* Wyckoff, 4 Hill, 442 (1842), holding also that if the form and appearance of the notes indicate that they were intended to be circulated as money, one who takes them, being thereby put upon his inquiry, is not a *bona fide* holder and cannot recover upon them. To same effect, Attorney-General *v.* Life, etc. Ins. Co., 9 Paige, 470 (1842); Mumford *v.* American, etc. Co., 4 N. Y. 463 (1851), holding that a certificate of deposit is not included in such a prohibition; Leavitt *v.* Yates, 4 Edw. Ch. 134 (1843), holding also that a trust deed given to secure such notes was also void; Hazleton Coal Co. *v.* Megargel, 4 Pa. St. 324 (1846), holding that the statute cannot be avoided by issuing a document which is in effect, though not in form, a note; Barry *v.* Merchants' Exchange Co., 1 Sandf. Ch. 280 (1844); Utica Ins. Co. *v.* Scott, 19 Johns. 1 (1821); Montgomery Branch Bank *v.* Crocheron, 5 Ala. (N. S.) 250 (1843), holding that the bills of a corporation which is prohibited from issuing them cannot be rendered legal by being issued by a bank under a contract with the corporation; Sackett's Harbor Bank *v.* Codd, 18 N. Y. 240 (1858), holding that a statute prohibiting the circulation of foreign bank-notes does not prevent their sale and delivery for any other purpose. Payment of a debt by a draft which is prohibited by statute is not payment, the draft not having been paid. Davis *v.* River Raisin Bank, 4 McLean, 387 (1848); s. c., 7 Fed. Cas. 111. A charter provision that no director or officer should borrow from the bank does not apply to loans to a firm of which the director is a member. Fisher *v.* Murdock, 13 Hun, 485 (1878). A deposit made with a corporation which is prohibited by statute from doing a banking business is presumed to have been a loan, and in any case is recoverable back in an action for money had and received. Chapman *v.* Comstock, 58 Hun, 325 (1890); aff'd, 134 N. Y. 509.

1 Oneida Bank *v.* Ontario Bank, 21 N. Y. 490 (1860); Pratt *v.* Short, 79 N. Y. 437 (1880), reviewing New York cases; Davis S. M. Co. *v.* Best, 30 Hun, 638 (1883); Mills *v.* Western Bank, 64 Mass. 22 (1852); Webb *v.* Herne Bay Com'rs, L. R. 5 Q. B. 642 (1870). Compare Faneuil Hall Bank *v.* Bank of Brighton, 82 Mass. 534 (1860), and Western Bank *v.* Mills, 61 Mass. 539 (1851); Utica Ins. Co. *v.* Kip, 8 Cow. 20 (1827); Utica Ins. Co. *v.* Cadwell, 3 Wend. 296 (1829), and Utica Ins. Co. *v.* Bloodgood, 4 Wend. 652 (1830); Planters' Bank *v.* Union Bank, 16 Wall. 483 (1872), holding that, when an illegal contract has been fully executed, the money constituting the price for it may be looked upon as a legal consideration for an express or implied promise. To same effect, Cook *v.* Sherman, 20 Fed. Rep. 167 (1882); Workingmen's Banking Co. *v.* Rautenberg, 103 Ill. 460 (1882), holding that a note given by a director for a loan in excess of the amount limited by charter is void so far as to release a guarantor upon it; Farmington Sav. Bank *v.* Fall, 71 Me. 49 (1880), holding that a prohibi-

But where the statute prohibits not only the enforcement of the note, but also the enforcement of any contract, express or implied, growing out of the transaction, then the corporation loses the money loaned.[1] Any corporation, unless expressly prohibited, has power to take a mortgage as security for a debt contracted in the course of its business.[2]

tion against lending money on the security of names only is merely directory, and a note so secured may be collected. To same effect, National Pemberton Bank *v.* Porter, 125 Mass. 333 (1878); U. S. Trust Co. *v.* Brady, 20 Barb. 119 (1855); Vanatta *v.* State Bank, 9 Ohio St. 27 (1858); Union, etc. Ins. Co. *v.* Keyser, 32 N. H. 313 (1855), where a note given for insurance upon property in one class, when by law it was insurance only in another class, was held valid; McFarlan *v.* Triton Ins. Co., 4 Denio, 392 (1847), where a bond owned by an insurance company was held to have been taken as an investment in default of proof of consideration; Marion Sav. Bank *v.* Dunkin, 54 Ala. 471 (1875), holding that an accommodation drawer of a bill, who did not at the time know it was discounted by a bank in violation of law, may defend by showing that the bank was not properly organized; Brown *v.* Killian, 11 Ind. 449 (1858), holding that notes in similitude of bank-notes are void, even the issuers not being liable upon them, but any consideration paid for them may be recovered back; White *v.* Franklin Bank, 39 Mass. 181 (1839), holding that money deposited in a savings bank in violation of a statute may be recovered; Lester *v.* Howard Bank, 33 Md. 558 (1870), where a director who borrowed money from a bank in violation of its charter was held liable for the money; Philadelphia Loan Co. *v.* Towner, 13 Conn. 249 (1839), where the original debt was validly incurred, but a subsequent note by the corporation was illegal; Pratt *v.* Eaton, 79 N. Y. 449 (1880), where notes secured by a mortgage were held void, but the mortgage valid; People *v.* Brewster, 4 Wend. 498 (1830), holding that prohibiting the carrying on of a banking business does not prevent lending money upon notes, if it is not done as a business; Otis *v.* Harrison, 36 Barb. 210 (1862); Barton *v.* Port Jackson, etc. Co., 17 Barb. 397 (1854).

1 New Hope, etc. Co. *v.* Poughkeepsie Silk Co., 25 Wend. 648 (1841).

2 State *v.* Rice, 65 Ala. 83 (1880); National Bank *v.* Insurance Co., 41 Ohio St. 1 (1884); Baird *v.* Bank of Washington, 11 Serg. & R. (Pa.) 411 (1824), holding that a power to take mortgages in the course of business confers the power to commute debts really due for land; Bank of Michigan *v.* Niles, 1 Doug. (Mich.) 401 (1844), holding that power to hold lands and take mortgages for business purposes does not confer the right to deal in lands; National Trust Co. *v.* Murphy, 30 N. J. Eq. 408 (1879), holding that a corporation not authorized to take land as original investment may take a mortgage on land in a foreign state as additional security; Clark *v.* Farrington, 11 Wis. 306 (1860). Sections 5135 and 5137 of the United States Revised Statutes do not prevent a national bank from enforcing the collection of a note secured by a mortgage of land by a foreclosure of the mortgage. National Bank *v.* Matthews, 98 U. S. 621 (1878); Palmer *v.* Lawrence, 3 Sandf. Super. 161 (1849); Lathrop *v.* Scioto Comm. Bank, 8 Dana (Ky.), 114 (1839); Mapes *v.* Scott, 94 Ill. 379 (1880), holding that national banks may take conveyances of land in payment of pre-existing debts. A national bank may enforce a mortgage securing future indebtedness. National

Although a corporation is prohibited by its charter from taking a real-estate mortgage as security for a debt, nevertheless the mortgage, after it has been taken, may be enforced by the corporation. The penalty is that the state may forfeit the corporate charter for misuser.[1] The laws concerning usury are enforced against corporations as fully as against individuals,[2] and where their charter for-

Bank *v.* Whitney, 103 U. S. 99 (1880); Simons *v.* First Nat. Bank, 93 N. Y. 269 (1883). The case of U. S. Mortgage Co. *v.* Gross, 93 Ill. 483 (1879), to the effect that foreign corporations for loaning on mortgages could not take mortgages in Illinois, inasmuch as no domestic corporation could be organized for that purpose, was overruled by Stevens *v.* Pratt, 101 Ill. 206 (1882), and Commercial, etc. Co. *v.* Scammon, 102 Ill. 46 (1882). A foreign corporation may foreclose a mortgage. American, etc. Ins. Co. *v.* Owen, 81 Mass. 491 (1860).

1 National Bank *v.* Whitney, 103 U. S. 99 (1880), reversing Crocker *v.* Whitney, 71 N. Y. 161 (1877), holding that, where a national bank takes a mortgage to secure future advances, it can be objected to only by the government; National Bank *v.* Matthews, 98 U. S. 621 (1878), reversing Matthews *v.* Skinker, 62 Mo. 329 (1876), holding that a bank holding a deed of trust upon real estate as security for a note, contrary to the act, may sell the land in order to collect the note; followed in Winton *v.* Little, 94 Pa. St. 64 (1880); Thornton *v.* National Exch. Bank, 71 Mo. 221 (1879), holding that the only penalty for violation of that act is forfeiture of charter, to be invoked only by the United States. A mortgagor of land to a national bank cannot defend against it on the ground that the bank had no power to take the mortgage. Camp *v.* Land, 122 Cal. 167 (1898). To same effect, Graham *v.* National Bank, 32 N. J. Eq. 804 (1880); Oldham *v.* Bank, 85 N. C. 240 (1881), and Grand Gulf Bank *v.* Archer, 16 Miss. 151 (1847). For a contrary decision, see Green *v.* Seymour, 3 Sandf. Ch. 285 (1846); Bard *v.* Chamberlain, 3 Sandf. Ch. 31 (1845).

2 McLean *v.* Lafayette Bank, 3 McLean, 587 (1846); s. c., 16 Fed. Cas. 264; New York F. Ins. Co. *v.* Sturges, 2 Cow. 664 (1824); Grand Gulf Bank *v.* Archer, 16 Miss. 151 (1847); Perkins *v.* Watson, 2 Baxt. (Tenn.) 173 (1872), holding that a bank may discount on the same terms as an individual, and should suffer the same forfeit for usury; Tyng *v.* Commercial Warehouse Co., 58 N. Y. 308 (1874), holding that general usury laws apply to corporations. Charter privileges to a building association to take larger interest than is allowed to others under the usury laws are unconstitutional in Kentucky. Gordon *v.* Winchester, etc. Assoc., 12 Bush (Ky.), 110 (1876). A note of a third party given by a debtor to a bank in good faith for an existing debt is not usurious; Dunkle *v.* Renick, 6 Ohio St. 527 (1856); Morse, Banking (3d ed.), § 72, etc. A corporation limited to "legal interest" may take legal interest as allowed by the laws of the state where the money is loaned. It is not confined to the rate prescribed by the laws of the state in which it is incorporated. U. S. Mortgage Co. *v.* Sperry, 138 U. S. 313 (1891). In some states the excess of interest is forfeited; in other states the whole interest is forfeited; and in still other states the whole debt is forfeited. See Stimson, Am. Stat. Law, § 4832. As to usury as a defense to a suit against a corporation, see § 766*b*, *infra*.

bid them from exacting more than a specified rate of interest they are bound by the restriction.[1] National banks are limited to the same rate of interest as the banks of the state wherein they are located are allowed to take, and to seven per cent. if there is no restriction in that state.[2] For any infraction of this statute the bank forfeits the interest, or, if already paid, is liable for twice such interest, but is not subject to the state statutes relative to usury.[3]

§ 691. *Preferences and assignments by insolvent corporations — Assignments by corporations for the benefit of creditors — Preferences in such assignments — Preferences by way of mortgages, etc.* — Corporations, unless restricted by their charters, or by general statutes, may make assignments for the benefit of creditors to the same extent that individuals may.

In making the assignment the corporation may make preferences to one or more creditors over others, or to one class of creditors over other classes.[4]

1 Bank of U. S. *v.* Owens, 2 Pet. 527 (1829), where notes given for more than the rate fixed by the charter of a bank were declared void; Planters' Bank *v.* Sharp, 12 Miss. 75 (1844). But here it was held that taking a greater amount of interest than that allowed by the charter rendered the corporation liable under the general usury laws, and that the contract was not void. On this point see Rock River Bank *v.* Sherwood, 10 Wis. 174 (1860); Commercial Bank *v.* Nolan, 8 Miss. 508 (1843); Grand Gulf Bank *v.* Archer, 16 Miss. 151 (1847); Bank of Chillicothe *v.* Swayne, 8 Ohio, 257 (1838), where a contract for more than the specified rate was held void. To same effect, Creed *v.* Commercial Bank, 11 Ohio, 489 (1842); Spalding *v.* Bank of Muskingum, 12 Ohio, 544 (1841), holding also that taking a commission is only a method of avoiding the statute, and Miami Exporting Co. *v.* Clark, 13 Ohio, 1 (1844), where the same ruling was made in regard to charging for exchange; Morse, Banking (3d ed.), § 52. A national bank cannot take usurious interest under the cover of a "commission," the latter to be paid in case the borrower does not keep a balance in the bank of a specified amount. Although a corporation is forbidden by statute to set up usury, yet a national bank cannot collect usurious interest from a railroad corporation borrowing money of the bank. Union Nat. Bank *v.* Louisville, etc. Ry., 145 Ill. 208 (1893).

2 U. S. Rev. Stats., § 5197.

3 U. S. Rev. Stats., § 5198; Barnet *v.* National Bank, 98 U. S. 555 (1878).

4 *Federal Courts:* That an assignment for the benefit of creditors may be made, see Graham *v.* Railroad Co., 102 U. S. 148 (1880). Compare on this subject the dictum in Consolidated, etc. Co. *v.* Kansas City, etc. Co., 45 Fed. Rep. 7 (1891). That preferences may be given, see Smith, etc. Co. *v.* McGroarty, 136 U. S. 237 (1890); Allis *v.* Jones, 45 Fed. Rep. 148 (1891); Atlanta, etc. R. R. *v.* Western Ry., 50 Fed. Rep. 790 (1892); Consolidated, etc. Co. *v.* Kansas City, etc. Co., 45 Fed. Rep. 7 (1891). Gould *v.* Little Rock, etc. Ry., 52 Fed. Rep. 680 (1892). A mortgage of an insolvent corporation given to a favored creditor without a new consideration is void if attacked within four months under the bankruptcy act.

There have been a few decisions to the contrary. There has also been considerable discussion in legal periodicals, decisions, and

Morgan *v.* First Nat. Bank, 145 Fed. Rep. 466 (1906). Where by resolution of the stockholders all the property of an embarrassed corporation is transferred to trustees to sell and pay the debts and reconvey the remainder to the corporation, and the trustees proceed to do so, the transaction is legal, even though the stockholders' meeting is not held at its principal office, and proxies were irregular and unauthorized, and the directors took no action, and the conveyances were irregular. Kessler & Co. *v.* Ensley Co., 141 Fed. Rep. 130 (1905); aff'd, 148 Fed. Rep. 1019. A solvent corporation may give preferences, and even if its assets are not equal to its liabilities, yet if the officers have reason to think that the corporation will continue, a preference may be legal. Wyman *v.* Bowman, 127 Fed. Rep. 257 (1904). Even though a creditor of a corporation arranges with it so that in case of its insolvency he shall obtain a preference, and even though such arrangement is void, yet his claim will not be postponed to other claims, but all claims will share ratably as though the agreement had never been made. United States Rubber Co. *v.* American, etc. Co., 181 U. S. 434 (1901), rev'g 96 Fed. Rep. 891. An insolvent corporation may execute a mortgage to secure an existing debt and further advances. Coler *v.* Allen, 114 Fed. Rep. 609 (1902). When a foreclosure sale is subject to chattel mortgages and the sale is confirmed, the purchaser cannot attack such chattel mortgages on the ground that the mortgagor was insolvent at the time. Richards *v.* Halliday, 112 Fed. Rep. 86 (1901), holding also that an insolvent New Jersey corporation may give a chattel mortgage.

Where a corporation makes an assignment for the benefit of its creditors it commits an act of bankruptcy. Clark *v.* American, etc. Co., 101 Fed. Rep. 962 (1900). Even though the bankruptcy court may have jurisdiction over an insolvent corporation that is being wound up in a state court, yet the bankruptcy court may refuse to take jurisdiction if it is clearly shown that the creditors will be benefited most by the state proceeding. *In re* Harper & Bros., 100 Fed. Rep. 266 (1900). The bankruptcy act does not apply to a water-works company, a quasi-public corporation. *In re* New York, etc. Co., 98 Fed. Rep. 711 (1900). Even though a Connecticut corporation which owns a railroad in Kentucky is being wound up, in accordance with the statutes of Connecticut, and even though the company has assigned to the statutory receiver in Connecticut all its property, yet such an assignment is not an assignment for the benefit of creditors, and hence a creditor of the railroad may attach in Kentucky assets in that state. Huntington *v.* Chesapeake, etc. Ry., 98 Fed. Rep. 459 (1899). As to what constitutes an act of bankruptcy on the part of a corporation, see *In re* Baker-Ricketson Co., 97 Fed. Rep. 489 (1899). A board of directors has power to make an assignment for the benefit of creditors. *In re* Bates Machine Co., 91 Fed. Rep. 625 (1899). Preferences are legal. National Bank of Commerce *v.* Allen, 90 Fed. Rep. 545 (1898). An insolvent corporation may give a chattel mortgage to secure a part of its debts. Such a mortgage is legal, notwithstanding a statute against assignments with preferences. Brown *v.* Grand Rapids, etc., Co. 58 Fed. Rep. 286 (1893), a case arising in Michigan. A creditor who becomes such after a mortgage is executed cannot object to the mortgage on the ground that it was an unlawful pref-

elsewhere to the effect that at common law an insolvent corporation could not prefer one creditor as against another. The almost

erence. Central Trust Co. *v.* Bridges, 57 Fed. Rep. 753 (1893). A statutory prohibition against preferences by an insolvent corporation does not prevent the giving of collateral for a debt when contracted. Armstrong *v.* Chemical Nat. Bank, 41 Fed. Rep. 234 (1890). A corporate creditor may take a mortgage on the corporate property, although he knows that the corporation is insolvent. Doe *v.* Northwestern, etc. Co., 78 Fed. Rep. 62 (1896). Judgment notes for past and future advances are illegal where the board of directors is at once turned over to the dummies of the holders of the judgment notes, and the company continues to do business as though said judgment notes had not been given, the intent being to insure a preference not only at once, but in the future. Such preferences as to the future must be evidenced by a mortgage or some other instrument upon the public records. American, etc. Co. *v.* Fargo, 77 Fed. Rep. 671 (1896).

A statute prohibiting preferences by any insolvent debtor during ninety days prior to an assignment does not apply to a mortgage given to take the place of a prior mortgage, and of obtaining a larger loan, the creditor having no reasonable cause to suppose the debtor was insolvent. Moore *v.* American L. & T. Co., 80 Fed. Rep. 49 (1896). A remittance to a correspondent by a national bank is legal, although the bank is insolvent at the time. Hayden *v.* Chemical Nat. Bank, 80 Fed. Rep. 587 (1897). Where the controlling directors of two corporations are the same persons, and one company becomes liable on paper for the accommodation of the other, and thereby renders the directors of the former personally liable for breach of trust, a mortgage given by the latter to the former as security for such paper is invalid, because it amounts to a preference to such officers. Hutchinson *v.* Sutton Mfg. Co., 57 Fed. Rep. 998 (1893), a case arising in Indiana. An attaching creditor cannot attack a corporate conveyance which operates as a preference, the corporation itself being insolvent, inasmuch as the reason against preferences by an insolvent corporation applies as much to attaching creditors as to parties taking by conveyance. Walker *v.* Miller, 59 Fed. Rep. 869 (1894). A statutory assignment by a Minnesota corporation to another Minnesota corporation does not prevent a subsequent attachment in Massachusetts by a citizen of New York who is a creditor of the insolvent Minnesota corporation to reach assets of the latter in Massachusetts, even though the New York creditor had notice of the assignment, but had not proven his claim nor filed a release therein. Security T. Co. *v.* Dodd, Mead & Co., 173 U. S. 624 (1899). In this case the court stated that common-law assignments were different and would be respected, except so far as they conflicted with the rights of local creditors or with the laws and policy of a state.

Section 5242 of the Revised Statutes of the United States prohibits a national bank from transferring any notes, bonds, bills of exchange, or other evidences of debt or mortgages or judgments or deposits either after an act of insolvency or in contemplation thereof with a view to a preference. The following decisions are on this statute: National Security Bank *v.* Butler, 129 U. S. 223 (1889), aff'g 22 Fed. Rep. 697, where a bank holding a certificate of deposit of an insolvent bank took assets of the latter on the day of its failure and gave a certificate of deposit therefor, and then sought to offset the one against

unanimous conclusion, however, is that preferences may be given by an insolvent corporation the same as by an insolvent individual.

the other. The court held that it was immaterial that the creditor of the insolvent bank was not aware of the insolvency. Roberts *v.* Hill, 24 Fed. Rep. 571 (1885), overruling 23 Fed. Rep. 311, where a bank transferred to one of its depositors a note which the bank held, the transfer being made when the bank was insolvent. Although the bank kept open for about three months thereafter, and even though the note was given to the depositor as collateral security, and was the only way of preventing him from drawing out his money, the court held that the act was in contemplation of insolvency, inasmuch as the officers could reasonably see that the bank would presently be unable to meet its obligation, and would be obliged to suspend operations. Case *v.* Citizens' Bank, 2 Woods, 23 (1873); s. c., 5 Fed. Cas. 251, in which an insolvent bank transferred various bills and notes to another bank, to which the former bank had, while solvent, transferred bills of exchange which were not thereafter honored. The court held the act to be illegal. Armstrong *v.* Chemical Nat. Bank, 41 Fed. Rep. 234 (1890), wherein it was held that an insolvent bank might transfer assets to secure a loan made contemporaneously with such transfer. Irons *v.* Manufacturers' Nat. Bank, 6 Biss. 301 (1875); s. c., 13 Fed. Cas. 100, where the phrase "act of insolvency" was held to mean any act which would be an act of insolvency by an individual banker. See also National Bank *v.* Colby, 21 Wall. 609 (1874). In Casey *v.* Société de Crédit Mobilier, 2 Woods, 77 (1874); s. c., 5 Fed. Cas. 262, it was held that the preference intended by the act is such as is given to secure or pay a pre-existing debt, and does not prevent the borrowing of money upon security. This case was reversed in 96 U. S. 467. Venango Nat. Bank *v.* Taylor, 56 Pa. St. 14 (1867), holding that the act relates to legal as well as voluntary transfers of property by banks. See also National, etc. Bank *v.* Mechanics', etc. Bank, 89 N. Y. 467 (1882); Robinson *v.* Newberne Nat. Bank, 81 N. Y. 385 (1880), holding that the act applies only to such banks as are insolvent or are about to become so. A state statute giving savings banks a preference in payment from the assets of an insolvent bank does not apply to national banks which become insolvent. Davis *v.* Elmira Sav. Bank, 161 U. S. 275 (1896), rev'g Elmira Sav. Bank *v.* Davis, 142 N. Y. 590, and 73 Hun, 357. Remittances by an insolvent national bank to its correspondent bank are legal where the former bank has not actually stopped business and the transactions were in good faith. Hayden *v.* Chemical Nat. Bank, 84 Fed. Rep. 874 (1898).

Alabama: That an assignment may be made, see Chamberlain *v.* Bromberg, 83 Ala. 576 (1888); Pope *v.* Brandon, 3 Ala. (O. S.) 401 (1830), holding also that it was not necessary that the creditors should sign the assignment; nor was the deed void because the trustee was the president of the assigning bank, who in that capacity executed the deed as grantor; Allen *v.* Montgomery R. R., 11 Ala. 437, 451 (1847). The president cannot make an assignment by the company for the benefit of creditors. A ratification by the directors is not good as against an attachment in the meantime. Norton *v.* Alabama Nat. Bank, 102 Ala. 420 (1894). A bill to compel an assignee for the benefit of creditors of an insolvent corporation to account, and to hold stockholders liable on stock issued for property, and to reach corporate assets in the hands of third parties, is multifarious.

And yet it must be conceded that great abuses have arisen therefrom. The directors and stockholders of a corporation are numer-

The theory that the capital stock is a trust fund is unfounded. O'Bear Jewelry Co. *v.* Volfer, 106 Ala. 205 (1895).

A preference, however, is not allowed in this state. Yet even though under the decisions of Alabama an insolvent corporation cannot give a preference, nevertheless so long as the corporation is a going concern it may pay a party who is not aware of the insolvency. Mary Lee, etc. Ry. *v.* Knox, 110 Ala. 632 (1895). A corporation in financial difficulties cannot execute a mortgage to secure bonds, and deliver these bonds to a bank as security for past and future advances, where two of the directors of the company are also directors of the bank. Such a mortgage delays other creditors. Only *bona fide* holders of such bonds are protected. Age-Herald Co. *v.* Potter, 109 Ala. 675 (1895). A mortgage deed of trust to secure bonds executed by an insolvent corporation is presumed to be a conveyance of corporate property to delay and defraud creditors; but a bill attacking such a mortgage must allege that parties receiving bonds to secure their debts did not advance money at the time of receiving bonds, but were antecedent creditors. Coal City, etc. *v.* Hazard Powder Co., 108 Ala. 218 (1896). Even though a corporation has allowed judgment to be taken against it, yet a general creditor cannot have a receiver appointed on the ground that such judgment constitutes an illegal preference. Builders', etc. Co. *v.* Lucas, 119 Ala. 202 (1898).

Arkansas: An insolvent Missouri corporation may prefer a creditor, but the preference is not good as to property in Arkansas, the Arkansas statutes prohibiting such preference. Smead *v.* Chandler, 71 Ark. 505 (1903). Preferences were formerly upheld in this state. Ringo *v.* Bisco, 13 Ark. 563 (1853); *Ex parte* Conway, 4 Ark. 302, 352 (1842). The statutes of Arkansas prohibit preferences among creditors of insolvent corporations. Sand & H. Digest, §§ 1425, 1427.

California: At common law a preference is legal. Merced Bank *v.* Ivett, 127 Cal. 134 (1899).

Canada: The directors may make an assignment of the corporate assets for the benefit of creditors. Whiting *v.* Hovey, 13 Ont. App. Cas. 7 (1886).

Colorado: In Colorado assignments by corporations for the benefit of creditors are regulated by statute. See L. 1897, ch. 26. An insolvent corporation may give preferences. Beaman *v.* Stewart, 19 Colo. App. 226 (1903). An insolvent corporation may give a preference and convey to one creditor all its property. John, etc. Co. *v.* Sweetzer, 10 Colo. App. 421 (1897). See 96 Pac. Rep. 172.

Connecticut: Preferences are upheld. Savings Bank *v.* Bates, 8 Conn. 505 (1831); Smith *v.* Skeary, 47 Conn. 47 (1879). The following case bears upon this principle of law, but does not conflict with it: Catlin *v.* Eagle Bank, 6 Conn. 233 (1826). A deed in trust by a corporation of all its property, made with consent of nearly all its creditors, to trustees to continue the business, is void as to non-consenting creditors. Waterman *v.* Sprague Mfg. Co., 55 Conn. 554 (1888); De Wolf *v.* Sprague Mfg. Co., 49 Conn. 282 (1881). Under the Connecticut statutes an insolvent corporation is placed in a receiver's hands for the benefit of all creditors, and a person holding security must stand on his security or else come in only for the excess of his claim above the value of the security. *Re* Waddell-Entz Co., 67 Conn. 324 (1896). Where a mortgagee at the request of the mortgagor corporation withholds the

ous, and each generally wishes some particular creditor to be preferred. Moreover an insolvent corporation never hopes to resume

mortgage from the record to deceive the public until the mortgagor becomes insolvent, the mortgage may be set aside for fraud. Curtis *v.* Lewis, 74 Conn. 367 (1902).

Georgia: An assignment for the benefit of creditors is legal. McCallie *v.* Walton, 37 Ga. 611 (1868). And preferences may be given. The following case bears upon this principle of law, but does not conflict with it: Hightower *v.* Mustian, 8 Ga. 506 (1850).

Illinois: Assignments by insolvent corporations with preferences are legal. Blair *v.* Illinois Steel Co., 159 Ill. 350 (1896), quoting and approving the text above; Illinois Steel Co. *v.* O'Donnell, 156 Ill. 624 (1895); Chicago, etc. Co. *v.* Smith, 158 Ill. 417 (1895). The preference may be by way of mortgage. Reed *v.* Bradley, 17 Ill. 321 (1856). A preference by an insolvent corporation is legal. State Nat. Bank *v.* Union Nat. Bank, 168 Ill. 519 (1897). It is legal in Illinois for an insolvent corporation to give judgment notes, even though judgment is immediately entered thereon and all its assets sold out, the creditor not being a director or stockholder. Peterson *v.* Brabrook, etc. Co., 150 Ill. 290 (1894). Although a New York insolvent corporation is prohibited by statute from preferring a creditor, yet where it turns over in Ohio property to a creditor, the Illinois courts will sustain the preference in accordance with Illinois decisions. Warren *v.* First Nat. Bank, 149 Ill. 9 (1893). A corporation that is unable to pay its debts as they become due in the usual course of business is insolvent. Atwater *v.* American, etc. Bank, 152 Ill. 605 (1894).

Indiana: The assignment may be made by a meeting of the board of directors, as in any other corporate business. De Camp *v.* Alward, 52 Ind. 468 (1876). Preferences are legal. First Nat. Bank *v.* Dovetail, etc. Co., 143 Ind. 550 (1895); Smith *v.* Wells, etc. Co., 148 Ind. 333 (1897). A mortgage given by an insolvent Ohio corporation to certain of its creditors residing in Ohio is valid in Indiana, such mortgage being upon real estate in Indiana, even though the Ohio courts have declared such a mortgage to be invalid. Nathan *v.* Lee, 152 Ind. 232 (1899). A mortgage securing bonds is not fraudulent by reason of the fact that it was agreed that it should not be recorded in order that the credit of the company might not be impaired. Am. Trust & S. Bank, etc. *v.* McGettigan, 152 Ind. 582 (1899).

Iowa: Preferences are legal. Rollins *v.* Shaver, etc. Co., 80 Iowa, 380 (1890). The following case bears upon this principle of law, but does not conflict with it: Buell *v.* Buckingham, 16 Iowa, 284 (1864). A director and stockholder who acquiesces in the giving of a mortgage to a certain creditor cannot afterwards complain of the same. Gillette *v.* Meredith, 103 Iowa, 155 (1897). An insolvent corporation may prefer one of its creditors. First Nat. Bank *v.* Garretson, 107 Iowa, 196 (1899). An insolvent individual who owes a bank may convey land to the bank for the benefit of its depositors, and the doctrine that individual assets must be applied to individual debts before being applied to partnership debts does not apply, even though he owns one-half of the stock of the bank. Steinke *v.* Yetzer, 108 Iowa, 512 (1899). The validity of a mortgage given by an insolvent Ohio corporation upon land owned by it in Iowa is determined by the laws of Iowa. Such a mortgage given two months before a general assignment by the corporation is valid, even though the corporation was insolveut during the whole time, the

business again, and is more ruthless and unconscionable in its preferences, because no moral obligation to do equity rests on any one

mortgagee not knowing thereof. Manton *v.* Seiberling, 107 Iowa, 534 (1899).

Kansas: An insolvent corporation may give preferences. Grand, etc. Co. *v.* Rude, etc. Co., 60 Kan. 145 (1899).

Kentucky: A receiver may set aside preferences in violation of the Kentucky statute. Industrial, etc. *v.* Taylor, 118 Ky. 851 (1904). A creditor of an insolvent corporation may, by attachment, obtain a preference over other creditors, and if an insolvent corporation makes a fraudulent assignment for the benefit of creditors, any creditor may levy such an attachment. A secret unrecorded mortgage, held until the company becomes insolvent, is fraudulent as to other creditors. Louisville, etc. Co. *v.* Etheridge, etc. Co., 43 S. W. Rep. 169 (Ky. 1897).

Louisiana: The Louisiana statute allowing insolvent individuals to apply to the court and obtain an extension of time on their debts does not apply to corporations. Isabella Lumber Co. *v.* Creditors, 48 La. Ann. 269 (1896).

Maine: An insolvent corporation in Maine may be declared an insolvent debtor under the statute, but cannot obtain a discharge in insolvency. A creditor may obtain a judgment at law and levy on property which the insolvent illegally transferred away. Miller *v.* Waldoborough Packing Co., 88 Me. 605 (1896). Although an Illinois corporation has passed through insolvency proceedings in Maine, yet a non-resident creditor who was not a party to such proceedings may thereafter sue such corporation in Maine. Hammond, etc. Co. *v.* Best, 91 Me. 431 (1898).

Maryland: Assignments are legal. State *v.* Bank of Maryland, 6 Gill & J. 205, 219 (1834). A vendor of goods to an insolvent corporation may rescind and replevy the goods if the corporate officers at the time had no reasonable expectation of making payment when the bill becomes due. Edelhoff *v.* Horner, etc. Co., 86 Md. 595 (1898). An assignment for the benefit of creditors, executed by the president and secretary without authority from the board of directors, may be valid if not promptly repudiated by the board of directors. Miller *v.* Matthews, 87 Md. 464 (1898).

Massachusetts: Where a corporation makes an assignment for the benefit of creditors, the assignee is entitled to all its books, including minute books. Lothrop, etc. Co. *v.* Williams, 191 Mass. 361 (1906). Assignments are legal. Sargent *v.* Webster, 54 Mass. 497 (1847), holding also that the assignment may be to a stockholder to pay a debt of the corporation to him, and the remainder to go to the corporate treasurer for the benefit of other creditors. As to the Massachusetts statute providing for insolvency proceedings against a corporation which makes an assignment for the benefit of creditors, see Steel, etc. Co. *v.* Manchester Sav. Bank, 163 Mass. 252 (1895). As to the evidence necessary to prove that an insolvent corporation had preferred a creditor in paying a debt in violation of the statute in Massachusetts, see Clarke *v.* Second Nat. Bank, 177 Mass. 257 (1901).

Michigan: Before a corporate creditor can complain of the method in which the corporation has disposed of its property he must obtain a judgment. McKee *v.* City Garbage Co., 140 Mich. 497 (1905). An insolvent corporation may make an assignment for the benefit of creditors, and the board of directors may make it without the assent of the stockholders. Boynton *v.* Roe, 114 Mich. 401 (1897). The Michigan statute against prefer-

director or stockholder. In all this an insolvent corporation dif-

ences in assignments does not prevent the giving of a mortgage to a trustee to secure certain debts due from the insolvent corporation mortgagor. Austin *v.* First Nat. Bank, 100 Mich. 613 (1894). At common law in Michigan an insolvent corporation might assign. Bank of Montreal *v.* Potts, etc. Co., 90 Mich. 345 (1892); Kendall *v.* Bishop, 76 Mich. 634 (1889). The president who makes an assignment of the company's assets for the benefit of creditors under a resolution of the board of directors cannot afterwards attack it. *Re* George, etc. Co., 86 Mich. 149 (1891); Covert *v.* Rogers, 38 Mich. 363 (1878), holding that the assignee may be one of the stockholders. In this case he was a former treasurer, who had resigned. Stockholders cannot prevent directors making an assignment for the benefit of corporate creditors, though their term of office expires in four days, the corporation being insolvent. A mortgage by an insolvent corporation given in pursuance of a prior agreement is legal where the mortgagee did not know the corporation was insolvent. Franklin, etc. Co. *v.* Amazon, etc. Co., 128 Mich. 198 (1901).

Minnesota: While a judgment creditor of a corporation may maintain a bill to redeem land which was deeded by it, but which was in fact a mortgage, the proof must be clear that the deed was intended as a mortgage. Minneapolis, etc. Co. *v.* Jones, 95 Minn. 127 (1905). The board of directors of an insolvent corporation may order an assignment for the benefit of creditors. Tripp *v.* Northwestern Nat. Bank, 41 Minn. 400 (1889), 45 Minn. 383 (1891). In Minnesota, by statute, an insolvent corporation cannot give preferences. Yanish *v.* Pioneer Fuel Co., 64 Minn. 175 (1896).

Mississippi: Preferences are legal. Sells *v.* Rosedale, etc. Co., 72 Miss. 590 (1895); Arthur *v.* Commercial, etc. Bank, 17 Miss. 394 (1848); Palmer *v.* George W. Hutchison Grocery Co., 11 S. Rep. 789 (Miss. 1892). The following case bears upon this principle of law, but does not conflict with it: Robins *v.* Embry, 1 Sm. & M. Ch. (Miss.) 207, 258 (1843). An assignment by a railroad assigns its income only. Arthur *v.* Commercial, etc. Bank, 17 Miss. 394, 430 (1848). See also State *v.* Commercial Bank, 21 Miss. 569 (1850). An insolvent corporation may give preferences. Fargason *v.* Oxford, etc. Co., 78 Miss. 65 (1900).

Missouri: Assignments are legal. Hutchinson *v.* Green, 91 Mo. 367 (1886); Shockley *v.* Fisher, 75 Mo. 498 (1882), construing a statute authorizing an assignment "by a debtor to any person in trust for his creditors" to include corporations, and holding that the right exists at common law, citing 2 Kent, Com. 398, and note. Preferences may be given. Meyer *v.* American, etc. Co., 130 Mo. 188 (1895); Slavens *v.* Cook Drug Co., 128 Mo. 341 (1895). A creditor of an insolvent corporation may obtain a preference by an attachment, and it is legal, even though a director of the corporation advised him to attach. La Grange, etc. Co. *v.* National Bank, 122 Mo. 154 (1894), the court refusing to follow the Tennessee rule. An embarrassed corporation may take title to land in a director's name and have him give a mortgage thereon to raise money for the corporation. Donham *v.* Hahn, 127 Mo. 439 (1895). An insolvent corporation may turn over to a bank book-accounts, merchandise and fixtures as security for a debt, even though the corporation thereafter, on the same day, assigns for the benefit of creditors. Alberger *v.* National Bank, 123 Mo. 313 (1894), calling attention also to the fact that contrary decisions in Ohio and Texas were based on statutes. A creditor who has not yet reduced his claim to

fers from an insolvent individual. As a result, the abuses from

a judgment cannot file a bill to set aside an alleged illegal transfer of property. Atlas Nat. Bank *v.* Moran, etc. Co., 138 Mo. 59 (1897). An assignment for the benefit of creditors, authorized by the directors acting separately and not as a board, is invalid. Calumet Paper Co. *v.* Haskell, etc, Co., 144 Mo. 331 (1897).

Montana: An insolvent corporation may give a preference by a mortgage. Teitig *v.* Boesman, 12 Mont. 404 (1892). Preferences are legal. Ames, etc. Co. *v.* Heslet, 19 Mont. 188 (1897). After foreclosure of a mortgage other creditors cannot attack a mortgage on the ground that the mortgagee had not complied with the state statutes. Miller *v.* Gates, 22 Mont. 305 (1899).

Nebraska: Even though a preference is set aside a creditor receiving the preference is entitled to share *pro rata* with the other creditors. National, etc. Co. *v.* Columbia Nat. Bank, 68 Neb. 47 (1903). An insolvent corporation may, in the absence of actual fraud, prefer one or more of the creditors, to the exclusion of others. Wallachs *v.* Robinson, etc. Co., 50 Neb. 469 (1897); Shaw *v.* Robinson, etc. Co., 50 Neb. 403 (1897). A mortgage given by way of preference by an insolvent corporation is valid unless it is given to a director or officer. M. A. Seeds, etc. Co. *v.* Heyn, etc. Co., 57 Neb. 214 (1898).

New Hampshire: Assignments may be made. Flint *v.* Clinton Co., 12 N. H. 430, 435 (1841). As to preferences, the following case bears upon this principle of law: Richards *v.* New Hampshire Ins. Co., 43 N. H. 263 (1861). As to proceedings against a corporation under the insolvent debtor's act, see Kennett *v.* Woodworth-M. Co., 68 N. H. 432 (1896).

New Jersey: Section 64 of the Laws of 1896 now forbids any assignment whatsoever of any of the assets of an insolvent corporation. Where the directors of an insolvent corporation who have paid dividends illegally, assign all its assets to an assignee for the benefit of its creditors, the assignee being one of their number, the court may appoint a receiver and remove the assignee, under the New Jersey statute. Gilroy *v.* Somerville, etc. Mills, 67 N. J. Eq. 479 (1904). A *bona fide* mortgagee is protected, even though the corporation was insolvent when the mortgage was made, and a mortgage by an insolvent corporation is prohibited by statute. A mortgage to raise money to keep the concern going is not in contemplation of insolvency. Regina, etc. Co. *v.* F. G. Otto & Sons, 65 N. J. Eq. 582 (1903). As to the invalidity of a mortgage by an insolvent corporation to one of its creditors for a past due debt, see Miller *v.* Gourley, 65 N. J. Eq. 237 (1903). A judgment creditor may by execution obtain priority in New Jersey up to the time of the appointment of a receiver. Squire *v.* Princeton, etc. Co., 68 Atl. Rep. 176 (N. J. 1907). A corporation is insolvent when it is seriously embarrassed for funds and has no available assets to pay present debts, even though it is still doing some business. Catlin *v.* Vichachi, etc. Co., 67 Atl. Rep. 194 (N. J. 1907). The statute of 1895, prohibiting insolvent corporations from making assignments, did not apply to companies organized before the passage of the statute. Such a statute did not invalidate an assignment for the benefit of creditors given by an insolvent New Jersey corporation in Pennsylvania. Borton *v.* Brines-Chase Co., 175 Pa. St. 209 (1896). A mortgage given by an insolvent corporation to a creditor for a pre-existing debt is invalid under the New Jersey statutes. Frost *v.* Barnert, 56 N. J. Eq. 290 (1897). The proper way to attack a preference given by an insolvent corporation is in the distribution proceedings in a suit to have the company declared

allowing an insolvent corporation to make preferences are so great

insolvent, and a receiver appointed, and its assets distributed. A warrant of attorney to confess judgment given in September and used in February is evidence of an intent to give a preference if existing notes are taken up and new notes given at the time of entry of judgment. Consolidated Coal Co. *v.* National St. Bank, 55 N. J. Eq. 800 (1897). At common law insolvent corporations may assign for the benefit of creditors. Wilkinson *v.* Bauerle, 41 N. J. Eq. 635 (1886). And preferences may be given. Vail *v.* Jameson, 41 N. J. Eq. 648 (1886); Wilkinson *v.* Bauerle, 41 N. J. Eq. 635 (1886). A chattel mortgage made in contempt of court and in violation of the statutes against preferences by a corporation is void. Bissell *v.* Besson, 47 N. J. Eq. 580 (1890). See also Bergen *v.* Porpoise Fishing Co., 42 N. J. Eq. 397 (1886). Under the old New Jersey statute the directors of a corporation might mortgage the property and issue bonds to themselves as security for previous advancements, even though the company was insolvent. Whittaker *v.* Amwell Nat. Bank, 52 N. J. Eq. 400 (1894). It is a disposal of property for the purpose of hindering and delaying creditors, within the meaning of the second section of the statute of frauds, for an insolvent firm to mortgage all their property to a trustee and take the bonds secured by that mortgage, even though they take the bonds to turn over to their creditors. But the act is voidable only as to those creditors who object and contest the matter. National Bank *v.* Sprague, 21 N. J. Eq. 530 (1870). Although New York corporations are forbidden by the statutes of New York to execute mortgages or give preferences in contemplation of insolvency, yet a mortgage given by a New York corporation on chattels and real estate in New Jersey was upheld in New Jersey, although made in contemplation of insolvency. The New Jersey courts did not apply the New York law, but will apply that of New Jersey. The debt secured by the mortgage in this case was payable in New Jersey, however, and most of the creditors resided there. Boehme *v.* Rall, 51 N. J. Eq. 541 (1893). A levy of execution prior to the appointment of a receiver has a prior claim on the assets levied upon. Van Steenberg *v.* Parsil, etc. Co., 34 Atl. Rep. 135 (N. J. 1896). An insolvent New Jersey corporation cannot as against some of its creditors issue mortgage bonds to other creditors. Skirm *v.* Eastern, etc. Co., 57 N. J. Eq. 179 (1898). A mortgage made by the president without authority is not binding on the company and cannot be validated after the company has become insolvent where the statute prohibits assignments after insolvency. Howell *v.* Keen, 43 Atl. Rep. 1070 (N. J. 1899). See 70 Atl. Rep. 297.

New York: In New York, from 1825 to 1892, the statutes prohibited corporations from making any transfers or assignments in contemplation of insolvency, and declared any such transfers and assignments utterly void. (1 R. S. 603, § 4.) By this statute all assignments by New York corporations for the benefit of creditors were held to be void. Sibell *v.* Remsen, 33 N. Y. 95 (1865); National, etc. Bank *v.* Mechanics' Nat. Bank, 89 N. Y. 467 (1882); Harris *v.* Thompson, 15 Barb. 62 (1853); Atkinson *v.* Rochester Printing Co., 114 N. Y. 168 (1889).

The following decisions were as to what was meant by "in contemplation of insolvency": In Robinson *v.* Bank of Attica, 21 N. Y. 406 (1860), where a state bank, three days before its failure, induced a party to give it accommodation checks, and on the following day turned out securities to secure such checks, the court held that the securities could be recovered

that the various states are enacting prohibitory statutes on this

back by the receiver. In Marine Bank *v.* Clements, 31 N. Y. 33 (1865), where an insolvent corporation assigned a note to a party, and that party brought suit upon the note, the court held that the maker of the note could not set up the insolvency as a defense, there being no proof that the indorsee did not give value at the time he took the note from the insolvent corporation. In Dutcher *v.* Importers', etc. Nat. Bank, 59 N. Y. 5 (1874), the court held that where the bank paid a check to a depositor who had no knowledge of the insolvency of the bank, this was not such a preference as was prohibited by the statute. In Paulding *v.* Chrome Steel Co., 94 N. Y. 334 (1884), although a chattel mortgage had been given five years before the company became insolvent, and had not been recorded, and was renewed and recorded at the time when the corporation was insolvent, yet the court held that the mortgage was valid. Under the New York act a director cannot obtain a preference by attachment, nor by a judgment taken by default. Throop *v.* Hatch Lithog. Co., 125 N. Y. 530 (1891). In 1892 the above statute was changed so that assignments by insolvent corporations are now legal, provided no preferences are given. (Stock Corporation Law, § 48.) A trust company holding the notes of a corporation with a good endorser may take a transfer of the property of the corporation in payment, even though the corporation thereby becomes insolvent. The New York statute against conveyances by an insolvent corporation does not apply. Perry *v.* Van Norden, etc. Co., 192 N. Y. 189 (1908). Preferences given to any creditor, whether a corporate officer, or stockholder, or outsider, are void. A chattel mortgage given by an insolvent Michigan corporation to a trustee for the benefit of all creditors who should accept its terms and extend their debts, the trustee being given power to continue the business, is not valid as to personal property in New York state, even though recorded as a chattel mortgage in New York state. Dearing *v.* McKinnon, etc. Co., 165 N. Y. 78 (1900). An assignment of personal property by an insolvent corporation for the benefit of such of its creditors as accept the same, one of the provisions being that they should extend the time of payment of their claims, is illegal under the statute of frauds in New York, in that it delays and hinders the creditors in obliging them to extend the time of payment and in that the assignee was authorized to sell on credit. The fact that such an instrument was legal in Michigan, where the corporation existed, did not legalize the instrument as to personal property in New York state. Dearing *v.* McKinnon, etc. Co., 33 N. Y. App. Div. 31 (1898). The New York statute does not render invalid a judgment obtained by a corporate creditor by default for failure to answer. Lopez *v.* Campbell, 163 N. Y. 340 (1900). Where an insolvent corporation has illegally transferred its property, a permanent receiver may bring a suit at law for conversion instead of suing in a court of equity. McQueen *v.* New, 45 N. Y. App. Div. 579 (1899). A judgment obtained by collusion with the president may be an illegal preference. Rossman *v.* Seaver, 41 N. Y. App. Div. 603 (1899). Where a corporation is formed to make advances to an insolvent copartnership, taking a lien on the property of the latter, and the latter continues the business in its own name and turns over the proceeds of the sales to the former, the scheme is illegal as giving the firm a false credit and as being inconsistent with the nature of a chattel mortgage. Mathews *v.* Hardt, 37 N. E. Misc. Rep. 653 (1902); aff'd, 79 N. Y. App. Div. 570. In

subject. Although a state cannot give a preference to its own cit-

Baker *v.* Emerson, 4 N. Y. App. Div. 348 (1896), where a manufacturing company, being insolvent, paid a note for $3,000, leaving $17,000 of debts unpaid, payment being made May 29, 1893, and the company suspended business June 5, 1893, the court held that the payment was illegal, although the company expected at the time of the payment to raise sufficient money to go on with its business; citing to this effect, Vennard *v.* McConnell, 93 Mass. 555, 562 (1866); also Forbes *v.* Howe, 102 Mass. 427, 436 (1869). A preference to a partnership of which a stockholder is a member is illegal. Jones *v.* Blun, 145 N. Y. 333 (1895). An assignment for the benefit of creditors is authorized by the directors and not the stockholders. A resolution of the board of directors that the company execute an assignment for the benefit of creditors may be carried out by the president without further authority; but he should not select himself as assignee. Rogers *v.* Pell, 154 N. Y. 518 (1898). In New York an insolvent corporation may make an assignment for the benefit of creditors, but there must not be any preferences. Croll *v.* Empire, etc. Co., 17 N. Y. App. Div. 282 (1897). Where a private corporation, with the consent of all its stockholders of record, agrees with its creditors that the property shall be taken charge of by an individual and managed for the purpose of paying the debts and then returning the property to the corporation, and one of the stockholders at that time secretly transfers some of the certificates of stock to his wife and she holds the stock for three years and then transfers it without consideration to a party who brings suit to set aside the transaction, the court will not give such relief. Marbury *v.* Stone, 17 N. Y. App. Div. 352 (1897); aff'd, 160 N. Y. 701. The fact that the company is unable to meet its obligations, and that judgments are being entered against it, shows insolvency. Nealis *v.* American, etc. Co., 76 Hun, 220 (1894); aff'd, 150 N. Y. 42. Even in New York, where a conveyance in view of insolvency is void, an embarrassed corporation may mortgage all its property to secure bonds which are given to creditors for their debts, where the creditor who refuses to take the bonds waits over three years before attacking the mortgage. New Britain Nat. Bank *v.* A. B. Cleveland Co., 91 Hun, 447 (1895); aff'd, 158 N. Y. 722 (1899). An insolvent corporation may give a mortgage to secure bonds given at that time, if the issue is a fair business transaction and for the purpose of saving the company and its property. Cochran *v.* Anglo-American, etc. Co., 69 Hun, 168 (1893). In an action by a receiver to set aside a transfer of property made in violation of the statute, it seems that it is no defense that an execution sale by a third party had taken all the equity of the company in the property. Stonebridge *v.* Perkins, 141 N. Y. 1 (1894). Formerly a foreign corporation might make, in New York, an assignment for the benefit of its creditors, where such assignment would be valid if made in the state where the company was incorporated; in this case in New Jersey. The New York statute against such assignments applied only to a domestic corporation. At common law any corporation might make such an assignment, and the president and secretary, under authority of the board of directors, might execute an assignment for the benefit of creditors made by the corporation. Vanderpoel *v.* Gorman, 140 N. Y. 563 (1894). An insolvent Massachusetts corporation, having goods in New York, might transfer the same to a creditor, and the transfer takes precedence of an attachment subsequently levied in

izens as against citizens of another state in the distribution of the

New York by another creditor. The New York act against assignments by insolvent corporations formerly applied only to domestic corporations. Lane *v.* Wheelwright, 69 Hun, 180 (1893); aff'd, 143 N. Y. 634. A creditor of a foreign corporation could obtain a preference in New York upon assets in New York. Logan *v.* McCall Pub. Co., 140 N. Y. 447 (1893); Coats *v.* Donnell, 94 N. Y. 168 (1883), holding that a statute prohibiting preferences by corporations did not apply to foreign corporations. In the case of Standard, etc. Bank *v.* Garfield, etc. Bank, 56 N. Y. App. Div. 43 (1900), it is held that the New York statute against assignments by an insolvent corporation does not apply to a foreign corporation, and that a statute of another state against such assignments does not apply in New York state. A foreign corporation not doing business in New York state is presumed to have power to make an assignment for the benefit of creditors with preferences. Matter of Hulbert Bros. etc., 38 N. Y. App. Div. 323 (1899); rev'd on another point in 160 N. Y. 9. As to foreign corporations now in New York, see L. 1897, ch. 384.

North Carolina: Preferences are upheld. Blalock *v.* Kernersville Mfg. Co., 110 N. C. 99 (1892). An insolvent corporation may prefer creditors in North Carolina subject to a sixty-day statutory restriction. Merchants' Nat. Bank *v.* Newton Cotton Mills, 115 N. C. 507 (1894). A corporation is not insolvent so long as its property, at market prices, is equal in value to its debts. Silver, etc. Co. *v.* North, etc. Co., 119 N. C. 417 (1896). *Cf.* s. c., 122 N. C. 542 (1898).

Ohio: Preferences are illegal. Damarin *v.* Huron Iron Co., 47 Ohio St. 581 (1890); Sayler *v.* Simpson, 46 Ohio St. 510 (1890); Rouse *v.* Merchants' Nat. Bank, 46 Ohio St. 493 (1889); followed in Smith, etc. Co. *v.* McGroarty, 136 U. S. 237 (1890), in an Ohio case.

Oregon: A failing corporation may give a mortgage if in good faith. Currie *v.* Bowman, 25 Oreg. 364 (1894); Savin *v.* Columbia Fuel Co., 25 Oreg. 15 (1894). A judgment creditor who has levied an execution may file a bill to set aside an illegal assignment, but cannot claim a preference on that fund. Kerslake *v.* Brower, etc. Co., 40 Oreg. 44 (1901).

Pennsylvania: The written statement by the officers to a bank that if anything happened the latter should be preferred, does not give it a preference over the claims of the officers against the company. *In re* Kittanning, etc. Co.'s estate, 210 Pa. St. 6 (1904). Assignments may be made. Ardesco Oil Co. *v.* North American, etc. Co., 66 Pa. St. 375 (1870). A New York corporation may execute a judgment note which is good in Pennsylvania, notwithstanding the New York statute against preferences. East Side Bank *v.* Columbus Tanning Co., 170 Pa. St. 1 (1895). A New Jersey corporation, although forbidden by New Jersey statutes from giving a preference by way of confession of judgment, yet may do so in Pennsylvania, where such a preference is legal, the New Jersey laws allowing preference by any other means than a confessed judgment. Pairpoint Mfg. Co. *v.* Philadelphia, etc. Co., 161 Pa. St. 17 (1894). See also Borton *v.* Brines-Chase Co., 175 Pa. St. 209 (1896). A preference given by a meeting of the board of directors at which a quorum is present, notice of which was not given to the other directors, may be valid if no officer or stockholder thereafter objected to the same. Moller *v.* Keystone, etc. Co., 187 Pa. St. 553 (1898).

Rhode Island: A New York corporation owning property in Rhode Island cannot make in the latter state an assignment which the New York stat-

assets of an insolvent corporation, yet as against corporations of other states such preference may be given.[1]

utes prohibit. Pierce *v.* Crompton, 13 R. I. 312 (1881). Where a corporation conveys away its property in order to enforce a settlement with its creditors it cannot compel a reconveyance of such property. Apponaug, etc. Co. *v.* Rawson, 22 R. I. 123 (1900).

South Carolina: Where the assignee for the benefit of creditors of an insolvent corporation becomes insolvent, the assets of the latter will be separated by the court from his assets. *Ex parte* Savings Bank, etc. 73 S. C. 393 (1906).

South Dakota: A preference by an insolvent corporation is illegal. Furber *v.* Williams, etc. Co., 111 N. W. Rep. 548 (So. Dak. 1907). An assignment for the benefit of creditors may be made by a corporation. A foreign corporation may make such an assignment. It is legal, although the foreign corporation has not complied with the law relative to filing a copy of its charter and appointing a resident agent. The assignment is properly made by the directors, and not by a meeting of the stockholders. Where the assignment is made to a director and there are indications of fraud, it is for the jury to say whether there was fraud. Wright *v.* Lee, 2 S. D. 596 (1892); s. c., 4 S. D. 237.

Tennessee: It has been held that preferences are illegal. Tradesman Pub. Co. *v.* Car Wheel Co., 95 Tenn. 634 (1895). *Cf.* Hopkins *v.* Gallatin, etc. Co., 4 Humph. 403 (1843). But a diligent creditor may obtain a preference by a judgment although the corporation is insolvent, it being a going concern. Buchanan *v.* Barnes, 34 S. W. Rep. 425 (Tenn. 1896). An assignment by a corporation for the benefit of creditors does not displace existing attachments. First Nat. Bank *v.* Lumber, etc. Co., 91 Tenn. 12 (1891). An insolvent corporation cannot turn over practically all its assets to one creditor by way of preference. Smith *v.* Bradt Printing Co., 97 Tenn. 351 (1896). After a corporation has been declared insolvent by the board of directors and directions given to file a bill to wind up its affairs, a creditor cannot obtain a preference by levy of execution before the bill is actually filed. Memphis B. etc. Co. *v.* Ward, 99 Tenn. 172 (1897). The Tennessee statute giving its citizens preference as to assets of an insolvent foreign corporation within the state is unconstitutional as to nonresident persons, but is constitutional as to foreign corporations which are creditors of the insolvent corporation. McClung *v.* Embreeville, etc. Ry., 103 Tenn. 399 (1899), following Blake *v.* McClung, 172 U. S. 239, 259 (1898). Where an insolvent corporation has assigned for the benefit of its creditors, and then one of the creditors files a bill to wind up the company and for distribution, his attorneys will not be given an allowance, inasmuch as no new assets were disclosed and no beneficial effect shown. Parkhurst, etc. Co. *v.* Wilkinson Co., 54 S. W. Rep. 58 (Tenn. 1899). A stockholder cannot bring suit against an assignee for the benefit of creditors to hold him liable for maladministration, inasmuch as any surplus, after paying the debts, would belong to the corporation. A request to the directors to bring suit is first necessary. State *v.* Mitchell, 104 Tenn. 336 (1898).

Texas: In Texas the statutes as construed by the courts make the corporate property upon insolvency a trust fund to be distributed equally among all creditors. The corporation may turn the property over to its directors

[1] Blake *v.* McClung, 172 U. S. 239 (1898).

The rights of the creditors of an insolvent corporation or indi-

for that purpose. Wright *v.* Euless, 12 Tex. Civ. App. 136 (1896). An insolvent corporation cannot prefer its creditors by giving a mortgage. Judgment creditors may cause it to be set aside and an accounting had. Lyons, etc. Co. *v.* Perry, etc. Co., 88 Tex. 468 (1894). An insolvent corporation cannot prefer certain creditors, and equity will prevent unjust preferences. Lang *v.* Daugherty, 74 Tex. 226 (Tex. 1889). In Texas, however, any creditor may obtain a preference by legal proceedings. Moon, etc. Co. *v.* Waxahachie, etc. Co., 13 Tex. Civ. App. 103 (1896); aff'd, 89 Tex. 511 (1896); Florsheim, etc. Co., *v.* Wettermark, 10 Tex. Civ. App. 102 (1895); Harrigan *v.* Quay, 27 S. W. Rep. 897 (Tex. 1894). But not by assignment. Orr, etc. Co. *v.* Thompson, 36 S. W. Rep. 1129 (Tex. 1896); aff'd, 89 Tex. 501 (1896); Fowler *v.* Bell, 90 Tex. 150 (1896); Specht *v.* Bookhout, 14 Tex. Civ. App. 443 (1896), the court holding also that a debtor of the corporation who pays such preferred creditor, to whom the claim has been assigned, does so at his peril. It has been held that no preference is sustained, even by attachment against an insolvent corporation, in Texas. Farmers', etc. Bank *v.* Waco, etc. Co., 36 S. W. Rep. 131 (Tex. 1896). Attachment lies against a corporation, although it is insolvent but is still doing business. American Nat. Bank *v.* Dallas, etc. Co., 15 Tex. Civ. App. 631 (1897). The directors of an insolvent corporation may authorize an assignment for the benefit of creditors. Birmingham, etc. Co. *v.* Freeman, 15 Tex. Civ. App. 451 (1897). A purchaser of the assets of an insolvent corporation, under an order of court in a suit instituted by a creditor, may contest the validity of a mortgage given by the insolvent corporation by way of preference, the validity thereof not having been passed upon in such suit, and may also contest the validity of a transfer by the insolvent corporation of its assets by way of preference. Rogers *v.* Southern, etc. Co., 21 Tex. Civ. App. 48 (1899). An attachment against a corporation carrying on its business in the usual way is good, even though the corporation is insolvent. Mallette *v.* Ft. Worth, etc. Co., 21 Tex. Civ. App. 267 (1899).

Utah: Preferences are legal. Weyeth, etc. Co. *v.* James, etc. Co., 15 Utah, 110 (1897). A mortgage by an insolvent corporation may be legal. Singer *v.* Salt Lake City, etc. Co., 17 Utah, 143 (1898). Only the board of directors of a bank may make an assignment for the benefit of creditors. Cupit *v.* Park City Bank, 20 Utah 292 (1899).

Vermont: Preferences are legal. Warner *v.* Mower, 11 Vt. 385, 390 (1839).

Virginia: Assignments may be made. Lewis *v.* Glenn, 84 Va. 947 (1888). And preferences given. Planters' Bank *v.* Whittle, 78 Va. 737 (1884).

Washington: A corporation may assign for the benefit of creditors. Nyman *v.* Berry, 3 Wash. St. 734 (1892). But preferences are illegal. Conover *v.* Hull, 10 Wash. St. 673 (1895); Thompson *v.* Huron Lumber Co., 4 Wash. St. 600 (1892). An insolvent corporation may sell its property to one of its creditors. Klosterman *v.* Mason, etc. R. R., 8 Wash. 281 (1894); Holbrook *v.* Peters, etc. Co., 8 Wash. 344 (1894). A mortgage by an embarrassed corporation is valid, if in good faith, even though the company soon after fails. Vincent *v.* Snoqualmie Mill Co., 7 Wash. 566 (1894). Even though a corporation has made an assignment for the benefit of creditors, yet a court of equity may appoint a receiver of the assets so assigned under the Washington statutes. Oleson *v.* Bank of Tacoma, 15 Wash. 148 (1896). Preferences are

vidual who mortgages property to secure bonds and then disposes

illegal. Compton *v.* Schwabacher, etc. Co., 15 Wash. 306 (1896). An insolvent corporation cannot make a voluntary preference by way of mortgage. Biddle, etc. Co. *v.* Port Townsend, etc. Co., 16 Wash. 681 (1897). A mortgage by an insolvent corporation to one of its creditors as a preference is illegal. Cook *v.* Moody, 18 Wash. 114 (1897). Where a preference by an insolvent corporation is invalid the agreement of all creditors that an insolvent bank may borrow money and pledge its securities as collateral is not valid and such pledge is illegal. Burrell *v.* Bennett, 20 Wash. 644 (1899). But such pledge is legal as against creditors assenting thereto. Bank of California *v.* Puget Sound, etc. Co., 20 Wash. 636 (1899). An attachment by a creditor prior to a receiver being appointed in insolvency proceedings will be set aside on the theory that the assets are a trust fund for creditors. Washington, etc. Co. *v.* Alladio Cafe Co., 28 Wash. 176 (1902).

West Virginia: Assignments formerly were legal. Lamb *v.* Cecil, 25 W. Va. 288 (1884); Lamb *v.* Pannell, 25 W. Va. 298 (1884). And preferences also. Pyles *v.* Furniture Co., 30 W. Va., 123 (1887). A mining company having assets of $25,000 and debts of $20,000 is solvent, and may execute a mortgage. Coaldale Min. etc. Co. *v.* Clark, 43 W. Va. 84 (1897). Preferences by insolvent corporations are now prohibited by statute. In West Virginia the board of directors have no power to make an assignment for the benefit of creditors, and in a stockholders' suit to set aside such assignment the corporation is not a necessary party if all stockholders, officers, and directors are made parties to the suit. Kyle *v.* Wagner, 45 W. Va. 349 (1898). Even though an assignment by an insolvent corporation may be only by vote of the stockholders, yet if made on a vote of the directors, and the stockholders acquiesce for a considerable time, it is legal. Young *v.* Improvement, etc. Assoc., 48 W. Va. 512 (1900).

Wisconsin: Where a grain dealing corporation becomes insolvent and a trustee is appointed and thereafter the president continues to do business on his own account, but uses the name of the corporation, moneys received by him are not subject to the debts of the corporation. Boyle *v.* Northwestern, etc. Bank, 125 Wis. 498 (1905). At common law a corporation may make an assignment for the benefit of creditors. Garden City, etc. Co. *v.* Geilfuss, 86 Wis. 612 (1893). In Wisconsin it is held that a trust deed executed by an insolvent corporation, giving the trustee power to take charge of the business and carry it on, is void, as intended to defeat and delay corporate creditors. First Nat. Bank *v.* McDonald Mfg. Co., 67 Wis. 373 (1886). In Wisconsin an insolvent corporation cannot prefer creditors. Ford *v.* Plankinton Bank, 87 Wis. 363 (1894). The mere insolvency of a corporation does not convert its property into a trust fund, so as to prevent preferences. Ford *v.* Hill, 92 Wis. 188 (1896). A creditor of an insolvent corporation may levy an attachment on its property, and thereby obtain a preference. Ballin *v.* Merchants' Exch. Bank, 89 Wis. 278 (1895). An insolvent corporation may give a preference, and such preference may be to creditors who by contract have named two of the five directors. South Bend, etc. Co. *v.* George, etc. Co., 97 Wis. 230 (1897); s. c., 81 N. W. Rep. 675 (1900). A corporation may make an assignment for the benefit of creditors. Goetz *v.* Knie, 103 Wis. 366 (1899). A corporation is not insolvent merely because it has not enough assets to pay its debts and still have its capital stock intact. Hamilton *v.* Menominee, etc. Co., 106 Wis. 352 (1900). A corpora-

of the bonds or offers them to the creditors is considered elsewhere.[1]

§ 692. *Preferences and assignments by insolvent corporations to directors, officers, or stockholders — Loans by directors to the corporation — Mortgages by corporations to directors.*—Turning now from preferences given to the ordinary creditor of a corporation to preferences given to a director of the corporation, it is found that entirely different rules prevail. No statute is necessary to prevent preferences to a director of an insolvent corporation. It is undoubtedly true that the law allows a director to loan money to a corporation, and allows the corporation, while it is solvent, to give a mortgage to the director to secure the money so loaned. The giving of the mortgage is viewed with suspicion, but it is legal when it is perfectly free from actual fraud.[2]

tion may assign for the benefit of creditors. Binder *v.* McDonald, 106 Wis. 332 (1900).

Wyoming: Preferences are legal. Conway *v.* Smith, etc. Co., 6 Wyo. 468 (1896).

England: An agreement to give a preference must be registered in the public registry, under the English statute. *Re* Jackson, etc. Co. Ltd., 95 L. T. Rep. 292 (1906).

1 See §§ 672, 674, *supra.*

2 Twin Lick Oil Co. *v.* Marbury, 91 U. S. 587 (1875); Duncomb *v.* N. Y. etc. R. R., 88 N. Y. 1 (1882), 84 N Y. 190; Hotel Co. *v.* Wade, 97 U. S. 13 (1877). A director in a solvent corporation may take a mortgage from it as security for money advanced. *In re* Estate, etc., 202 Pa. St. 589 (1902). Directors may execute judgment bonds to themselves at a time when the company is solvent, and may enforce them after it becomes insolvent. Neal's appeal, 129 Pa. St. 64 (1889). A corporation, at the time of borrowing money from its treasurer personally, who is also a director, may give him a judgment bill to enter judgment. Cowan *v.* Pennsylvania, etc. Co., 184 Pa. St. 1 (1898). In a foreclosure suit a subsequent judgment creditor who was made a party defendant cannot set up that the mortgagee was a director of the company and took part in authorizing the mortgage, the good faith of the mortgage not being otherwise questioned. Marsters *v.* Umpqua, etc. Co., 90 Pac. Rep. 151 (Ore. 1907). A mortgage is not void on the ground that it was to a director, where the director was absent when elected, did not serve, was not eligible, and soon sent in a resignation. Augusta, etc. R. R. *v.* Kittel, 52 Fed. Rep. 63 (1892). A solvent corporation may make a mortgage to one of its officers and stockholders to secure a loan made by him. Mullanphy Sav. Bank *v.* Schott, 135 Ill. 655 (1891). The fairness of a debt alleged to be due from the corporation to directors and audited by them will be closely scrutinized and a note and mortgage therefor set aside if not found entirely in good faith and the whole amount justly due. Graves *v.* Mono Lake, etc. Co., 81 Cal. 303 (1889). A director may loan money to a corporation and take a mortgage to secure the same, and foreclose and buy in the property. Preston *v.* Loughran, 58 Hun, 210 (1890). A mortgage may be given by a corporation to secure directors who at the time of the giving of the mortgage guarantee certain debts of the company. *Re* Pyle Works, [1891] 1 Ch. 173. A

The supreme court of the United States, speaking of loans made by an officer and stockholder to a corporation, said: "Undoubtedly his relation as a director and officer, or as a stockholder of the company, does not preclude him from entering into contracts with it,

mortgage by a company to its directors to secure them as loaners of money to the company is valid, and may be enforced where the transaction was in good faith and beneficial to the company, and sanctioned by the stockholders, and no offer is made to restore the consideration. Gorder *v.* Plattsmouth Canning Co., 36 Neb. 548 (1893); Hope *v.* Valley City Salt Co., 25 W. Va. 789 (1885); Warfield *v.* Marshall, etc. Co., 72 Iowa 666 (1887). And see the principles and cases in § 653, *supra.* See also Harpending *v.* Munson, 91 N. Y. 650 (1883); Hallam *v.* Indianola Hotel Co., 56 Iowa, 178 (1881), where, however, the purchase of the property by the director at the foreclosure sale for a small price was set aside; Claflin *v.* South Carolina R. R., 8 Fed. Rep. 118 (1880). *Cf.* Wilbur *v.* Lynde, 49 Cal. 290 (1832), invalidating a note given to a director. In the important case of Koehler *v.* Black River, etc. Co., 2 Black, 715 (1862), the court held void a mortgage given by the directors to themselves, where there were other unsecured claims and where the giving of the mortgage was inequitable. In Cumberland, etc. Co. *v.* Parish, 42 Md. 598 (1875), a mortgage to a director was defeated, there being no clear proof that the debt was actually incurred. Directors who guarantee a corporate debt may take a mortgage from the company as security, and may foreclose it. Hopson *v.* Ætna, etc. Co., 50 Conn. 597 (1883). A company indebted to its president may, to secure such debt, give a mortgage to secure a debt due from him to a third party. Bank *v.* Flour Co., 41 Ohio St. 552 (1885). Directors may loan money to the corporation and have it repaid. Ulster Ry. *v.* Banbridge, etc. Ry., Ir. L. R. 2 Eq. 190 (1868); Borland *v.* Haven, 37 Fed. Rep. 394 (1888). A person may enforce a note against a corporation although he was a promoter thereof, and is a director, stockholder, and manager of the corporation. Fitzgerald, etc. Co. *v.* Fitzgerald, 137 U. S. 98, 110 (1890). Where two directors borrow money for the corporation and give their own notes therefor, the company, being still solvent, may give them security. First Nat. Bank *v.* Dovetail, etc. Co., 143 Ind. 534 (1896). *Cf.* Cahill *v.* People's, etc. Co., 47 La. Ann. 1483 (1895). A pledgee of bonds from the corporation cannot attack another pledge of bonds to the president to secure a debt due the president, especially where the former took the bonds in pledge with knowledge of the pledge to the president. Hook *v.* Ayers, 63 Fed. Rep. 347 (1894); s. c., 64 Fed. Rep. 660. A corporation may make a mortgage to one of its directors. St. Joe, etc. Co. *v.* First Nat. Bank, 10 Colo. App. 339 (1897). A director may take a mortgage from the company for money loaned at the time of the mortgage, and may buy in the property at the foreclosure sale thereof. Jones *v.* Hale, 32 Oreg. 465 (1898). A mortgage given by a solvent corporation to a director, which, in order to preserve the credit of the corporation, is not recorded, is invalid. Montgomery *v.* Phillips, 53 N. J. Eq. 203 (1895), holding also that a mortgage by an insolvent corporation to a director is illegal. An officer advancing money to a corporation may repay the money to himself from the treasury when its condition will permit. Stokes *v.* Stokes, 91 Hun, 605 (1895). The president may own receivers' certificates. McKittrick *v.* Arkansas Central Ry., 152 U. S. 473 (1894). A loan by the president of a

making loans to it, and taking its bonds as collateral security; but courts of equity regard such personal transactions of a party in either of these positions, not perhaps with distrust, but with a large measure of watchful care; and unless satisfied by the proof that the transaction was entered into in good faith, with a view to the benefit of the company as well as of its creditors, and not solely with a view to his own benefit, they refuse to lend their aid to its enforcement." [1]

bank to himself is legal, if the directors acquiesce therein. Reynolds *v.* Bank of Mt. Vernon, 6 N. Y. App. Div. 62 (1896); aff'd, 158 N. Y. 740 (1899). A corporation may pledge treasury stock to a director. Where treasury stock, instead of being given to the corporation, is placed in the hands of trustees under a trust agreement, such agreement may be modified by a new agreement and the stock turned over to the corporation. Kinsman *v.* Fisk, 83 Hun, 494 (1895). It is legal for a solvent corporation to give a mortgage to the president to secure a debt due to him. Strohl *v.* Seattle, etc. Bank, 25 Wash. 28 (1901). Two years' delay on the part of a stockholder in complaining of a mortgage given by the corporation to raise money to pay a debt due to the president is fatal, even though the president had originally agreed to require payment only out of sales of property by the corporation. Wills *v.* Porter, 132 Cal. 516 (1901). A foreclosure is not invalid, even though some of the bonds are held by the directors. Rawlins *v.* New Memphis, etc. Co., 60 S. W. Rep. 206 (Tenn. 1900), holding also that a director who owns bonds may purchase the property at foreclosure sale. Stockholders and directors may loan money to the corporation and participate ratably as creditors upon its insolvency, and in insolvency proceedings the legal existence of the corporation cannot be questioned. Hooven, etc. Co. *v.* Evans, etc. Co., 193 Pa. St. 28 (1899). A bank director may foreclose a mortgage given by the bank for money loaned, even though the bank becomes insolvent after the loan was made. Millsaps *v.* Chapman, 76 Miss. 942 (1899). The Ohio statute prohibiting a director being interested in the purchase of bonds from his corporation at less than par does not apply to an issue of bonds to an outsider who subsequently admits a director as a partner in the transaction. Toledo, etc. R. R. *v.* Continental Trust Co., 95 Fed. Rep. 497 (1899). Where the trustee of a mortgage makes a loan to the mortgagor on the bonds secured by the mortgage and then sells out the collateral and buys it in himself, he can upon foreclosure enforce the bonds only to the extent of the amount loaned and interest. Knickerbocker Trust Co. *v.* Penacook Mfg. Co., 100 Fed. Rep. 814 (1900). Directors may loan money to the corporation. Savage *v.* Madelia, etc. Co., 98 Minn. 343 (1906). Where the stockholders and directors have either approved or not objected to a note given by the treasurer to the president for money borrowed, the corporation is bound. First Nat. Bank *v.* Com. Travelers' Assoc., 108 N. Y. App. Div. 78 (1905); aff'd, 185 N. Y. 575. A preference to a director is legal where it is not shown that the corporation is insolvent. Wolf & Bro. *v.* Erwin, etc. Co., 71 Ark. 438 (1903).

1 Hence where an officer, for a loan of $100,000 to the company, takes its notes therefor and four hundred bonds as collateral, and twelve hundred and fifty shares of paid-up stock as a "bonus," the court characterized the transaction as a fraud, and held

But where the corporation is insolvent an entirely different question arises. There has been a difference of opinion in the courts, but the weight of authority clearly and wisely holds that an insolvent corporation cannot pay or secure a pre-existing debt due to a director in preference to debts due others, either by transferring property or cash to him or by giving him a mortgage on corporate assets.[1]

that the pledge of the bonds would be disregarded and declared void. Richardson *v.* Green, 133 U. S. 30 (1890).

[1] Hays *v.* Citizens' Bank, 51 Kan. 535 (1893); Chicago, etc. Bridge Co. *v.* Fowler, 55 Kan. 17 (1895); Ingwerson *v.* Edgecombe, 42 Neb. 740 (1894). In the case of Harding *v.* Hart, 113 Fed. Rep. 304 (1902), where an insolvent insurance company turned over to its president and director as a preference $100,000 worth of securities, the court, after twenty-five years of litigation, compelled him at the instance of general creditors, to return the amount. In another decision involving the same transaction, Hart *v.* Globe Ins. Co., 113 Fed. Rep. 307 (1882), the court held that a decision in the state court upholding the transaction, but not bringing in all the parties, was not a bar.

A transfer of property by an insolvent corporation to its directors in part payment of their claims is illegal. Hill *v.* Standard, etc. Co., 198 Pa. St. 446 (1901). A director cannot obtain a preference, but the invalidity of his preference does not invalidate preferences to others in the same transaction. Moller *v.* Keystone, etc. Co., 187 Pa. St. 553 (1898). A preference by an insolvent corporation to its directors is illegal. Pangburn *v.* American Vault, etc. Co., 205 Pa. St. 83 (1903). Property taken by directors in an insolvent corporation by way of preference must be restored or its value at the time of the taking be paid by them, but they are then entitled to share *pro rata* the same as other creditors. Hill *v.* Standard, etc. Co., 209 Pa. St. 231 (1904). Where directors in an insolvent corporation in violation of statute transfer a part of its property to two of their number to pay certain creditors, the receiver may recover from such two directors the value of the property so transferred and if they have already paid some of the debts they will be subrogated to the rights attached to such debts. All of the directors authorizing or participating in the act are liable jointly and severally. Mills *v.* Hendershot, 70 N. J. Eq. 258 (1905). An officer who pays a debt due from the corporation to himself within ten days of a receivership must refund. Jessup *v.* Thomason, 68 N. J. Eq. 443 (1904). Where the president of an insolvent corporation resigns in order that he may be given a preference, the preference is illegal. Nixon *v.* Goodwin, 3 Cal. App. 358 (1906). A loan by some of the directors to the corporation secured by mortgage is voidable but not void, where a majority of the directors voting for the loan were not interested in it, even though the loan was made to a person who was a mere figurehead, and the purpose of the directors making the loan was to foreclose the property and buy it in, inasmuch as the directors could only purchase at public sale under a decree of foreclosure the same as other stockholders or third persons. Schnittger *v.* Old Home, etc. Co., 144 Cal. 603 (1904). A preference to the officers is illegal. Shields *v.* Hobart, 172 Mo. 491 (1903). Directors are liable on a note given by them to a bank to make up losses of the bank. Skordal *v.* Stanton, 89 Minn. 511 (1903). Where the board of directors allow an illegal preference to one director they are

But a corporation acting in good faith and without any purpose of defrauding its creditors, but with the sole object of continuing a

personally liable to other creditors to the extent of such preference, and, even though one of them resigns, the liability continues for the benefit of past as well as future creditors. Nix *v.* Miller, 26 Colo. 203 (1899). An insolvent corporation cannot prefer one of its directors. Symonds *v.* Lewis, 94 Me. 501 (1901). A receiver may bring suit to set aside a preference given by an insolvent corporation to the directors. Taylor *v.* Mitchell, 80 Minn. 492 (1900). In Indiana it is held that directors may vote as directors on the question of giving themselves a preference. Nappanee, etc. Co. *v.* Reid, etc. Co., 159 Ind. 614 (1903). An insolvent corporation's mortgage to secure debts due to a majority of its directors and debts for which they are sureties is legal. Nappanee, etc. Co. *v.* Reid, etc. Co., 159 Ind. 614 (1903), rev'g 60 N. E. Rep. 1068. A receiver may recover back property delivered by an insolvent corporation to its directors as a preference; but where the directors in order to relieve corporate property from attachment in another state take an assignment of the claims, their preference in that state out of assets in that state may be allowed. Gray *v.* Taylor, 44 Atl. Rep. 668 (N. J. 1899). A conveyance by an insolvent foreign corporation to four creditors, one of whom is a director, in satisfaction of an antecedent debt, is invalid, and other creditors may attach the property, it appearing that all the vendees knew the facts. Schmidt *v.* Perkins, 67 Atl. Rep. 77 (N. J. 1907). A corporate mortgage by an officer to his wife to secure a debt due to himself from the corporation is illegal. Rowe *v.* Leuthold, 101 Wis. 242 (1898). Although a director cannot obtain a preference, yet this does not prevent his estate obtaining a preference. Nebraska Nat. Bank, etc. *v.* Clark, 58 Neb. 183 (1899). In a stockholders' suit to set aside an execution sale of all the property for a debt due to the directors and a purchase at the sale by the directors, it is not necessary for the court to order an accounting, but the court may hear the entire case and decide it. Davis *v.* Hofer, 38 Oreg. 150 (1900). A preference by an insolvent corporation to the treasurer is illegal. King *v.* Wooldridge, 78 Miss. 179 (1900). A preference to a director is illegal, even though such preference was agreed to when the money was loaned. Monroe, etc. Co. *v.* Arnold, 108 Ga. 449 (1899). An insolvent corporation cannot give a preference to a director by offsetting against his subscription a debt due to him. Wyman *v.* Williams, 53 Neb. 670 (1898); Hulings *v.* Hulings Lumber Co., 38 W. Va. 351 (1893). A sale of property by an insolvent company to a director in order to prefer his debt is illegal. Beach *v.* Miller, 130 Ill. 162 (1889). Where a corporation has $15,000 assets, owes $160,000, and confesses judgment for $40,000 to its largest stockholder for an old indebtedness due him, a court of equity will restrain a sale under that judgment until the rights of all creditors are determined. Krause *v.* Malaga, etc. Co., 18 Atl. Rep. 367 (N. J. 1889). Where the board of directors borrow money on the statement that the loan is from an outsider, and it afterwards transpires that the loan was by the president and another director, a commission of twenty per cent. paid for the loan can be recovered back by the corporation. Bensiek *v.* Thomas, 66 Fed. Rep. 104 (1895). Where a corporate creditor offers to take payment, but is induced to let the debt stand in order that the president personally may use the money, the corporation is no longer liable. Edwards *v.* Carson Water Co., 21 Nev. 469

business which promises to be successful, may give a mortgage to directors who have lent their credit to it, in order to induce a con-

(1893). Corporate creditors may enjoin the collection of judgments fraudulently confessed by an insolvent corporation to its officers and stockholders. Nimocks *v.* Cape Fear Shingle Co., 110 N. C. 230 (1892). A preference by an insolvent corporation to one of its directors is invalid. It is insolvent when early suspension of business and a failure are inevitable. Corey *v.* Wadsworth, 99 Ala. 68 (1892). But see *contra*, s. c., 118 Ala. 488. A director of an insolvent corporation cannot obtain a preference for his debt. Gibson *v.* Trowbridge Furnace Co., 96 Ala. 357 (1892). Where an act by the directors amounts to a preference to them, the corporation being insolvent, the act cannot be validated by a vote of the stockholders, the directors themselves voting a majority of the stock. Farmers' L. & T. Co. *v.* San Diego, etc. Co., 45 Fed. Rep. 518 (1891). Although creditors may complain of a mortgage given to directors by the corporation when largely in debt, yet the president, who is also a large stockholder, and who signs the mortgage, cannot do so. Perry *v.* Pearson, 135 Ill. 218 (1890). Where a corporation purchases a firm's business, it cannot legally pay a debt due by the firm to a director in the corporation, if such payment is induced by such director and the corporation is insolvent. Rudd *v.* Robinson, 54 Hun, 339 (1889), reversed on another point in 126 N. Y. 113. If a director as a creditor takes all the corporate assets in payment of his debt, he is liable to other creditors for the difference between the actual value of the property and the price at which he took it. Wilkinson *v.* Bauerle, 41 N. J. Eq. 635 (1886). The president of an insolvent corporation cannot provide for the payment of a debt to his wife, thereby giving her a preference. West *v.* West, etc. Co., 9 N. Y. St. Rep. 255 (1887). Directors knowing that the company is insolvent cannot assign its property in trust to pay debts due to themselves. Gaslight Imp. Co. *v.* Terrell, L. R. 10 Eq. 168 (1870); Haywood *v.* Lincoln Lumber Co., 64 Wis. 639 (1885). A preference to a director by an insolvent corporation is unlawful, and the directors who cause the preference are personally liable for property so applied. A director who took no part is not liable. Adams *v.* Kehlor Milling Co., 36 Fed. Rep. 212 (1888). The law "prohibits directors, when a corporation is insolvent and about to go into liquidation, from preferring debts due to themselves from the corporation, or from preferring debts in the payment of which they have a personal interest." So held in a case where a deceased director was preferred by the other directors, his brothers, and agents. Adams *v.* Kehlor Milling Co., 35 Fed. Rep. 433 (1888). A director of an insolvent corporation cannot have his own debt due from the corporation paid to the exclusion of other creditors. Adams *v.* Cross, etc. Co., 27 Ill. App. 313 (1888), holding void a mortgage upon which this suit for foreclosure was brought, it having been given by an insolvent corporation to its directors to secure debts due from it to them. A confession of judgment by an insolvent corporation to one of its directors is a fraudulent preference, and the preference will be cut off. The director will be allowed to come in the same as other creditors. Stratton *v.* Allen, 16 N. J. Eq. 229 (1863). A mortgage by an insolvent corporation preferring its president and director was canceled in Lippincott *v.* Shaw Carriage Co., 25 Fed. Rep. 577 (1885).

In Bradley *v.* Farwell, Holmes, 433 (1874); s. c., 3 Fed. Cas. 1146, a transfer by an insolvent corporation of all

tinuance of that credit, and in order to obtain renewals of maturing paper at a time when the corporation, although it may not be then

its assets to a partnership in payment of a debt was set aside, where one member of the partnership was also a director in the corporation. The fact that nine months elapsed before the corporation passed into a receiver's hands was immaterial. A sale of corporate property to a director in payment of debts due him from the insolvent company cannot be objected to in a suit at law by him for the conversion of the property. The objection must be made by bill in equity. Little Rock, etc. Ry. *v.* Page, 35 Ark. 304 (1880). In New Jersey, by statute, a receiver is invested with all the rights of creditors. After his appointment a creditor cannot sue to set aside illegal conveyances to the officers, not even in the federal court. Werner *v.* Murphy, 60 Fed. Rep. 769 (1894). A preference to a president is illegal. Mallory *v.* Kirkpatrick, 54 N. J. Eq. 50 (1895). A stockholder may cause to be set aside a lease of a warehouse and a sale of the wheat therein to two of the directors, and a foreclosure by them of a chattel mortgage on the buildings, which chattel mortgage had been purchased by two of the directors and the property purchased by them at the foreclosure sale. Loftus *v.* Farmers' Shipping Assoc., 8 S. D. 201 (1896). Under the Michigan decisions (prior to the statute) and of the federal court sitting in Michigan, the president of an insolvent corporation could secure a preference for debts due him, even though the corporation was insolvent and the debts were old debts. Childs *v.* Carlstein Co., 76 Fed. Rep. 86 (1896). Where the board of directors of a failing corporation voted all the assets to a few of their number in payment of an antecedent debt, the transaction is fraudulent and will be set aside, even in Michigan, the directors so preferred being three-fourths of the board. Rickerson, etc. Co. *v.* Farrell, etc. Co., 75 Fed. Rep. 554 (1896). Although a director's mortgage is illegal, yet where, after its foreclosure, another prior mortgage is foreclosed, he is not liable to stockholders as having wrecked the corporation. Keeney *v.* Converse, 99 Mich. 316 (1894). In Doyle *v.* Leitelt, 97 Mich. 298 (1893), the court refused to compel a director to refund moneys applied on his claim against the corporation, although he had caused all the corporate property to be sold, it appearing that substantial justice had been done and that complainant had no real grievance. A resolution of the board of directors that the company execute an assignment for the benefit of creditors may be carried out by the president without further authority, but he should not select himself as assignee. Rogers *v.* Pell, 154 N. Y. 518 (1898). At common law a mortgage may be made by a corporation to a director as trustee for creditors. Savage *v.* Miller, 56 N. J. Eq. 432 (1898). The corporation itself cannot defend against a suit by a director on a note on the ground that the judgment will be an illegal preference. Welling *v.* Ivoroyd Mfg. Co., 15 N. Y. App. Div. 116 (1897); aff'd, 162 N. Y. 599; Bangs *v.* National Macaroni Co., 15 N. Y. App. Div. 522 (1897). The New York statute does not prevent an officer assigning his claim against the corporation to his assignee for the benefit of creditors, and such assignee may obtain judgment and thereby obtain a preference. Jefferson, etc. Bank *v.* Townley, 159 N. Y. 490 (1899). In New York a director may be assignee. Linderman *v.* Hastings, etc. Co., 38 N. Y. App. Div. 488 (1899). For a detailed review of the authorities on this subject, see Lamb *v.* Laughlin, 25 W. Va. 300 (1884). Directors may be compelled to pay back salaries which they

in fact possessed of assets equal at cash prices to its indebtedness, is in fact a going concern, and is intending and is expecting to continue in business.[1] Even though a corporation is insolvent, yet, if the directors believe it is solvent, although in financial distress, they may loan money to the corporation and take securities as collateral thereto, and they are not bound to know that the corporation is insolvent.[2] But where a director cannot legally obtain a preference directly, he cannot do so indirectly by attachment, or by obtaining judgment and causing execution to be levied.[3] A director can-

pay to themselves when the company is insolvent. Smith *v.* Putnam, 61 N. H. 632 (1882). An insolvent bank cannot legally transfer its real estate to a director in exchange for his stock. Roan *v.* Winn, 93 Mo. 503 (1887). Where the president causes the company illegally to buy its own stock from his wife, a preference to her for the debt will be set aside. Butler Paper Co. *v.* Robbins, 151 Ill. 588 (1894). Preferences to directors are illegal. Noble, etc. Co. *v.* Mt. Pleasant, etc. Inst., 12 Utah, 213 (1895). Where, three months prior to a petition for winding up a company, the directors, who owe on their stock, offset the same by applying the amount on their unpaid salaries, they jointly and severally will be compelled, under the English statute, to refund the money with interest. The transaction is fraudulent. *Re* Washington, etc. Co., [1893] 3 Ch. 95, rev'g the court below. Where an embarrassed corporation had many secured creditors, but only four unsecured creditors, and three of the latter, with full notice to the former, took charge of the company by a change of its directors and advanced funds to keep the company going, and for two and a half years endeavored to extricate it from trouble, they may then legally take a mortgage upon the corporate property for the money so advanced and also for their old unsecured debts, and the fourth creditor cannot complain. American, etc. Bank *v.* Ward, 111 Fed. Rep. 782 (1901). A sale of property by an insolvent corporation to one of its directors is valid as against its creditors where a full consideration was paid therefor. Webb *v.* Rockefeller, 66 Kan. 160 (1903). *Cf.* § 652, *supra.* Even though a mortgage is void as to a part by reason of being an illegal preference, it may be valid as to the remainder. Reed *v.* Helois, etc. Co., 64 N. J. Eq. 231 (1903). A preference to directors who loaned money to pay off debts, some of which are owing to them, is not void, but is voidable at the instance of creditors or stockholders. Wyman *v.* Bowman, 127 Fed. Rep. 257 (1904).

1 Sanford Fork, etc. Co. *v.* Howe, etc. Co., 157 U. S. 312 (1895). An embarrassed corporation may, in order to obtain working capital, borrow money on its notes endorsed by its stockholders and directors and may give a mortgage to secure them. Webster *v.* Ypsilanti, etc. Co., 113 N. W. Rep. 7 (Mich. 1907).

2 Converse *v.* Sharpe, 161 N. Y. 571 (1900).

3 Atwater *v.* American, etc. Bank, 152 Ill. 605 (1894). The president of the company may loan money to it and take judgment for it and purchase the property at execution sale thereon if he acts in good faith. Law *v.* Fuller, 66 Atl. Rep. 754 (Penn. 1907). Under the Pennsylvania statute, directors cannot obtain a preference by taking judgment by default and issuing execution. Hopkins's Appeal, 90 Pa. St. 69 (1879). So also in New York. Throop *v.* Hatch Lithog. Co., 125 N. Y. 530 (1891). The remedy in such a case is in equity and not at

not legally vote on a renewal of a note to himself.[1] The court will set aside a sale by an insolvent corporation of all its assets to its secretary and treasurer, who was the chief creditor, the sale being in payment of his debt; and the court will hold him liable for such of the assets as he has disposed of.[2] A preference, also, to a large stockholder has been condemned by the courts where, under the facts of the case, the transaction amounted to an actual fraud, as distinguished from an implied fraud.[3] It has been held that a mort-

law. Braem *v.* Merchants' Nat. Bank, 127 N. Y. 508 (1891). A statute against preference by an insolvent corporation is violated by an offer of judgment by the corporation and the appointment of a receiver under it. National Broadway Bank *v.* Wessell Metal Co., 59 Hun, 470 (1891), holding also that a director cannot obtain a preference by causing a receiver to be appointed on his judgment and then purchasing the property at an inadequate price. A director may obtain judgment against the company and buy its property on execution sale if no undue advantage was taken by him, and it is not necessary to give special notice to all the stockholders of the sale. Marr *v.* Marr, 66 Atl. Rep. 182 (N. J. 1907). A judgment against the corporation by the wife of the president is legal, even though he and the directors aided. Shinn *v.* Kummerle, 66 Atl. Rep. 949 (N. J. 1907). A judgment obtained by a director against an insolvent corporation by confession is illegal and may be set aside. Hill *v.* Pioneer Lumber Co., 113 N. C. 173 (1893). Where a director of an insolvent corporation obtains judgment against it and sells out its property, another corporate creditor may compel him to account for a proportionate share of the actual value of the property. Kittel *v.* Augusta, etc. R. R., 84 Fed. Rep. 386 (1898). A judgment lien which is indirectly for the benefit of the directors, the corporation being insolvent, may be set aside at the instance of the receiver. Taylor *v.* Fanning, 87 Minn. 52 (1902).

1 Smith *v.* Los Angeles, etc. Assoc., 78 Cal. 289 (1889).

2 Brown *v.* Morristown, etc. Co., 42 S. W. Rep. 161 (Tenn. 1897).

3 A stockholder cannot secure a transfer from the corporation to himself of the property of the corporation so as to deprive a corporate creditor of the payment of his debt. Where he does so through legal proceedings fraudulently and by conspiracy, the property may be reached. Angle *v.* Chicago, etc. Ry., 151 U. S. 1 (1894). Where a stockholder who is also a creditor of an insolvent corporation obtains for himself, just before the cessation of business, an assignment of practically all the assets of the corporation, it is a question for the jury as to whether such assignment is not fraudulent. Wortendyke *v.* Salladin, 45 Neb. 755 (1895). A corporation may mortgage its property to a stockholder, even though he controls a large majority of the stock. Hanchett *v.* Blair, 100 Fed. Rep. 817 (1900). It is legal for a corporation to pay one of its creditors who is also a stockholder before the debt is due, especially where the stockholder guarantees the loan which the corporation makes in order to make such payment. Wills *v.* Porter, 132 Cal. 516 (1900). Where the chief promoter of a proposed manufacturing corporation obtains donations from property owners to the proposed corporation on his agreement that $75,000 of stock should be subscribed for within a certain time, and then proceeds to organize the company, he himself subscribing for $25,000 of the stock, and the

gage by an insolvent corporation to a creditor corporation, the two corporations having a majority of their directors in common, is illegal.[1] A purchaser of the equity of redemption from the corporation

corporation then purchases certain worthless patents and agency contracts and issues therefor $63,250 of full-paid stock, including the $25,000 subscribed for by him, and afterwards the corporation collects $4,000 of such donations and borrows money from such promoter and gives him a mortgage therefor, his mortgage is not good as against the parties who donated the $4,000. Moore *v.* Universal, etc. Co., 122 Mich. 48 (1899). Even though the purchasers of an equity in land sell it to a corporation which they form, at a price which pays them back their money, and more, and the corporation becomes insolvent and they purchase the land at execution sale, yet a stockholder cannot have the sale set aside unless he repays to them the amounts actually disbursed by them. Fleckenstein *v.* Waters, 160 Mo. 649 (1901). A preference to a director or stockholder is illegal. Reynolds *v.* Smith, 60 Neb. 197 (1900). A mortgage given to repay to preferred stockholders the amount they have invested in their stock as well as to secure regular creditors of the company is invalid altogether. Reagan *v.* First Nat. Bank, 157 Ind. 623 (1902). A stockholder as a creditor has the same standing that other creditors have. Standard, etc. Co. *v.* Excelsior, etc. Co., 108 La. 74 (1902). A stockholder cannot obtain a preference. Lamb *v.* Russel, 32 S. Rep. 916 (Miss. 1902). A mortgage to secure debts due to stockholders was upheld in Crossette *v.* Jordan, 132 Mich. 78 (1902). In the case of Hodge *v.* United States Steel Corp., 64 N. J. Eq. 807 (1903), the court said: "Like other stockholders, they had a right to be influenced by what they conceived to be for their own interest, and they cannot lawfully be denied that right, nor can it be limited or circumscribed by the fact that they occupied the position of directors in the company." In Texas the court held that an insolvent corporation could not, by way of mortgage, prefer creditors who were stockholders. Lyons, etc. Co. *v.* Perry, etc. Co., 86 Tex. 143 (1893); s. c., 88 Tex. 468. See also Cochran *v.* Ocean Dry Dock, 30 La. Ann. 1365 (1878), holding that stockholders cannot appropriate assets to pay their salaries as officers, or to pay money due them on other accounts, until all creditors who are not stockholders have been paid; Swepson *v.* Exchange, etc. Bank, 9 Lea (Tenn.), 713 (1882), holding that a conveyance of land by the president of a bank to its sole stockholder, after its insolvency, would be set aside at the suit of a judgment creditor of the bank who had levied upon and sold it. Where all the corporate property is pledged to a creditor who owns all the stock, other creditors may object. Stewart *v.* Gould, 8 Wash. 367 (1894). Corporate creditors cannot object to a sale of all the corporate property to one of the creditors in payment of her debt, even though she be the wife of the president and chief stockholder. Ragland *v.* McFall, 137 Ill. 81 (1891). See also Reichwald *v.* Commercial Hotel Co., 106 Ill. 439 (1883). In Massachusetts it has been held that a preference given to a large stockholder is legal. Sargent *v.* Webster, 54 Mass. 497 (1847). An insolvent corporation may give a preference to a stockholder. Moreover, a corporate creditor, who became such after such preference, cannot complain. Burchinell *v.* Bennett, 10 Colo. App. 502 (1898). See also Krause *v.* Malaga, etc. Co., 18 Atl. Rep. 367 (N. J. 1889).

1 Sutton Mfg. Co. *v.* Hutchinson, 63 Fed. Rep. 496 (1894). See also § 658,

cannot claim that the mortgage was to a director and hence invalid.[1] A creditor who becomes such after a mortgage is executed cannot object to the mortgage on the ground that it was an unlawful preference.[2]

An officer of an insolvent corporation cannot acquire a preference over its unsecured creditors by accepting its bonds on account of his claims against it, even though the officer did not actually know of the insolvency.[3] A director of a corporation may purchase its

supra. An insolvent corporation whose president is president also of another corporation, the latter corporation being a creditor of the former corporation, cannot cause a preference to be given to such latter corporation, but if the former corporation is not actually insolvent at the time of the preference it is legal. Finch, etc. Co. *v.* Stirling Co., 187 Pa. St. 596 (1898). Where an insolvent savings bank is really controlled by a national bank, although they have not the same directors, yet the former cannot prefer the latter. It is an illegal preference in behalf of the directors. Slack *v.* Northwestern, etc. Bank, 103 Wis. 57 (1899). The fact that an officer of a bank is a director in a manufacturing company does not prevent the latter, though insolvent, giving a preference to the former. Nat. Bank of Commerce *v.* Allen, 90 Fed. Rep. 545 (1898). Mortgage bonds issued by a corporation as security to two banks will be valid, even though the corporation turns out to have been insolvent, but was supposed to be solvent, and even though the directors and stockholders of the corporation are stockholders in the banks. Chick *v.* Fuller, 114 Fed. Rep. 22 (1902). Even though directors are interested in the construction company which takes the bonds, and the property is foreclosed and is brought in by the directors, yet the railroad company cannot set aside the transaction unless it offers to pay to the directors what they have expended, or offers to take the property subject to such mortgage bonds. San Antonio, etc. Ry. *v.* San Antonio, etc. R. R., 25 Tex. Civ. App. 167 (1900). An insolvent corporation may give a preference to a creditor, another corporation, having stockholders and directors in common with it. Sells *v.* Rosedale, etc. Co., 72 Miss. 590 (1895). A preference by an insolvent corporation is legal, although one of the directors is interested in the corporation that is preferred. Colorado, etc. Co. *v.* Western Hardware Co., 16 Utah, 4 (1897). Where the president and a director, without authority from the board of directors of an insolvent corporation, turn over the assets to another corporation in payment of a debt, such president and director being interested in the latter corporation, the transaction is illegal. German Nat. Bank *v.* First Nat. Bank, 55 Neb. 86 (1898).

1 Greenstreet *v.* Paris, 21 Grant, Ch. (Can.) 229 (1874).

2 Central Trust Co. *v.* Bridges, 57 Fed. Rep. 753 (1893). A conveyance to a director in settlement of a claim made two months prior to the insolvency of the corporation is legal so far as subsequent creditors are concerned. Tennant *v.* Appleby, 41 Atl. Rep. 110 (N. J. 1898). A preference by a mortgage to directors is invalid; but where the property is sold by a receiver subject to the mortgage and the purchaser is also a director he cannot attack the mortgage. Richards *v.* Haliday, 92 Fed. Rep. 798 (1899). See also § 46, *supra.*

3 Sicardi *v.* Keystone Oil Co., 149 Pa. St. 148 (1892). Unless all the stockholders consent, the directors cannot issue bonds to secure debts due

mortgage bonds at their market value, and enforce them at their full value.[1] While an ordinary corporate debtor may offset claims against the corporation which he has purchased, yet officers, stockholders, or persons occupying a trust relationship may not legally do so.[2]

If a majority of the directors of an insolvent corporation, knowing it to be insolvent, vote and cause the treasurer to execute to themselves the corporation's judgment note, and then enter judgment on it at once, the judgment is fraudulent as to other creditors, though the debt was legal.[3]

A mortgage by an insolvent corporation to a director may be upheld to the extent that the director, at the time of the mortgage, advanced funds to pay its debts, but not as to antecedent debts due the director.[4]

There are cases which uphold mortgages given by insolvent corporations to their directors, but these cases are wrong in principle and law.[5]

to the directors. Scott *v.* Farmers', etc. Bank, 97 Tex. 31 (1903).

1 Camden, etc. Co. *v.* Citizens', etc. Co., 69 N. J. Eq. 718 (1905). See § 766, *infra.*

2 Nix *v.* Ellis, 118 Ga. 345 (1903). *Cf.* § 660, *supra.*

3 Roseboom *v.* Whittaker, 132 Ill. 81 (1890).

4 Corbett *v.* Woodward, 5 Sawyer, 403 (1879); s. c., 6 Fed. Cas. 531. See also Williams *v.* Patrons of Husbandry, 23 Mo. App. 132 (1886); White, etc. Co. *v.* Pettes, etc. Co., 30 Fed. Rep. 864 (1887); Lippincott *v.* Shaw Carriage Co., 25 Fed. Rep. 577 (1885); Stout *v.* Yaeger Milling Co., 13 Fed. Rep. 802 (1882).

5 Planters' Bank *v.* Whittle, 78 Va. 737 (1884), dictum, that directors may make preferences in favor of themselves if they are creditors; but in so doing they must act in perfect good faith. At common law a corporation may give a preference to a director. Wilson *v.* Stevens, 129 Ala. 630 (1901). In the case of Corey *v.* Wadsworth, 118 Ala. 488 (1899), the court held that a preference to a director might be legal, but that under the circumstances of that case it was illegal. In Texas a director in an insolvent corporation may obtain a preference by attachment. Frank Co. *v.* Berwind, 47 S. W. Rep. 681 (Tex. 1898). A mortgage given by an insolvent corporation is valid, although given to secure debts due to the wife of a director, the administrator of another deceased director, and the payee of a note indorsed by still another director. Garrett *v.* Burlington Plow Co., 70 Iowa, 697 (1886). A sale of all the property of an insolvent corporation to a director, who is also present, in payment of his debt, cannot be set aside by other corporate creditors. Buell *v.* Buckingham, 16 Iowa, 284 (1864). A preference is legal, although given by directors who are relatives of the creditor. Rollins *v.* Shaver, etc. Co., 80 Iowa, 380 (1890). Directors and officers of an insolvent corporation may be given preference, even though their vote was necessary to authorize the same. City Nat. Bank *v.* Goshen, etc. Co., 163 Ind. 214 (1904). Corporate creditors cannot object to a sale of all the corporate property to one of the creditors in payment of her debt, even though she be the wife of the president and

§ 693. *Preferences in favor of corporate debts upon which the directors are liable as indorsers or otherwise.*—Where a director is merely the indorser, surety, or guarantor of a corporate debt or note, to which a preference is given by an insolvent corporation, a much more difficult question arises than where such debt or note is held by the director himself. The decisions are in conflict on this subject. The great weight of authority undoubtedly is that such a

chief stockholder. Ragland *v.* McFall, 137 Ill. 81 (1891). A director may obtain judgment and sell out the assets of an insolvent corporation if he does so in good faith. Off *v.* Jack, 204 Ill. 79 (1903). An insolvent corporation, under the Arkansas decisions, may give a mortgage to one of its directors to secure a present or precedent debt, and such mortgage is valid. Gould *v.* Little Rock, etc. Ry., 52 Fed. Rep. 680 (1892), reviewing the authorities. An insolvent corporation may mortgage its property to any one of its creditors. Such a mortgage is not for the benefit of all creditors, even though it is given to secure several. The mortgage may be given to a director or stockholder. Bank of Montreal *v.* Potts, etc. Co., 90 Mich. 345 (1892). A director in an insolvent corporation may take security. Campau *v.* Detroit, etc. Club, 135 Mich. 575 (1904). Even though a company sells all its assets for cash to another company it may apply such cash to the payment of some of the creditors, and not to others, and if the president is a creditor he may be included among those who are paid. Shipman Co. *v.* Detroit, etc. Ry., 140 Mich. 589 (1905). The following cases are exceptions to and not contradictory of the general rule: Where a part of the trustees are the only creditors, and the business is a losing one, they may take a mortgage to secure moneys loaned by them to the company, and may foreclose such mortgage. Skinner *v.* Smith, 134 N. Y. 240 (1892); Whitwell *v.* Warner, 20 Vt. 425 (1848), holding that stockholders who avail themselves of their superior advantages to obtain security from the corporation for debts due them, whether by attachment or assignment, are not guilty of fraud so as to render themselves personally liable for corporate debts. Where a corporation owes money to the directors, and to pay the same borrows money and gives a mortgage, and subsequently the property is sold for less than the mortgage, a creditor whose debt was not due when the mortgage was given cannot complain. Holt *v.* Bennett, 146 Mass. 437 (1888). But see St. Louis *v.* Alexander, 23 Mo. 483, 528, 531 (1856), where it was attempted to overturn a deed of trust on the ground that is was executed by a bare quorum of the directors and one or more of them were legally incapacitated by being directly interested. The language of the court was: "I can see no reason why a member of the board of directors might not sit in the board, and, without fraud, in conjunction with others, consent to an order for securing a debt actually due to him from the corporation." A preference given by an insolvent corporation to directors may be legal. The remedy of corporate creditors against an illegal preference is by creditors' bill and not by an execution sale. Butler *v.* Harrison, etc. Co., 139 Mo. 467 (1897). In Missouri it is held that the directors in an insolvent corporation may prefer their own debts, but a degree of good faith is required which practically nullifies such preference. State *v.* Manhattan, etc. Co., 149 Mo. 181 (1899). Where an insolvent corporation sells property to one of its directors in payment of a debt, he must prove that he did not influence the directors to vote for

preference is illegal.[1] This is so held because, first, such a preference is practically the same as a preference to the director himself, inasmuch as he would have had to take up the debt as indorser if no preference had been given; and second, because to sustain such a preference would tempt a director holding a corporate obligation to sell the same with his guaranty or indorsement, and then induce the board of directors to prefer that obligation.

the transaction. Pitman *v.* Chicago, etc. Co., 93 Mo. App. 592 (1892). A stockholder cannot have a receiver appointed and mortgages set aside where all the stock is "water," even though the controlling party had made the mortgages to himself and is about to sell the assets of the company to another company controlled by himself, and has levied an assessment on the stock of the old company in order to sell out the stock. Robinson *v.* Dolores, etc. Co., 2 Colo. App. 17 (1892). In Illinois it is held that an insolvent corporation may prefer a creditor who is the father of a majority of the directors. It is also held that a preference may be given to directors for a debt contracted while the company was insolvent. Illinois Steel Co. *v.* O'Donnell, 156 Ill. 624 (1895). In Missouri an insolvent corporation may prefer a director. Schufeldt *v.* Smith, 131 Mo. 280 (1895). *Cf.* National Tube Works Co. *v.* Ring, etc. Co., 118 Mo. 365 (1893). Under the old New Jersey statute the directors of a corporation could mortgage the property and issue bonds to themselves as security for previous advancements, even though the company was insolvent. Whittaker *v.* Amwell Nat. Bank, 52 N. J. Eq. 400 (1894). In Connecticut it has been held that a corporation may turn over property to a director in payment of a debt, even though the corporation is insolvent, it being shown that all parties supposed at the time that all debts could be paid. Smith *v.* Skeary, 47 Conn. 47 (1879). A mortgage by a solvent corporation to secure its directors as creditors is legal. Hinz *v.* Van Dusen, 95 Wis. 503 (1897).

1 The president's transfer of corporate property to himself and wife as security for indorsements on notes is not legal. Hill *v.* Marston, 178 Mass. 285 (1901). A preference by an insolvent corporation to a debt for which the directors are sureties is illegal. National, etc. Co. *v.* Columbia Nat. Bank, 63 Neb. 234 (1901); Merchants' Nat. Bank *v.* McDonald, 63 Neb. 363 (1901); Williams *v.* Turner, 63 Neb. 575 (1902). A mortgage given by an insolvent corporation to secure debts on which three directors are liable is not legal where the vote of those three directors was necessary to authorize such mortgage. Swift & Co. *v.* Dyer-Veatch Co., 28 Ind. App. 1 (1901); aff'd, 60 N. E. Rep. 169. A mortgage given by an insolvent corporation as security for a debt for which the directors were personally liable as indorsers is not valid as against other creditors, unless the debt was incurred at that time or an agreement to give the mortgage was made when the debt was incurred. Atlas, etc. Co. *v.* Exchange Bank, etc., 111 Ga. 703 (1900). A sale of all the property of an insolvent corporation to one of its directors, payment being by indorsement by credit on notes on which such director is indorser, is illegal, and other creditors are entitled to share *pro rata.* Dozier *v.* Arkadelphia, etc. Co., 67 Ark. 11 (1899).

Where a director is guarantor of a debt, a preference obtained by a judgment creditor's action is illegal. Wisconsin, etc. Bank *v.* Lehigh, etc. Co., 64 Fed. Rep. 497 (1894). A draft drawn by an insolvent corporation to pay a debt for which a director is surety is illegal. Bosworth *v.* Jack-

Notwithstanding these decisions and reasons, there are circumstances under which such a preference will be sustained. A cor-

sonville Nat. Bank, 64 Fed. Rep. 615 (1894). Where two out of four directors of an insolvent corporation are liable as indorsers on a corporate debt, a mortgage given to secure that debt will be set aside as an illegal preference, even though the mortgage has been foreclosed. Lippincott *v.* Shaw Carriage Co., 34 Fed. Rep. 570 (1888). Where a corporation is practically insolvent, and has assigned its property by deed of trust to pay certain debts for which the directors are sureties, a court of equity in Missouri will enjoin proceeding under the deed of trust, and will appoint a receiver. Consolidated, etc. Co. *v.* Kansas City, etc. Co., 43 Fed. Rep. 204 (1890); s. c., 45 Fed. Rep. 7 (1891). An insolvent corporation may give a preference by confession of judgment, but not to a creditor whose claims were assigned to him by directors. Gottlieb *v.* Miller, 154 Ill. 44 (1895). The directors of an insolvent corporation are trustees for the creditors. They cannot, after it becomes insolvent, take mortgages to themselves on its property to secure advances and indorsements made by them for it. Olney *v.* Conanicut Land Co., 16 R. I. 597 (1889). Directors of an insolvent corporation cannot apply corporate funds exclusively to corporate debts for which they are sureties. All debts will be allowed to participate ratably. Richards *v.* New Hampshire Ins. Co., 43 N. H. 263 (1861). An insolvent corporation cannot give a preference to creditors for whose debts the directors are sureties. Tillson *v.* Downing, 45 Neb. 549 (1895). A mortgage to secure a debt upon which one of the directors is liable is illegal. Stough *v.* Ponca Mill Co., 54 Neb. 500 (1898). A corporation supposed to be solvent may give a mortgage to secure a debt guaranteed by its directors. Sabin *v.* Columbia Fuel Co., 25 Oreg. 15 (1893). An insolvent corporation cannot transfer all its property to pay a note of which a director is an indorser, joint maker, or guarantor. Goodyear Rubber Co. *v.* Scott Co., 96 Ala. 439 (1892). A mortgage given by an insolvent corporation to secure debts for which the directors are sureties is illegal. It is not legal, even though it is given for the benefit of co-sureties who are not directors. The directors are bound to know whether the company is solvent or insolvent. Lowry Banking Co. *v.* Empire Lumber Co., 91 Ga. 624 (1893). Where the controlling directors of two corporations are the same persons, and one company becomes liable on paper for the accommodation of the other, and thereby renders the directors of the former personally liable for breach of trust, a mortgage given by the latter to the former as security for such paper is invalid, because it amounts to a preference to such officers. Hutchinson *v.* Sutton Mfg. Co., 57 Fed. Rep. 998 (1893). A preference by an insolvent corporation to creditors whose notes are secured by the indorsements of directors cannot be given by the corporation by the vote of such directors. Love Mfg. Co. *v.* Queen City Mfg. Co., 74 Miss. 290 (1896). Even though an insolvent corporation illegally, but in good faith, gives a mortgage by way of preference to its president, this does not sustain an attachment by another creditor on the ground that the corporation is disposing of its property with intent to defraud the creditors. Trebilcock *v.* Big, etc. Co., 9 S. Dak. 206 (1896). An insolvent corporation cannot give a preference to a debt for which its directors are sureties. Gray *v.* Taylor, 38 Atl. Rep. 951 (N. J. 1897). *Cf.* s. c., 44 Atl. Rep. 668. But a corporate creditor who advised the directors to take a mortgage from the corporation to secure them in their indorsement of corporate paper cannot afterwards object to such

porate creditor is not to be punished simply because the directors have guaranteed his claim. The supreme court of the United States has strongly intimated that such is the law;[1] and indeed it is difficult to see how a court of equity can refuse to uphold, in behalf of the corporate creditor himself, a preference which has been given to such creditor, even though a director is surety therefor, where the

mortgage. *Re* Bloomfield, etc. Mills, 101 Iowa, 181 (1897). A corporation in financial difficulties cannot execute a mortgage to secure bonds, and deliver these bonds to a bank as security for past and future advances, where two of the directors of the company are also directors of the bank. Such a mortgage delays other creditors. Only *bona fide* holders of such bonds are protected. Age-Herald Co. *v.* Potter, 109 Ala. 675 (1895). A director cannot legally pay from moneys belonging to an insolvent corporation a debt on which he is a surety. Graham *v.* Carr, 130 N. C. 271 (1902). Directors who are guarantors of corporate notes may assume the payment thereof in consideration of property transferred to them by the corporation. Swentzel *v.* Franklin, etc. Co., 168 Mo. 272 (1902). A mortgage given by an insolvent corporation to secure debts on which three directors are liable is not legal where the vote of those three directors was necesary to authorize such mortgage. Swift & Co. *v.* Dyer-Veatch Co., 28 Ind. App. 1 (1901); aff'd, 60 N. E. Rep. 169. Even though the president has personally given security for a loan to a corporation, the lender may obtain a judgment against the corporation, and even though by agreement the security is sold and the money deposited as security for the judgment, this does not constitute payment so far as the statutory liability of stockholders is concerned. Lancaster *v.* Knight, 74 App. Div. 255 (1902).

1 In Sanford, etc. Co. *v.* Howe, etc. Co., 157 U. S. 312, 318 (1895), rev'g Howe, etc. Co. *v.* Sanford, etc. Co., 44 Fed. Rep. 231, Mr. Justice Brewer said, with much force: "Are creditors who are neither stockholders nor directors, but strangers to a corporation, disabled from taking security from the corporation by reason of the fact that upon the paper they hold there is also the indorsement of certain of the directors or stockholders? Must, as a matter of law, such creditors be content to share equally with the other creditors of the corporation, because, forsooth, they have also the guaranty of some of the directors or stockholders whose guaranty may or may not be worth anything?" A preference may be given by an insolvent corporation on a debt that was incurred before insolvency, even though a director is guarantor of such debt. Rockford, etc. Groc. Co. *v.* Standard, etc. Co., 175 Ill. 89 (1898). A corporate creditor is not guilty of having received a preference under the bankruptcy act, where he had held the personal note of the directors, although the money was paid to the corporation and thereafter the directors borrowed the money elsewhere on their personal notes, and had the corporation apply the proceeds to the payment of the first note. Keegan *v.* Hamilton Nat. Bank, 163 Ind. 216 (1904). Directors who are guarantors of certain notes of an insolvent corporation are not liable to its other creditors, by reason of the former creditors having levied an attachment and obtained a preference, the directors not having aided in such preference. Emanuel *v.* Barnard, 71 Neb. 756 (1904). An insolvent corporation may give a mortgage to secure notes on which its directors are sureties. Swift & Co. *v.* Dyer-Veatch Co., 60 N. E. Rep. 169 (Ind. 1901); modified on another point in 28 Ind. App. 1. Where a director becomes surety for a bank in receiving city deposits

corporate creditor acquired his claim either from the director or from the corporation itself at a time when the corporation was solvent; or where the corporate creditor did not know that the corporation was insolvent when he acquired his claim from the director or from the corporation itself; or where the corporate creditor loaned money to a corporation itself when it was insolvent, and at the same

the bank may legally transfer notes held by the bank to such director as security. Klein *v.* Funk, 82 Minn. 3 (1900). A corporation may give security to a director at the same time that he indorses its note. Anglo-American, etc. Co. *v.* Davis, etc. Co., 112 Fed. Rep. 574 (1902). An insolvent corporation in North Carolina may confess judgment to a creditor for whose debt the president is surety. Howard *v.* Central, etc. Co., 123 N. C. 90 (1898). In Georgia it is held that where the directors are guarantors of a note secured by mortgage and the note is not paid, they may take an assignment of the note and mortgage and enforce the mortgage, even though the corporation might possibly pay the debt if time were given. Rylander *v.* Sheffield, 108 Ga. 111 (1899). An insolvent corporation may give a preference to a note which is indorsed by a director where the company received the money for the note and the indorsement was for accommodation. Nat. Bank, etc. *v.* George, etc. Co., 18 Utah, 400 (1898). The payment and securing of a corporate debt are not fraudulent merely because some of the directors had guaranteed the debt. Taylor County Court *v.* Baltimore, etc. R. R., 35 Fed. Rep. 161 (1888). A chattel mortgage securing a part of the creditors of an insolvent corporation may be valid although some of the directors and stockholders who voted for the mortgage are guarantors and indorsers of the debts so secured. Brown *v.* Grand Rapids, etc. Co., 58 Fed. Rep. 286 (1893), following the Michigan decisions, and stating that the supreme court of the United States has not decided that a corporation may not prefer one of its directors. A creditor may be preferred by the giving of security by an insolvent corporation, even though his claim is secured by the directors and stockholders, he not knowing of the insolvency at the time of the giving of the security. Henderson *v.* Indiana Trust Co., 143 Ind. 561 (1895). An insolvent corporation may give a mortgage to a creditor, by way of preference, even though a director is surety on the debt. Waggoner, etc. Co. *v.* Ziegler, etc. Co., 128 Mo. 473 (1895). A mortgage to a creditor on part of the property of an insolvent corporation is legal, although some of the stockholders and directors are indorsers of the debt. Weihl *v.* Atlanta, etc. Co., 89 Ga. 297 (1892). In Arkansas it is held that an insolvent corporation may prefer certain creditors, even though their claim is secured by the indorsements of the directors. Worthen *v.* Griffith, 59 Ark. 562 (1894). In Milledgeville Banking Co. *v.* McIntyre Alliance Store, 98 Ga. 503 (1896), the court very properly held that a mortgage given by an insolvent corporation to an outside creditor was valid, although the directors had given their personal note as additional security for the debt, such note being purely an accommodation note. The court distinguished Lowry Banking Co. *v.* Empire Lumber Co., 91 Ga. 624. A director who votes for a preference on debts for which other directors are liable cannot complain. Lucas *v.* Friant, 111 Mich. 426 (1897). Although a mortgage is invalid as to the debts in which the directors are interested, it may be valid as to the remaining debts secured by it. Savage *v.* Miller, 56 N. J. Eq. 432 (1898). A

time received a mortgage by way of preference, and also obtained the indorsements of the directors on his paper; or where the directors were merely indorsers for the accommodation of the corporation. It is true that the above rules would enable a corporation to give preference to a corporate creditor in most cases where a director is indorser or guarantor of the claim. But, on the other hand, it is now a general custom in banking circles not to loan to a business corporation unless the directors guarantee the debt. If the law puts such a debt at a disadvantage as compared with other corporate debts, the credit of business corporations will be greatly curtailed, thereby rendering insolvent many corporations which otherwise would be able to extricate themselves from their troubles. In New Jersey the ingenious rule has been sustained that where a preference has been given by an insolvent corporation to debts guaranteed by the directors, the amount realized from such preference, over and above what would have been realized if there had been no preference, may be recovered by the other creditors from the directors.[1]

§ 694. *Land may be purchased by a domestic corporation.*[2]—The English statutes of mortmain are not in force in this country

preference is legal although some of the directors voting therefor were sureties on the paper to which such preference is given, their votes not being necessary. Levering *v.* Bimel, 146 Ind. 545 (1897). Where a mortgage is given by an insolvent corporation to secure an antecedent debt for which a director is surety, the mortgage is not necessarily illegal; but if the transaction is actually a scheme to give the director a preference, it is illegal. Atlas Tack Co. *v.* Macon Hardware Co., 101 Ga. 391 (1897). Where the debts equal only one-third of the market value of the corporate property, and certain creditors holding notes on which the directors are indorsers demand security or else threaten to sue the corporation, the directors may authorize confession of judgment in their favor. Mueller *v.* Monongahela, etc. Co., 183 Pa. St. 450 (1898). A preference may be given to debts for which the directors are sureties. Nappanee, etc. Co. *v.* Reid, etc. Co., 159 Ind. 614 (1903).

[1] Savage *v* Miller, 56 N. J. Eq. 432 (1898). Where the president as indorser has been discharged by the payment of a note illegally, the court may set the transaction aside and restore the president's liability. Miller *v.* Audenried, 67 N. J. Eq. 252 (1904).

[2] Richardson *v.* Massachusetts, etc. Assoc., 131 Mass. 174 (1881); Lancaster *v.* Amsterdam Imp. Co., 140 N. Y. 576 (1894); Kelly *v.* People's Transp. Co., 3 Oreg. 189 (1870); Page *v.* Heineberg, 40 Vt. 81 (1868); Central Gold Min. Co. *v.* Platt, 3 Daly, 263 (1870), to the effect that the holding may be upon special trust; Nicoll *v.* New York, etc. R. R., 12 N. Y. 121, 127 (1854); Barry *v.* Merchants' Exchange Co., 1 Sandf. Ch. 280 (1844); Sherwood *v.* American Bible Soc., 1 Keyes, 561 (1864); Steamboat Co. *v.* McCutcheon, 13 Pa. St. 13 (1850); Riley *v.* Rochester, 9 N. Y. 64 (1853); Downing *v.* Marshall, 23 N. Y. 366 (1861); State *v.* Mansfield, 23 N. J. L. 510 (1852); State *v.* Newark, 25 N. J. L. 315 (1855); First Parish *v.* Cole, 20 Mass. 232 (1825); Old Colony R. R. *v.* Evans, 72 Mass. 25 (1856), where the company purchased a gravel pit to transport and sell the gravel. And

except in Pennsylvania. The only limitation upon the right of corporations to hold real property is that the purchase must be a natural incident of the business specified in the charter.[1] A different rule

see Smith *v.* Sheeley, 12 Wall. 358 (1870). A corporation is presumed, in the absence of any showing to the contrary, to have the right to purchase and hold land. Stockton Sav. Bank *v.* Staples, 98 Cal. 189 (1893). In a suit by a railroad to quiet title to its land, the defendants cannot question the power of a railroad to hold land. Russell *v.* Texas, etc. Ry., 68 Tex. 646 (1887). In a bill to quiet title, a corporation need not allege that it has power to hold land. Torrent F. Eng. Co. *v.* Mobile, 101 Ala. 559 (1894). A publishing company may take a lease of a building and may sublet such parts of it as it does not use. Oswald *v.* St. Paul, etc. Pub. Co., 60 Minn. 82 (1895). A bank may accept a deed of real estate from a stockholder and director to make good an impairment of the capital stock, it being agreed that compensation therefor should be paid from future profits. Brown *v.* Bradford, 103 Iowa, 378 (1897). Where a bank has legally acquired a part interest in real estate, it may purchase the remaining interest for the purpose of handling the property. Cockrill *v.* Abeles, 86 Fed. Rep. 505 (1898). The contract of a religious corporation to purchase land for speculative purposes is not enforceable, and a note given in connection therewith is not valid except in *bona fide* hands. Thompson *v.* West, 59 Neb. 677 (1900). Although a statute prescribes that a corporation shall not hold real estate if more than twenty per cent. of its stock is owned by aliens, it is presumed that not more than twenty per cent. is so held by aliens until the contrary is proved. Northwestern, etc. Co. *v.* Chicago, etc. Ry., 76 Minn. 334 (1899). A statute prohibiting a corporation, a majority of whose stock is held by aliens, from acquiring land, does not prohibit it from acquiring fishing lands. Hastings *v.* Anacortes, etc. Co., 29 Wash. 224 (1902). Where a corporation buys land in the name of its agent as trustee it is liable for the price thereof. Hurst *v.* Am. Assoc., 49 S. W. Rep. 800 (Ky. 1899). Although a deed of a corporation provides that in a certain contingency the land "should revert to the stockholders, their heirs and assigns," yet such reversion is to the corporation and not to the stockholders. Pettit *v.* Stuttgart, etc. Institute, 67 Ark. 430 (1900). A corporation may be a *bona fide* purchaser of land, even though it was not authorized by its charter to purchase the land. Schneider *v.* Sellers, 98 Tex. 380 (1905).

[1] 2 Kent, Com. *282; Moore *v.* Moore, 4 Dana (Ky.), 354 (1836); Lathrop *v.* Scioto Comm. Bank, 8 Dana (Ky.), 114, 121 (1839); Potter *v.* Thornton, 7 R. I. 252 (1862); Perin *v.* Carey, 24 How. 465 (1860); McCartee *v.* Orphan Asylum Soc., 9 Cow. 437, 451 (1827); Page *v.* Heineberg, 40 Vt. 81 (1868). See also Odell *v.* Odell, 92 Mass. 1 (1865); Downing *v.* Marshall, 23 N. Y. 366, 392 (1861); First Parish *v.* Cole, 20 Mass. 232, 239 (1825); Richardson *v.* Massachusetts, etc. Assoc., 131 Mass. 174 (1881). There are no real mortmain acts in Massachusetts. Hubbard *v.* Worcester, etc., 80 N. E. Rep. 490 (Mass. 1907). One who agrees to sell land to a corporation is not bound to see that it is required for the purposes of the corporation, and if acting in good faith, and without knowledge of an intention to misapply the corporate funds, he may enforce specific performance of the contract. Eastern Counties Ry. *v.* Hawkes, 5 H. L. Cas. 331 (1855). Frequently the charter places some limitations or grants some privileges herein. A charter

prevails in Pennsylvania.[1] In that state the mortmain laws are held to still exist, and the state itself has enacted a statute restricting the right.

In the other states, however, the rule is firmly established that the right of a domestic corporation to purchase and hold land can be questioned only by a stockholder or by the state in a direct proceeding for that purpose. The objection cannot be made by others.[2]

power to hold land for business purposes and to secure debts does not authorize the purchase of land for the purpose of selling it again. Bank of Michigan *v.* Niles, Walk. (Mich.) 99 (1842); aff'd, 1 Douglas, 401. Pacific R. R. *v.* Seely, 45 Mo. 212 (1870), where a railroad was held to have no power to acquire land for speculation; Land *v.* Coffman, 50 Mo. 243 (1872); Rensselaer, etc. R. R. *v.* Davis, 43 N. Y. 137 (1870). Under such an express power the corporation cannot purchase merely for the convenience of the corporation, nor for purposes foreign to its objects. State *v.* Mansfield, 23 N. J. L. 510 (1852); State *v.* Newark, 25 N. J. L. 315 (1855). But the purchase is presumed to be for purposes mentioned in the charter. Chautauque County Bank *v.* Risley, 19 N. Y. 369 (1859); *Ex parte* Peru Iron Co., 7 Cow. 540 (1827); Moss *v.* Rossie Lead Min. Co., 5 Hill, 137 (1843); Alward *v.* Holmes, 10 Abb. N. Cas. 96 (1880), where a foreign bank had purchased. A railroad, instead of condemning a right of way, may purchase the fee. Nicoll *v.* New York, etc. R. R., 12 N. Y. 121 (1854).

1 This arose from the fact that the judges of the supreme court, appointed to examine and report to the legislature such of the English statutes as were in force in that state, reported that the statutes of mortmain were "so far in force that all conveyances . . . made to a body corporate, or for the use of a body corporate, are void, unless sanctioned by charter or act of assembly." The report may be found in 3 Binney (Pa.), 595, 626 (1808). See also Methodist Church *v.* Remington, 1 Watts (Pa.), 218 (1832); Miller *v.* Porter, 53 Pa. St. 292 (1866). The statute of April 6, 1833, made all purchases of land by or for corporations, without the license of the commonwealth, subject to forfeiture. Under this act it has been held that a foreign corporation may purchase and hold real estate in Pennsylvania, subject to being divested by the direct action of the state. Runyan *v.* Coster, 14 Pet. 122 (1840). To same effect, Leazure *v.* Hillegas, 7 Serg. & R. (Pa.) 313 (1821). A similar statute, passed April 26, 1855, was construed to the same effect in Hickory Farm Oil Co. *v.* Buffalo, etc. R. R., 32 Fed. Rep. 22 (1887), after having been declared a mortmain act in American Slate Co. *v.* Phillipsburg, etc. Bank, 8 W. N. Cas. 430 (1880). A person sued in Pennsylvania on a debt to a foreign corporation cannot set up that the corporation is illegally holding land in the state. Grant *v.* Henry Clay Coal Co., 80 Pa. St. 208 (1876). Where a foreign corporation cannot directly own land in a state, it cannot own land indirectly by owning a majority of the stock of a domestic corporation which owns the land. The state may escheat the land. Commonwealth *v.* New York, etc. R. R., 114 Pa. St. 340 (1886). But under the statutes of Pennsylvania it is legal for a railroad company to own all the stock of a mining company which owns land, and such land does not escheat. Commonwealth *v.* New York, etc. R. R., 139 Pa. St. 457 (1891). See also § 695, *infra.*

2 Only the state can raise the ques-

Whether a corporation has purchased more land than it is authorized

tion that the corporation was not entitled to acquire real estate. Cooney *v.* Booth, etc. Co., 169 Ill. 370 (1897); Land *v.* Coffman, 50 Mo. 243 (1872), holding also that a deed voluntarily made to the corporation of real property in excess of the amount allowed by its charter will pass a good title; Natoma Water, etc. Co. *v.* Clarkin, 14 Cal. 544, 552 (1860), Field, C. J., saying: "It would lead to infinite inconveniences and embarrassments if, in suits by corporations to recover the possession of their property, inquiries were permitted as to the necessity of such property for the purposes of their incorporation, and the title made to rest upon the existence of that necessity." The right of a corporation to take an assignment of the lease cannot be questioned by the lessor. Springer *v.* Chicago, etc. Co., 202 Ill. 17 (1903). A grantor of a right of way for a telephone line cannot claim that the grantee—a water company—had no power to take such a grant. North Eastern, etc. Co. *v.* Hepburn, 65 Atl. Rep. 747 (N. J. 1907). The *cestui que trust* cannot claim that a bank which purchased land from their trustee had no power to purchase it. State *v.* Hoskins, 130 Iowa, 339 (1906). A grantor of a right of way to a tramway company cannot repudiate the deed on the ground that the company was not authorized to construct a railroad. Beasley *v.* Aberdeen, etc. R. R., 59 S. E. Rep. 60 (N. C. 1907). The lessor of oil and gas rights cannot maintain a suit to cancel the contract on the ground that the lessee corporation had no authority to make it Harris *v.* Independence Gas Co., 92 Pac. Rep. 1123 (Kan. 1907). Even though a safe deposit company is authorized to possess real estate necessary for the transaction of its business, and it erects a large office building fourteen stories high and rents nearly all of it, yet a tenant cannot avoid payment of rent on the ground that it holds too much real estate. Rector *v.* Hartford Deposit Co., 190 Ill. 380 (1901). A person claiming land by adverse possession as against a corporation cannot set up that the corporation had no power to acquire the land. Only the state can raise this question. Chicago, etc. R. R. *v.* Keegan, 185 Ill. 70 (1900). The right of a beneficial association to purchase land as an investment cannot be questioned by any one but the state. Hagerstown, etc. Co. *v.* Keedy, 91 Md. 430 (1900). A vendor of land to a corporation cannot afterwards claim that the corporation had no power to purchase. Miller *v.* Flemingsburg, etc. Co., 109 Ky. 475 (1900). A party who has made an executory contract to sell real estate to a corporation cannot refuse to transfer on the ground that the company had no power to buy, the company having made improvements. Coleridge, etc. Co. *v.* Jenkins, 92 N. W. Rep. 123 (Neb. 1902). The power of a private corporation to acquire land cannot be questioned by the grantor of land to the corporation, and moreover, even if the rule were otherwise, an agent who bought for the corporation as agent would not be personally liable. Ray *v.* Foster, 53 S. W. Rep. 54 (Tex. 1899). A grantor of property to a railroad company for picnic purposes cannot avoid his deed and its obligations by claiming that the purchase by the company was *ultra vires*. Shelby *v.* Chicago, etc. R. R., 143 Ill. 385 (1892). The corporation cannot defend against a mortgage on the ground that it had no power to purchase the property. Butterworth, etc. *v.* Kritzer, etc. Co., 115 Mich. 1 (1897). There are many other cases in which it is held that the state alone can raise this objection. National Bank *v.* Matthews, 98 U. S. 621, 628 (1878), and cases cited; Cowell *v.* Springs Co., 100 U. S. 55 (1879); Myers *v.* Croft, 13 Wall. 291

to purchase concerns only the state and cannot be raised collaterally

(1871); Southern Pac. R. R. *v.* Orton, 6 Sawy. 157, 181 (1879), and cases cited; s. c., 32 Fed. Rep. 457, 470; Shewalter *v.* Pirner, 55 Mo. 218 (1874); Chambers *v.* St. Louis, 29 Mo. 543, 576 (1860); McIndoe *v.* St. Louis, 10 Mo. 576 (1847); People *v.* Mauran, 5 Denio, 389 (1848); Silver Lake Bank *v.* North, 4 Johns. Ch. 370 (1820); Leazure *v.* Hillegas, 7 Serg. & R. (Pa.) 313 (1821); Goundie *v.* Northampton Water Co., 7 Pa. St. 233 (1847); Steamboat Co. *v.* McCutcheon, 13 Pa. St. 13 (1850); Kelly *v.* People's Transp. Co., 3 Oreg. 189 (1870); Morgan *v.* Donovan, 58 Ala. 241 (1877). But in this case it was said that in a suit to enforce a contract of purchase which remained executory, or to recover for its breach, the question of *ultra vires* would be material. Banks *v.* Poitiaux, 3 Rand. (Va.) 136, 146 (1825); Barrow *v.* Nashville, etc. Co., 9 Humph. (Tenn.) 304 (1848), holding that the fact that a corporation uses real estate for purposes beyond its powers furnishes no ground to the vendor for a rescission of the contract of sale; Runyan *v.* Coster, 14 Pet. 122, 129 (1840); Chicago, etc. R. R. *v.* Lewis, 53 Iowa, 101 (1880); Mapes *v.* Scott, 94 Ill. 379 (1880), in which the rule was applied to national banks; Alexander *v.* Tolleston Club, 110 Ill. 65 (1884); Smith *v.* Sheeley, 12 Wall. 358 (1870); De Camp *v.* Dobbins, 29 N. J. Eq. 36 (1878), which case was affirmed in 31 N. J. Eq. 671 (1879), where it was, however, held that an heir-at-law may object that a corporation cannot hold land in trust in excess of its statutory powers. See this report for a well-considered opinion, citing cases, and notes by the reporter. Bone *v.* Delaware, etc. Co., 5 Atl. Rep. 751 (Pa. 1886); Chicago, etc. R. R. *v.* Lewis, 53 Iowa, 101 (1880); Missouri, etc. Co. *v.* Bushnell, 11 Neb. 192 (1881); Jones *v.* Habersham, 107 U. S. 174 (1882); Barnes *v.* Suddard, 117 Ill. 237 (1886), in which the rule was applied to a foreign corporation; Hickory Farm Oil Co. *v.* Buffalo, etc. R. R., 32 Fed. Rep. 22 (1887), to the same effect; Spear *v.* Crawford, 14 Wend. 20 (1835), where a stockholder was held liable on his statutory liability to a corporate creditor who had sold land to the corporation.

If a corporation buys land and then finds it is *ultra vires*, and sells its contract to a third person, it may collect from the latter moneys paid on the purchase. Crutcher *v.* Nashville Bridge Co., 8 Humph. (Tenn.) 403 (1847). A railroad company cannot refuse to complete a purchase of lands which, *prima facie*, it could use for railroad purposes. It cannot claim that the purchase was *ultra vires.* Eastern Counties Ry. *v.* Hawkes, 5 H. L. Cas. 331 (1855). A turnpike company may take a lease of land for storing purposes. Crawford *v.* Longstreet, 43 N. J. L. 325 (1881). An agreement of a company to buy land if a certain bill passes is legal and binding. Taylor *v.* Chichester, etc. Ry., L. R. 4 H. L. 628 (1870), reversing s. c., L. R. 2 Exch. 356 (1867). Coleman *v.* San Rafael Turnp. Co., 49 Cal. 517 (1875), holds that, in an action to quiet title, a bond to convey to a corporation for purposes beyond its requirements is void. Thweatt *v.* Bank of Hopkinsville, 81 Ky. 1 (1883), where an execution sale to a bank was held to be void at the suit of the execution debtor; Riley *v.* Rochester, 9 N. Y. 64 (1853), holding, in an action of trespass, that a conveyance to a municipal corporation of land beyond its limits for the purposes of a street is void. Although a corporation purchases land in excess of the amount limited by its charter, yet only the state can object, and its remedy is forfeiture of the charter. Fayette Land Co. *v.* Louisville, etc. R. R., 93 Va. 274 (1896). The power of a trust

by private persons.[1] It is legal for a corporation to hold property in excess of the amount of its capital stock.[2] A statute to the effect that a corporation must sell its unnecessary real estate within five years does not give the state title to such real estate if not so sold.[3] But the constitutional provision that real estate held by a corporation for more than five years and not necessary for its business will be escheated to the state may be enforced by the legislature and the real estate may be given by it to the school fund. The escheat does not apply to land sold before proceedings are commenced, and no one else can object to its holding the property, and a judgment is necessary before the state can take possession.[4] A stockholder has the same right to object to an *ultra vires* purchase of land as he has to object to any other *ultra vires* act;[5] but he must be prompt in his objection,[6] and must bring suit in behalf of all the stockholders to set the purchase aside.[7] Under a statute authorizing the court to dissolve any corporation on good cause shown, a minority stockholder may file a bill to have the corporation dissolved for purchasing unnecessary real estate.[8] Whenever a corporation may take the legal title to land it may take the beneficial interest in it, but if it cannot hold a legal

company to buy a tax title cannot be attacked by a mortgagee foreclosing a mortgage on the land. Watts *v.* Gantt, 42 Neb. 869 (1894). In a suit by a corporation to quiet title, a grantee of its grantees cannot set up that the corporation had no power to acquire or hold title. Butte Hardware Co. *v.* Cobban, 13 Mont. 351 (1893). For a careful review of the authorities, and an argument that the corporation or its stockholders are in all cases protected as to real estate purchased *ultra vires*, see 8 Harvard L. Rev. 15 (1894).

1 Blair *v.* Chicago, 201 U. S. 400 (1906). The question of whether a corporation holds more land than it is allowed by law can be raised only by the state in a direct proceeding for that purpose. Thomas *v.* Wilcox, 18 S. Dak. 625 (1904). See 47 S. Rep. 2.

2 Barry *v.* Merchants' Exchange Co., 1 Sandf. Ch. 280 (1844). Where a corporation owns property in excess of an amount specified and limited by the charter, an exemption from taxation does not apply to such excess. Seashore House, etc. *v.* City of Atlantic City, 48 Atl. Rep. 242 (N. J. 1900).

3 People *v.* Stockton, etc. Soc., 133 Cal. 611 (1901). Only the state can claim that a corporation has held land for longer than ten years in violation of a statute, such land not being in actual use. Pere Marquette R. R. *v.* Graham, 136 Mich. 444 (1904).

4 Louisville, etc. *v.* King, 107 S. W. Rep. 247 (Ky. 1908).

5 *Re* Kent Benefit Bldg. Soc., 1 Dr. & Sm. 417 (1861); Grimes *v.* Harrison, 26 Beav. 435 (1859), where the directors were compelled to make good the funds of the corporation used *ultra vires* to purchase land. A corporation will not be dissolved at the instance of a stockholder because it purchased a half acre of land *ultra vires*, where it sold the same immediately upon complaint being made. Bixler *v.* Summerfield, 210 Ill. 66 (1904).

6 See ch. XLIV, *infra*.

7 See ch. XLV, *infra*.

8 Bixler *v.* Summerfield, 195 Ill. 147 (1902).

title it cannot hold as *cestui que trust.*[1] A corporation taking out patents to land in the names of its employees, and then taking a conveyance from them, holds the land subject to forfeiture by the government.[2] The state may by *quo warranto* proceedings forfeit the charter of a corporation which has acquired land not reasonably needed for the purposes of the business specified in its charter.[3]

1 Coleman *v.* San Rafael Turnp. Co., 49 Cal. 517, 522 (1875). In this case a bond to an individual to convey land in trust for the stockholders of a corporation, with power to sell under direction of its board of trustees, was held to constitute the corporation a *cestuis que trust.* Vidal *v.* Girard, 2 How. 127, 187 (1844), holding also that, if the trust be repugnant to or inconsistent with the purposes of the corporation, a new trustee may be substituted, but no ground is furnished to declare the trust void. See also De Camp *v.* Dobbins, 29 N. J. Eq. 36 (1878); affirmed, 31 N. J. Eq. 671 (1879); Clemens *v.* Clemens, 37 N. Y. 59 (1867); Chamberlain *v.* Chamberlain, 43 N. Y. 424 (1871); Harris *v.* American Bible Soc., 2 Abb. App. Dec. 316 (1867), but here the corporation had express power to hold in trust; Downing *v.* Marshall, 23 N. Y. 366 (1861).

2 United States *v.* Trinidad Coal, etc. Co., 137 U. S. 160 (1890). Where several persons, in order to evade section 2331 of the United States Revised Statutes, which limits to twenty acres the amount of placer-mining ground that a single person may locate, agree that "dummies" shall be used as locators, and the "dummies" shall transfer the land to one person, who shall hold it for all of the principal parties, and all this is done, the person thus obtaining title cannot be compelled by the others to divide. The contract is illegal and the court will not aid any party. Mitchell *v.* Cline, 84 Cal. 409 (1890). See also Case *v.* Kelly, 133 U. S. 21 (1890). Where land is entered in the names of individuals in order to evade a statute against corporations, and then they deed to the corporations, the state may set aside the grants. Wichita, etc. Co. *v.* State, 80 Tex. 684 (1891). A corporation which engages in the business of buying and selling real estate through a trustee does not forfeit its title to land acquired by such trustee, although contrary to 2 Utah Comp. L. 1888, § 2272, which provides that a corporation "shall not have power to enter into, as a business, the buying and selling of real estate," but affixed no penalty for its violation. Fisk *v.* Patton, 7 Utah, 399 (1891). Even a domestic corporation cannot obtain a patent to a mining claim under the federal statutes, unless all of its stockholders are citizens of the United States, and are severally and individually qualified and competent to make the location. Thomas *v.* Chisholm, 13 Colo. 105 (1889). A foreign corporation not authorized to own and register ships in America cannot evade the law by taking title in the names of trustees who are residents of America. Ogden *v.* Murray, 39 N. Y. 202 (1868),—a dictum. Under a constitutional provision that conveyances to a corporation, a majority of the stock of which is held by aliens, shall be void, the attorney-general may commence suit to have certain conveyances declared void, even though a majority of the stock was owned by citizens at the time of the conveyance, such majority having since that time passed into alien hands. State *v.* Hudson Land Co., 19 Wash. 85 (1898).

3 A corporation organized to manufacture railway cars has no power to lay out a town around its works and

Although the officers of a railroad company take in their own names the title to lands, which are donated to the railroad, yet the railroad cannot compel them to give up the lands, if the railroad company had no power to acquire such lands.[1] The contract by which a party turns in land in exchange for stock may be such as to give him a vendor's lien on such land in case the scheme is not carried out.[2]

Quo warranto does not lie to oust a corporation from the possession of land. *Quo warranto* lies only to oust a company from the franchises it claims, and not to divest it of property.[3]

It is well settled that corporations may, without special authority, dispose of land as they may deem expedient,[4] and may mort-

build twenty-two hundred homes to lease to its employees, to build and run a hotel and saloon, and also a theater, a gas plant, a system of water-works and a brick plant, and to own and run a farm for supplies to sell and for its employees, and to own stock in other corporations manufacturing and selling bar iron and railroad spikes; but may erect an office building containing more space than it requires at the time, and may purchase more real estate than it actually requires at the time, and may supply liquor to passengers on its cars, and may sell surplus steam power. The state may bring *quo warranto* proceedings to forfeit the charter. It is no defense that the usurpations had continued for many years to the knowledge of the state, or that a legislative committee had reported that the real estate was properly taxed. People *v.* Pullman's Palace Car Co., 175 Ill. 125 (1898). A religious corporation has no implied power to use its real estate for business purposes. First M. E. Church, etc. *v.* Dixon, 178 Ill. 260 (1899).

1 Case *v.* Kelly, 133 U. S. 21 (1890). Land given to the president in consideration of the company extending its line, belongs to the corporation, even though the corporation had no power to acquire such property. Scott *v.* Farmers', etc. Bank, 97 Tex. 31 (1903).

2 Slide, etc. Mines *v.* Seymour, 153 U. S. 509, 520 (1894).

3 State *v.* Pittsburgh, etc. R. R., 50 Ohio St. 239 (1893).

4 White Water, etc. Co. *v.* Vallette, 21 How. 414, 424 (1858); Barry *v.* Merchants' Exchange Co., 1 Sandf. Ch. 280 (1844); Dupee *v.* Boston Water Power Co., 114 Mass. 37 (1873); Burton's Appeal, 57 Pa. St. 213 (1868); Miners' Ditch Co. *v.* Zellerbach, 37 Cal. 543 (1869); Reynolds *v.* Stark County, 5 Ohio, 204 (1831); Newark *v.* Elliott, 5 Ohio St. 113 (1855); De Ruyter *v.* St. Peter's Church, 3 Barb. Ch. 119 (1848); aff'd, 3 N. Y. 238; Buell *v.* Buckingham, 16 Iowa, 284 (1864), holding also that the sale may be by directors having general powers to make contracts. Aurora, etc. Soc. *v.* Paddock, 80 Ill. 263 (1875). And see Binney's Case, 2 Bland, Ch. 99, 142 (1829); Railroad Co. *v.* Howard, 7 Wall. 392 (1868), in which a sale by a corporation without authority, but with the consent of all the parties interested in the subject-matter of it, was held valid; Edward *v.* Fairbanks, 27 La. Ann. 449 (1879); Rutland, etc. R. R. *v.* Proctor, 29 Vt. 93 (1856), holding also that a purchaser from a corporation cannot defeat an action for the purchase-money by the defense that the corporation had no power to acquire the property. A corporation may authorize an agent to deed land belonging to the corporation. Bar-

gage lands in the course of legitimate business.[1] A statute authorizing a sale of corporate property in whole or in part upon a vote of the stockholders does not require such vote upon an ordinary sale of real estate.[2]

Under the English statute of wills a devise of land to certain bodies corporate is unlawful. Similar statutes have been enacted quite generally in America.[3]

cello *v.* Hapgood, 118 N. C. 712 (1896). Where a signed copy of a resolution of the board of directors selling certain corporate lands was handed to the vendee this satisfies the statute of frauds. Western, etc. Co. *v.* Kalama, etc. Co., 42 Wash. 620 (1906). A resolution of the board of directors, even though entered on the minutes, authorizing the president to sell the real estate of the corporation, does not satisfy the statute of frauds. Cumberland, etc. R. R. *v.* Shelbyville, etc. R. R., 117 Ky. 95 (1903). A mining company having express power to buy land has implied power to sell it. *Re* Kingsbury, etc. Ltd., 96 L. T. Rep. 829 (1907).

1 See §§ 779, etc., *infra.*

2 Marvin *v.* Anderson, 11 Wis. 387 (1901). A statute requiring leases by corporations to be first approved by the stockholders applies only to leases of property essential to the existence of the corporation for the carrying on of its business, and does not apply to leases of a small portion of a corporate property. Such statute does not apply to purely private corporations at all. Coal, etc. Co. *v.* Tennessee, etc. R. R., 106 Tenn. 651 (1901). The Michigan statute preventing mining companies from selling their land except by vote of the stockholders does not apply to a sale of standing timber. Baggaley *v.* Pittsburg, etc. Co., 90 Fed. Rep. 636 (1898). Even though a deed by a mining company has not been ratified by two-thirds in interest of the stockholders, as required by statute, yet only a stockholder or some one connected with the title of the corporation can raise this objection. Galbraith *v.* Shasta, etc. Co., 143 Cal. 94 (1904).

3 McCartee *v.* Orphan Asylum Soc., 9 Cow. 437 (1827); Downing *v.* Marshall, 23 N. Y. 366, 384 (1861), but holding that a charter provision enabling a corporation to take land "by direct purchase or otherwise" is an express authority within the meaning of the statute of wills. See also Kerr *v.* Dougherty, 79 N. Y. 327 (1880), overthrowing a bequest by a resident of another state to a New York corporation which was forbidden to take by bequest; State *v.* Bates, 2 Harr. (Del.) 18 (1835), where a devise of money arising from the sale of land was held to be in effect a devise of land; but the contrary view of such a devise was taken in American Bible Soc. *v.* Noble, 11 Rich. Eq. (S. C.) 156 (1859). The statutes of New York against bequests to certain corporations made within a certain time before the testator's death do not apply to a bequest by a foreigner made in a foreign land to a corporation to be organized under the laws of New York, the bequest being valid at the domicile of the testator. Dammert *v.* Osborn, 140 N. Y. 30 (1893). In Massachusetts it has been held that a town or a parish may take and hold a devise for the use of schools. First Parish *v.* Cole, 20 Mass. 232 (1825). As to the rule governing bequests to charitable corporations in New York, see Wetmore *v.* Parker, 52 N. Y. 450 (1873). If the objects of the trust are uncertain or vague a devise to a charitable corporation will be void. Pratt *v.* Trustees, etc., 88 Md. 610 (1898). A foreign charitable corpo-

An educational corporation authorized to accept property to a certain amount cannot take a devise or bequest of property after it already has property equal to the amount limited by its charter.[1]

A devise or bequest to a corporation to be hereafter created is valid.[2] A deed made before incorporation, to be delivered to the

ration cannot take New York land by devise unless the New York statute permits. White *v.* Howard, 46 N. Y. 144 (1871). *Cf.* White *v.* Howard, 38 Conn. 342 (1871). And concerning the common-law restrictions on the power of charitable corporations to sell land, see Madison Ave. Bapt. Ch. *v.* Oliver St. Bapt. Ch., 46 N. Y. 131 (1871). See also § 695, *infra*, as to foreign corporations.

1 Cornell University *v.* Fiske, 136 U. S. 152 (1890); McGraw *v.* Cornell University, 45 Hun, 354 (1887); *Re* McGraw, 111 N. Y. 66 (1888). *Contra*, Hubbard *v.* Worcester, etc., 80 N. E. Rep. 490 (Mass. 1907). Where land is willed to a corporation, the heirs cannot defeat the devise by claiming that the corporation already has all the land that the statutes allow. Only the state can raise that question. Hamsher *v.* Hamsher, 132 Ill. 273 (1890). In Jones *v.* Habersham, 107 U. S. 174 (1882), where the limit was on the income and the gift increased it beyond the limit, the court held that only the state could object. Where the limitation upon the capacity of a corporation to hold land is based upon a yearly value, the yearly value at the time it is acquired is intended, and the title is not affected by a subsequent increase in its value above the amount limited. Bogardus *v.* Trinity Church, 4 Sandf. Ch. 633 (1847); Humbert *v.* Trinity Church, 24 Wend. 587, 629 (1840). And see Harvard College *v.* Boston, 104 Mass. 470 (1870); Church of Redemption *v.* Grace Church, 68 N. Y. 570 (1877); Bogardus *v.* Trinity Church, 4 Sandf. Ch. 633 (1847). *Cf.* Rainey *v.* Laing, 58 Barb. 453 (1871). Although a corporation is limited by its charter as to the amount of property it may take, yet a devise to it of property greater in value than that amount is not void, inasmuch as only the state can complain. Farington *v.* Putnam, 90 Me. 405 (1897).

2 Russell *v.* Allen, 107 U. S. 163 (1882); Burrill *v.* Boardman, 43 N. Y. 254 (1871); Webster *v.* Wiggin, 19 R. I. 73 (1895). A bequest to a company to be incorporated within the time allowed by statute is valid. People *v.* Simonson, 126 N. Y. 299 (1891). "That a valid devise or bequest may be limited to a corporation to be created after the death of the testator, provided it is called into being within the time allowed for the vesting of future estates, is not denied." Tilden *v.* Green, 130 N. Y. 29, 47 (1891), the court holding, however, that the devise should be to the corporation to be formed and should not be in trust to the executors to convey to such corporation when formed if the executors think best. See also Burrill *v.* Boardman, 43 N. Y. 254 (1871); Inglis *v.* Trustees of Sailors' Snug Harbor, 3 Pet. 99 (1830); Dammert *v.* Osborn, 140 N. Y. 30 (1893). A devise and bequest to a corporation to be organized is legal if it is to be organized within the period of two lives in being at the time of the execution of the instrument. St. John *v.* Andrews Institute, 191 N. Y. App. Div. 254 (1908). A bequest to a corporation to be formed is legal. St. John *v.* Andrews Institute, 117 N. Y. App. Div. 698 (1907). A devise to a corporation to be created is legal. Brigham *v.* Peter, etc. Hospital, 126 Fed. Rep. 796 (1903); aff'd, 134 Fed. Rep. 513.

corporation after incorporation, is good.[1] A corporation may take the title to land in fee although the duration of the corporation itself is limited.[2] Where a deed is made by or to a *de facto* corporation, the corporate existence cannot be questioned by any of the parties.[3] A devise of real estate to an unincorporated association does not fail. The title descends to the heir at law, who holds the same as trustee for the use and benefit of the association.[4] The land owned by such an association is generally vested in trustees for its benefit.[5]

1 Spring, etc. Bank *v.* Hurlings, etc. Co., 32 W. Va. 357 (1889). Where the promoters pay for land and take a deed in the name of the proposed corporation, the vendor cannot claim that the deed was void, even though the corporation was not actually organized until three years after such deed was given. White Oak, etc. *v.* Murray, 145 Mo. 622 (1898). A deed to a corporation before its charter was taken out may be accepted after the charter is granted, and is valid, even though a slightly different name is adopted from that which appears in the deed. Sumter, etc. Co. *v.* Phœnix Ins. Co., 56 S. E. Rep. 654 (S. C. 1907). A deed to a corporation before it is organized is not void, but is valid in equity and conveys title to the individuals as partners. Smith *v.* First, etc. Bank, 95 S. W. Rep. 1111 (Tex. 1906). A lease to a corporation not yet organized is void. Utah, etc. Co. *v.* Keith, 18 Utah, 464 (1899). A deed to certain persons "as incorporators" of a company not yet incorporated does not vest title in the company when incorporated. McCandless *v.* Inland, etc. Co., 112 Ga. 291 (1900); s. c., 115 Ga. 968. See also §§ 504, 637, *supra.*

2 Nicoll *v.* New York, etc. R. R., 12 N. Y. 121 (1854); Rives *v.* Dudley, 3 Jones, Eq. (N. C.) 126 (1856); Asheville Division *v.* Aston, 92 N. C. 578 (1885); Delhi School Dist. *v.* Everett, 52 Mich. 314 (1883). A deed of property to a railroad for fifty years, or so long as its charter continued, which by charter is fifty years, passes the land to a corporation which by legislative enactment succeeds to the rights of the first corporation. Davis *v.* Memphis, etc. R. R., 87 Ala. 633 (1888). A dissolution of a corporation after it has conveyed real estate does not impair the title of the grantees. People *v.* Mauran, 5 Denio, 389 (1848). See also § 641, *supra.*

3 See § 637, *supra.* Where the owner of real estate deeds it to a supposed corporation, and many years afterwards makes another deed to another corporation, the latter cannot claim that the first corporation was illegally organized. It is for the state alone to make such claim. Los Angeles, etc. *v.* Spires, 126 Cal. 541 (1899). A person who has contracted to purchase land from a supposed corporation cannot avoid the contract by the defense that the charter of the company had expired. West Missouri, etc. Co. *v.* Kansas City, etc. Ry., 161 Mo. 595 (1901). Under the Montana statutes, even though no organization meetings of the stockholders and directors are held, yet a deed of property to the corporation may be valid. Morrison *v.* Clark, 24 Mont. 515 (1900).

4 American Bible Soc. *v.* American Tract Soc., 62 N. J. Eq. 219 (1901), the court refusing to follow the New York decisions to the contrary. See also § 504, *supra.*

5 See § 504, *supra.*

§ 695. *Land may be purchased, held, and sold by a foreign as distinguished from an alien corporation, if there is no statute of the state to the contrary.*—A foreign corporation, other than an alien corporation, having power to buy and sell land, may at common law buy and sell land in other states, as well as that in which it was incorporated.[1]

In the exercise of comity between the states, corporations created in one of them may acquire, hold, and transfer land in another, the same as individuals.[2]

1 Lancaster *v.* Amsterdam Imp. Co., 140 N. Y. 576, 584 (1894), wherein the court said: "As a corporation *de facto*, possessing some capacity to acquire and convey real property, its conveyance is unimpeachable upon any ground of an excess or of an abuse of powers conferred; and unless in the laws of this state we are able to find a prohibition, expressed herein, or to be implied therefrom, which disabled this corporation from acquiring the land and from conveying it, the plaintiff would obtain a valid title to the premises conveyed."

2 Cowell *v.* Springs Co., 100 U. S. 55 (1879); Runyan *v.* Coster, 14 Pet. 122, 130 (1840); Christian Union *v.* Yount, 101 U. S. 352 (1879); Barnes *v.* Suddard, 117 Ill. 237 (1886); New Hampshire Land Co. *v.* Tilton, 19 Fed. Rep. 73 (1884); Lathrop *v.* Commercial Bank, 8 Dana (Ky.), 114 (1839); American Bible Soc. *v.* Marshall, 15 Ohio St. 537 (1864); State *v.* Boston, etc. R. R., 25 Vt. 433 (1853); Claremont Bridge *v.* Royce, 42 Vt. 730, 736 (1870); Lumbard *v.* Aldrich, 8 N. H. 31 (1835); Cincinnati, etc. R. R. *v.* Pearce, 28 Ind. 502 (1867); Silver Lake Bank *v.* North, 4 Johns. Ch. 370 (1820), holding that a corporation of another state may file a bill for the foreclosure of a mortgage on land in New York; Columbus Buggy Co. *v.* Graves, 108 Ill. 459 (1884); Black *v.* Delaware, etc. Canal Co., 22 N. J. Eq. 130, 422 (1871), the chancellor saying "that a foreign corporation may own property in this state and transact business, and make contracts in it to be performed here, is too well settled to discuss;" Northern Transp. Co. *v.* Chicago, 7 Biss. 45, 52 (1874); s. c., 18 Fed. Cas. 362, 365; aff'd, 99 U. S. 635; Lebanon Sav. Bank *v.* Hollenbeck, 29 Minn. 322 (1882); New York Dry Dock *v.* Hicks, 5 McLean, 111 (1850); s. c., 18 Fed. Cas. 151; Whitman Gold, etc. Co. *v.* Baker, 3 Nev. 386 (1867); Metropolitan Bank *v.* Godfrey, 23 Ill. 579 (1860), holding also that foreign corporations can only acquire and hold lands upon the terms and conditions and in the way authorized by the law of their creation. They may loan money on real-estate mortgages. See § 690, *supra. Cf.* Northwestern, etc. Ins. Co. *v.* Overholt, 4 Dill. 287 (1878); s. c., 18 Fed. Cas. 403; Morris Canal, etc. Co. *v.* Townsend, 24 Barb. 658 (1857), where a statute authorizing a foreign corporation to appropriate land on payment of a just compensation to its owners was held valid (affirmed as to this point, *Re* Townsend, 39 N. Y. 171—1868); Stewart *v.* Lehigh Valley R. R., 38 N. J. L. 505 (1875); National Trust Co. *v.* Murphy, 30 N. J. Eq. 408 (1879); Sherwood *v.* American Bible Soc., 1 Keyes, 561 (1864); Elston *v.* Piggott, 94 Ind. 14 (1883), to the effect that it may hold land purchased at a judicial sale under a decree in its favor. A corporation organized in one state may own land in another state unless the statutes of the latter prohibit the same. Blodgett *v.* Lanyon Zinc Co., 120 Fed. Rep. 893 (1903). An alien corporation may purchase and hold land in

This right of foreign corporations to acquire and hold real estate is, however, subject to the statutory laws of the state wherein the land is situated, and also to its public policy and the general policy of its statutes relating to domestic corporations.[1]

Missouri. Missouri, etc. Co. *v.* Reinhard, 114 Mo. 218 (1893). The Connecticut Land Company was organized in Connecticut in 1795 and owned the entire Connecticut "Western Reserve." This land was held in the names of trustees for the benefit of the stockholders of the company until 1809, when the company partitioned the land among its stockholders and divided its assets and was dissolved. Holmes *v.* Cleveland R. R., 93 Fed. Rep. 100 (1861), where the court held that a small parcel of land which accidentally was omitted in making such division of the assets could not be claimed by the heirs of the stockholders fifty years after the division was made. Although an alien cannot own real estate, yet he may own stock in a corporation which owns real estate. Princeton Min. Co. *v.* First Nat. Bank, 7 Mont. 530 (1888). As to foreign corporations holding land, see 35 Cent. L. J. 166. As to the act of congress prohibiting foreign corporations from owning land in the territories, see Potter *v.* Rio Arriba, etc. Co., 4 N. M. 322 (1888). Where a Colorado corporation has power, among other things, to deal in real estate, its purchases of land in Texas cannot be questioned by any one except the state, even though Texas does not allow incorporation for that purpose. Galveston, etc. Co. *v.* Perkins, 26 S. W. Rep. 256 (Tex. 1894). Where a banker sells stock to a lawyer, and informs the latter that the company, the owner of land in Mexico, had a right, though an alien to Mexico, to own land therein, as the banker had been informed by his attorney, a note of the vendee in payment of the stock cannot be defeated on the ground that such corporation could not legally hold the land. Daly *v.* Brennan, 87 Wis. 36 (1894). A foreign corporation may buy and sell land if authorized so to do by its charter. Barcello *v.* Hapgood, 118 N. C. 712 (1896). A foreign corporation may own land in Mississippi. Taylor *v.* Alliance Trust Co., 71 Miss. 694 (1894).

1 Christian Union *v.* Yount, 101 U. S. 352 (1879); Carroll *v.* East St. Louis, 67 Ill. 568 (1873), where a corporation chartered by Connecticut for the sole purpose of buying and selling land was held not competent to acquire land in Illinois, because such business was contrary to the general policy of the state and tended to create perpetuities; U. S. Trust Co. *v.* Lee, 73 Ill. 142 (1874), in which the court denied the right of a foreign corporation to hold real estate in Illinois beyond what is necessary to the transaction of its business or the collection of its debts, either for its own benefit or in trust for others; U. S. Mortgage Co. *v.* Gross, 7 Cent. L. J. 226 (1878), in which the Illinois rule was explained so as not to exclude foreign corporations empowered to loan money on real-estate securities; Thompson *v.* Waters, 25 Mich. 214 (1872); Holbert *v.* St. Louis, etc. Ry., 45 Iowa, 23 (1876), holding that statutes authorizing railroads to take land for their right of way do not apply to foreign corporations; Farmers' L. & T. Co. *v.* McKinney, 6 McLean, 1 (1853); s. c., 8 Fed. Cas. 1048; Farmers' L. & T. Co. *v.* Harmony F. & M. Ins. Co., 51 Barb. 33 (1868); aff'd, 41 N. Y. 619; White *v.* Howard, 46 N. Y. 144 (1871); Hollis *v.* Drew Theol. Seminary, 95 N. Y. 166 (1884), holding that foreign corporations are subject to the New York statute which declares invalid a devise or bequest in a will executed less

Only the state or a dissenting stockholder can question the power of a foreign corporation to hold land.[1] Only the state can object

than two months before the death of the testator. In *Re* Prime's Estate, 136 N. Y. 347, 362 (1893), the court said: "A general law of the state prohibiting corporations from exercising particular powers will operate upon foreign corporations, not because the act binds such corporations *ex proprio vigore*, but for the reason that their exercise of such powers here would violate the public policy of the state, indicated by the general restraint imposed upon our own corporations." For the decisions in Pennsylvania on its statutes and policy excluding foreign corporations from holding land, see § 695, *supra*. Where land is claimed by a foreign corporation, the courts of the state in which the land is situated will construe its charter and determine whether it authorizes the corporation to hold the real estate. Boyce *v.* St. Louis, 29 Barb. 650 (1859); White *v.* Howard, 38 Conn. 342 (1871). And in construing such foreign charters the court will consider the decisions of the courts of the state granting them, though it will not be bound thereby. Thompson *v.* Waters, 25 Mich. 214 (1872); Boyce *v.* St. Louis, 29 Barb. 650 (1859). The right of a corporation to hold realty is determined not alone by its charter, but by the statutes of the state where the land is. A corporate deed in a chain of title is presumed good. Tarpey *v.* Deseret Salt Co., 5 Utah, 494 (1888). If a foreign corporation is not authorized to hold real estate, it cannot take land in another state by devise. Boyce *v.* St. Louis, 29 Barb. 650 (1859); Starkweather *v.* American Bible Soc., 72 Ill. 50 (1874).

On the other hand, if by its charter, either expressly or impliedly, a corporation may take lands by devise, an independent provision of law in its own state prohibiting corporations from taking by devise, unless expressly authorized to do so, will not prevent its taking by devise in another state. American Bible Soc. *v.* Marshall, 15 Ohio St. 537 (1864); Thompson *v.* Swoope, 24 Pa. St. 474 (1855); Chamberlain *v.* Chamberlain, 43 N. Y. 424 (1871), but here the bequest was of personal property. To same effect, Sherwood *v.* American Bible Soc., 4 Abb. App. Dec. 227 (1864). A devise of land to a foreign corporation is void unless authorized by the law of the state where it lies, even though such foreign corporation is duly authorized by its charter to take it. White *v.* Howard, 46 N. Y. 144 (1871), followed in United States *v.* Fox, 94 U. S. 315 (1876), declaring void a devise of land in New York to the government of the United States.

1 Seymour *v.* Slide, etc. Mines, 153 U. S. 523 (1894). The state alone can object to a foreign corporation holding more than five thousand acres of land in the state as prescribed by the statutes. American Mortgage Co. *v.* Tennille, 87 Ga. 28 (1891). Where a Connecticut company owning land in South Dakota sells it to a Minnesota corporation organized to speculate in land, a subsequent deed by the former company to an individual is not good. Only the state can question the power of the Minnesota corporation to take title. The constitutional provision of South Dakota relative to land does not change this rule. Gilbert *v.* Hole, 2 S. D. 164 (1891). Only the state can claim that a foreign corporation has no power to own land in the state. McKinley, etc. Co. *v.* Gordon, 113 Iowa, 481 (1901). Even though a foreign corporation is prohibited by statute from owning land in the state, and it purchases land in the name of an agent, and the agent transfers it without consideration, such foreign corporation

that a foreign corporation has held land in the state for more than five years in violation of the constitution.[1] And only the state can object to a foreign corporation holding more land than the statutes permit.[2] A deed of land to a foreign corporation in Colorado is valid, although the corporation has not filed a copy of its charter as required by the statutes. The grantor cannot complain.[3]

A state may restrict the right of foreign corporations to take and hold real property within its borders.[4]

§§ 696-700. *Foreign corporations — Their right to do business in the various states — Restrictions thereon.*—The corporation of one state may exercise any or all of their powers in another state, unless the latter state, by its statutes, decisions, or policy, forbids.[5] This right of a corporation to act and contract in any state is due

may bring suit to recover the title to the land. Only the state can object to its owning the land. Omnium, etc. Co. *v.* North American T. Co., 65 Kan. 50 (1902).

1 Summet *v.* City, etc. Co., 106 S. W. Rep. 614 (Mo. 1907).

2 Reorganized Church, etc. *v.* Church of Christ, 60 Fed. Rep. 937 (1894).

3 Fritts *v.* Palmer, 132 U. S. 282 (1889). In a suit by a New Jersey corporation to protect its title to land in Florida, it is no defense that the company was organized in New Jersey to do all its business in Florida for the purpose of avoiding the laws of Florida relative to incorporation. Indian River Mfg. Co. *v.* Wooten, 46 S. Rep. 185 (Fla. 1908). Even though a foreign corporation has not complied with the statutes, yet if it legally acquired land before the statute was passed, it may protect its title at least as against all parties other than the state. War Eagle, etc. Co. *v.* Dickie, 94 Pac. Rep. 1034 (Idaho, 1908).

4 Runyan *v.* Coster, 14 Pet. 122 (1840); Thompson *v.* Waters, 25 Mich. 214 (1872); United States *v.* Fox, 94 U. S. 315 (1876).

5 Quoted and approved in Tootle *v.* Singer, 118 Iowa, 533 (1901). A New Jersey corporation may do business in Missouri even though all of its stock excepting one share is held by citizens of Missouri, and even though the statutes of Missouri forbid foreign corporations doing business in that state where they were organized for the purpose of avoiding the laws of that state. State *v.* Cook, 181 Mo. 596 (1904). A foreign business corporation doing business in Colorado ceases to be a corporation in that state after twenty years, even though by its charter it was to exist fifty years, the duration of domestic corporations in Colorado being limited to twenty years. Iron, etc. Co. *v.* Cowie, 31 Colo. 450 (1903). Where a city refuses to designate the location of poles for a telephone company, as prescribed by statute, and requires the wires to be laid in underground conduits, *mandamus* lies to compel it to designate the location of the poles, and a general statute applicable to telephone companies to that effect applies to foreign as well as domestic telephone companies. State *v.* Mayor, etc., 76 Pac. Rep. 758 (Mont. 1904); 30 Mont. 338. A foreign corporation authorized by its charter to do certain business, may transact that business in another state, even though the statutes of such state do not authorize incorporation for that purpose, the purpose itself being legal. Haskins *v.* Kelly, 93 Pac. Rep. 605 (Kan. 1908).

to the spirit of comity between the states.[1] It is constitutional, however, for a state to refuse to allow that privilege,[2] except as to interstate commerce. As has been truly said by the supreme court of Tennessee, foreign corporations have no inherent power to do business in the state and are mere "guests," and may be ejected by any procedure which the state may care to adopt.[3]

A state may require a foreign corporation to pay a license fee

1 As to the power of a foreign corporation to do business in New York, the court, in Lancaster *v.* Amsterdam Imp. Co., 140 N. Y. 576, 591 (1894), said: "It seems to me to be very clear, upon examination of our laws and by reference to such judicial opinions, that there never was a time in the history of the state when a foreign corporation was prevented from entering its boundaries to transact any lawful business which a non-resident natural person might have transacted here." In People *v.* Fidelity, etc. Co., 153 Ill. 25 (1894), it was held that, in the absence of an express prohibitory statute, a corporation legally organized under the laws of another state to do a multiform insurance business may do such business in Illinois, although such a corporation could not be organized under the laws of Illinois.

2 Bank of Augusta *v.* Earle, 13 Pet. 519 (1839); Western Union Tel. Co. *v.* Mayer, 28 Ohio St. 521 (1876); Newburg Petroleum Co. *v.* Weare, 27 Ohio St. 343 (1875); Paul *v.* Virginia, 8 Wall. 168 (1868); affirmed in Ducat *v.* Chicago, etc., 10 Wall. 410 (1870); Matthews *v.* Theological Seminary, 2 Brewst. (Pa.) 541 (1868); Land Grant, etc. Co. *v.* Coffey County, 6 Kan. 245 (1870); Ducat *v.* Chicago, 48 Ill. 172 (1868); Williams *v.* Creswell, 51 Miss. 817 (1876); Hadley *v.* Freedmen's, etc. Co., 2 Tenn. Ch. 122 (1874); Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. 566 (1870); s. c. *sub nom.* Oliver *v.* Liverpool, etc. Ins. Co., 100 Mass. 531; Kennebec Co. *v.* Augusta Ins. etc. Co., 72 Mass. 204 (1856); Day *v.* Ogdensburgh, etc. R. R., 107 N. Y. 129 (1887), where a domestic company leased a railroad in another state; Kerchner *v.* Gettys, 18 S. C. 521 (1882); Mutual, etc. Ins. Co. *v.* Davis, 12 N. Y. 569 (1855); Slaughter *v.* Commonwealth, 13 Gratt. (Va.) 767 (1856); Doyle *v.* Continental Ins. Co., 94 U. S. 535 (1876); Fire Department *v.* Noble, 3 E. D. Smith, 440 (1854); People *v.* Philadelphia Fire Assoc., 92 N. Y. 311 (1883); Atterbury *v.* Knox, 4 B. Mon. (Ky.) 90 (1843), where foreign corporations were forbidden to do banking. See also Cooley, Const. Law, p. 183; Wharton, Conf. L., § 48*a*. In Diamond Match Co. *v.* Powers, 51 Mich. 145 (1883), the court refused to *mandamus* the defendant, a register of deeds, to allow the plaintiff, a foreign corporation, to make abstracts of all the land in the county, there being no evidence of the corporate powers of the plaintiff. A foreign corporation may make a loan in Missouri. Ferguson *v.* Soden, 111 Mo. 208 (1892). An English corporation is of course an alien corporation. Eureka, etc. Co. *v.* Richmond, etc. Co., 2 Fed. Rep. 829 (1880). A state may exclude a foreign corporation from doing business in the state unless engaged in interstate business. Huffman *v.* Western, etc. Co., 13 Tex. Civ. App. 169 (1896). A foreign corporation cannot prevent a state granting a charter to a corporation with the same name and for the same purposes. National Council, etc. *v.* State Council, 203 U. S. 151 (1906).

3 State *v.* Standard Oil Co., 110 S. W. Rep. 565 (Tenn. 1908).

before doing business within its borders.[1] Where a state has authorized a foreign corporation to do business in the state after paying a certain fee, it cannot by a subsequent statute require it to pay an additional fee which is not exacted also from domestic corporations.[2] Again, after a foreign corporation under authority granted by the state has acquired property in the state and made large investments under express authority of the statutes of the state, the state cannot prohibit such corporations from doing further business in the state, there being no charge of misuser or non-user.[3] A statute of a state

1 Walker *v.* Springfield, 94 Ill. 364 (1880); Pembina, etc. Co. *v.* Pennsylvania, 125 U. S. 181 (1888). A state may levy a privilege tax on the right to do business wholly within the state, and even though the company is engaged in interstate commerce, yet if it has a right to cease to do business wholly within the state, such privilege tax will not be regarded as a tax on interstate commerce. Allen *v.* Pullman's, etc. Co., 191 U. S. 171 (1903). An express company doing interstate business may maintain a suit in the United States court in Alabama to enjoin the collection of an illegal license fee, even though it has not complied with the statutes of that state relative to filing papers before doing business in that state. Southern Ex. Co. *v.* Mayor, etc., 116 Fed. Rep. 756 (1902). A state may require a foreign corporation to pay an excise tax on its capital stock as a privilege of doing business in the state, and this is not a restriction or regulation of interstate commerce. The statute is not applicable to a corporation engaged entirely in interstate commerce, but applies to a corporation which has a place of business in the state for other purposes, as well as interstate commerce. Attorney-General *v.* Electric, etc. Co., 188 Mass. 239 (1905). A state may require a foreign corporation to pay a license fee graduated according to its capital stock before doing business in the state. Such license tax may be annual and is not a tax on interstate commerce, even though imposed on the business, and even though only a part of the capital stock is employed in the state. American, etc. Co. *v.* People, 34 Colo. 240 (1905). The United States court has no jurisdiction of a suit brought by a telegraph company against prosecuting attorneys to enjoin them from suing for penalties on account of the telegraph company not taking out a license and paying certain fees as required by statute. Western Union Tel. Co. *v.* Andrews, 154 Fed. Rep. 95 (1907). A statute requiring foreign corporations to file a copy of a charter and pay a fee of $25, applies to a telegraph company engaged in intrastate business, even though it is also engaged in interstate business, and a penalty of $1,000 for not so doing may be collected. Western Union, etc. Co. *v.* State, 101 S. W. Rep. 748 (Ark. 1907). A stockholder in a corporation cannot maintain a bill to enjoin the payment by the corporation of the tax imposed by act of congress upon such corporation for doing business in Alaska. Corbus *v.* Alaska, etc. Co., 187 U. S. 455 (1903). See note 2, p. 2153, *infra*.

2 American, etc. Co. *v.* Colorado, 204 U. S. 103 (1907). A foreign corporation which has paid a license fee to do business in the state, as required by statute, cannot by a subsequent statute be required to pay an additional fee. British, etc. Co. *v.* Jones, 56 S. E. Rep. 983 (S. C. 1907).

3 Seaboard, etc. Ry. *v.* Railroad Commission, 155 Fed. Rep. 792 (1907). A railroad corporation may enjoin a

prohibiting a foreign corporation from doing business in the state, if such corporation is connected with a trust, is constitutional.[1]

Foreign corporations must exercise their powers and franchises in accordance with the laws of the state where they do business, and in consonance with the principles of its general policy.[2] In Missouri it is held that a foreign corporation admitted to do business in the state, either by comity or by express statutory provisions, can transact only the business which a domestic corporation of like character is authorized to transact, and hence that a foreign railroad company having power to build telegraph lines as well as a

state officer from forfeiting its right to do business in the state, where it acquired valuable property in the state after being authorized to do business therein. Chicago, etc. Co. *v.* Ludwig, 156 Fed. Rep. 152 (1907).

1 Waters-Pierce, etc. Co. *v.* Texas, 177 U. S. 28 (1900). The Tennessee statute prohibiting foreign corporations from doing business in the state where they have combined to lessen competition and influence prices is legal, and the state may file a bill to restrain foreign corporations from doing business in the state where they have violated such statute. State *v.* Schlitz, etc. Co., 104 Tenn. 715 (1900).

2 Runyan *v.* Coster, 14 Pet. 122 (1840; *Re* Comstock, 3 Sawyer, 218 (1874); s. c., 6 Fed. Cas. 244; Phœnix Ins. Co. *v.* Commonwealth, 5 Bush (Ky.), 68 (1868); Gill *v.* Kentucky, etc. Co., 7 Bush (Ky.), 635 (1870); Martin *v.* Mobile, etc. R. R., 7 Bush (Ky.), 116 (1870); Milnor *v.* New York, etc. R. R., 53 N. Y. 363 (1873); Frazier *v.* Willcox, 4 Rob. (La.) 517 (1843); Bard *v.* Poole, 12 N. Y. 495 (1855); Diamond Match Co. *v.* Powers, 51 Mich. 145 (1883); Pierce *v.* Crompton, 13 R. I. 312 (1881); Stevens *v.* Pratt, 101 Ill. 206 (1882), holding that the general policy of a state restricting foreign corporations must be expressed in some affirmative way; Blair *v.* Perpetual Ins. Co., 10 Mo. 559, 564 (1847); 2 Kent, Com. 284, 285. The general incorporating law of Massachusetts, which does not allow incorporation for manufacturing liquor, does not prevent incorporation for selling liquor, and hence a foreign corporation may sell liquor in that state. Enterprise, etc. Co. *v.* Grimes, 173 Mass. 252 (1899). A foreign corporation may set up the defense of usury, even though it could not do so by the laws of the state in which it is incorporated. Stack *v.* Detour, etc. Co., 114 N. W. Rep. 876 (Mich. 1908). A court will not grant *mandamus* at the instance of a foreign corporation to compel the secretary of state to issue a permit to it to do business in the state where its business is the selling of mortgages not properly secured. New York Mtge. Co. *v.* Secretary of State, 114 N. W. Rep. 82 (Mich. 1907). A foreign corporation may transact business within the state provided a similar domestic corporation may transact such business within the state. Floyd *v.* National, etc. Co., 49 W. Va. 327 (1901). Where the statutes of a state provide that a mortgage shall not be given by a domestic mining corporation on its mines, except by the consent of two-thirds of the capital stock, and the statutes also provide that foreign corporations shall not be allowed to do business within the state on more favorable terms than domestic corporations, a mortgage by a foreign corporation on a mine within the state, without the consent of the stockholders, is void. Williams *v.* Gold Hill, etc. Co., 96 Fed. Rep. 454 (1899);

railroad cannot build a telegraph line in Missouri.[1] As a rule, however, no such restrictions are placed on foreign corporations.[2]

The validity and enforceability of a contract by a foreign corporation are determined, not by its charter, but by the law prevailing where the contract is made.[3]

A state legislature may impose such terms, conditions, and restrictions upon foreign corporations as it may see fit,[4] unless inter-

aff'd, 186 U. S. 157 (1902). *Cf.* Saltmarsh *v.* Spaulding, 147 Mass. 224. The legislature may require foreign coal mining corporations to weigh the coal before it is screened. Woodson *v.* State, 69 Ark. 521 (1900).

1 State *v.* Cook, 171 Mo. 348 (1903). A statute in Washington provides that a foreign corporation cannot transact business in the state which a domestic corporation cannot transact. State *v.* Nichols, 94 Pac. Rep. 196 (Wash. 1908).

2 See notes, *supra;* also §§ 237-240, *supra.*

3 Quoted and approved in Skinner *v.* Southern, etc. Assoc., 46 Fla. 547 (1903). A charter provision prohibiting the corporation from selling its bonds below par does not invalidate the bonds when sold to a *bona fide* purchaser in another state. Elsworth *v.* St. Louis, etc. R. R., 33 Hun, 7; aff'd, 98 N. Y. 553 (1885). See also Philadelphia Loan Co. *v.* Towner, 13 Conn. 249 (1839); Nichols *v.* Mase, 94 N. Y. 160 (1883), holding that the holder of bonds issued by a foreign corporation, valid upon their face, is not bound to show that the provisions of the statute which authorized their issue have been complied with; Bard *v.* Poole, 12 N. Y. 495 (1855), holding that a corporation prohibited by its charter from contracting for interest over a certain rate may, however, contract for a greater rate in another state under whose laws it is legal. To same effect, Knox *v.* Bank of U. S., 26 Miss 655 (1854), and Bank of U. S. *v.* Owens, 2 Pet. 527 (1829); American Life Ins. Co. *v.* Dobbin, Hill & D. (Lalor's Supp.) 252 (1843), where, construing the New York restraining act, it was held that a foreign corporation could purchase and sell promissory notes, but not bills of exchange; Bank of Chillicothe *v.* Dodge, 8 Barb. 233 (1850), holding that money paid by a foreign corporation in violation of local law is recoverable by it. For cases under a statute of Missouri, see Bank of Louisville *v.* Young, 37 Mo. 398 (1866); Connecticut Mut. L. Ins. Co. *v.* Albert, 39 Mo. 181 (1866); Long *v.* Long, 79 Mo. 644 (1883). But corporate creditors and stockholders are subject to provisions and regulations contained in the charter. Canada Southern Ry. *v.* Gebhard, 109 U. S. 527, 536 (1883), where a statutory recapitalization was held to be valid; Hitchcock *v.* U. S. Bank, 7 Ala. (N. S.) 386, 435 (1845), holding that the corporation can exercise only the powers given to it by its charter. A foreign corporation may take any interest allowed by the place of contract, though such interest is usurious by its charter. Hitchcock *v.* U. S. Bank, 7 Ala. (N. S.) 386 (1845).

4 Paul *v.* Virginia, 8 Wall. 168 (1868); Ducat *v.* Chicago, 10 Wall. 410 (1870); Doyle *v.* Continental Ins. Co, 94 U. S. 535 (1876); Lafayette Ins. Co. *v.* French, 18 How. 404 (1855), holding that a corporation doing business in such state is presumed to assent to its rules; State *v.* Lathrop, 10 La. Ann. 398 (1855); State *v.* Fosdick, 21 La. Ann. 434 (1869); Indiana *v.* American Exp. Co., 7 Biss. 227 (1876); s. c., 13 Fed. Cas. 24; Fire Department *v.* Noble, 3 E. D. Smith, 440 (1854); Smith *v.* Alford,

state commerce is interfered with. *Quo warranto* lies against foreign corporations doing business in a state contrary to its statutes.[1]

Restrictions by a state on foreign corporations must not conflict with provisions of the federal constitution. Thus, the restriction must not interfere with interstate commerce,[2] or with the jurisdic-

63 Barb. 415 (1866); Merrick *v.* Van Santvoord, 34 N. Y. 208 (1866); Lamb *v.* Lamb, 13 Bankr. Reg. 17 (1875); s. c., 14 Fed. Cas. 1016; Farmers', etc. Ins. Co. *v.* Harrah, 47 Ind. 236 (1874); Cincinnati Mut. etc. Co. *v.* Rosenthal, 55 Ill. 85 (1870), holding that a charter power to transact business in other states does not exempt them from local restrictions; People *v.* Howard, 50 Mich. 239 (1883); People *v.* Philadelphia Fire Assoc., 92 N. Y. 311 (1883); Goldsmith *v.* Home Ins. Co., 62 Ga. 379 (1879), where a statute imposing upon foreign corporations the same license taxes as their own states impose was held constitutional; Home Ins. Co. *v.* Davis, 29 Mich. 238 (1874); Slaughter *v.* Commonwealth, 13 Gratt. (Va.) 767 (1856); American Union Tel. Co. *v.* Western Union Tel. Co., 67 Ala. 26 (1880); Matthews *v.* Theological Seminary, 2 Brewst. (Pa.) 541 (1868); Commonwealth *v.* Milton, 12 B. Mon. (Ky.) 212 (1851); Tioga R. R. *v.* Blossburg, etc. R. R., 20 Wall. 137 (1873), prohibiting foreign corporations from setting up the statute of limitations. Foreign corporations doing business in a state which prescribes statutory provisions for that business cannot in contracts do away with the application to it of these provisions. Fletcher *v.* New York Life Ins. Co., 13 Fed. Rep. 526 (1882). The same rule applies to an insurance corporation chartered by congress. It must conform to state restrictions. Daly *v.* National Life Ins. Co., 64 Ind. 1 (1878). A railroad company, by going into another state and having and operating a road there, subjects itself to the legislation of that state. Stone *v.* Illinois Central R. R., 116 U. S. 347 (1885). Foreign corporations may be compelled to pay a license fee before doing business. Pembina, etc. Co. *v.* Pennsylvania, 125 U. S. 181 (1888).

1 State *v.* Fidelity, etc. Co., 39 Minn. 538 (1888). A state by a proceeding in the nature of *quo warranto* may oust a foreign corporation from doing business in the state, no license for that purpose having been issued by the state. State *v.* Kansas, etc. Co., 71 Kan. 785 (1905). *Mandamus* does not lie at the instance of the state to compel a foreign corporation to qualify to do business in the state. Secretary of State *v.* National, etc. Co., 126 Mich. 644 (1901). Under the Nebraska statute, in a suit instituted by the state to enjoin a foreign corporation from doing business in the state on the ground that it is violating an anti-trust statute, the court may order the defendant to allow the plaintiff to examine the defendant's books and records for the purpose of obtaining evidence in the case. State *v.* Standard Oil Co., 61 Neb. 28 (1900). Where a foreign corporation has not complied with reasonable regulations by the state as a condition of its doing business in the state, *quo warranto* lies to oust it of its claim of right to do business in the state. State *v.* American, etc. Co., 65 Kan. 847 (1902).

2 Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 1 (1877); Telegraph Co. *v.* Texas, 105 U. S. 460 (1881); Rae *v.* Grand Trunk Ry., 14 Fed. Rep. 401 (1882). A state statute cannot prevent a foreign corporation sending its agent into the state to sell goods and then shipping the goods into the state to fill the orders. Loverin, etc. Co. *v.* Travis, 115 N. W. Rep. 829 (Wis. 1908). A sale of goods by a corporation in

tion of the federal courts,[1] or with the removal of causes from state to United States courts.[2] Even though a state statute requires a

one state to be shipped and delivered to parties in another state is an act of interstate commerce and notes given in payment therefor can be collected, although payable in the latter state, and although the corporation has not complied with the laws of the latter state in regard to doing business there. Julius, etc. Co. *v.* Perilloux & Co., 127 Fed. Rep. 1011 (1902). A New Jersey corporation may sell and ship goods to a citizen in South Carolina and collect therefor, even though it did not comply with the statutes of South Carolina in regard to doing business in that state until after the transaction. A single transaction is not doing business in the state, and subsequent compliance with the statute was sufficient, and the interstate commerce clause of the federal constitution does not allow such a statute to prevent collection. Kirven *v.* Virginia, etc. Co., 145 Fed. Rep. 288 (1906). A New York corporation in the brokerage business may buy stock for a citizen of Wisconsin and forward it to be paid for in the usual way. This is an act of interstate commerce and not within the meaning of the statute of Wisconsin relative to foreign corporations doing business in the state. Catlin *v.* Schuppert, 130 Wis. 642 (1907). A state can neither prohibit nor impose conditions on the power of a foreign corporation to transact interstate business within the state, even though it may prohibit such corporation from transacting intrastate business within the state. Hence a New Jersey manufacturing company may sell goods in Colorado through a selling Colorado corporation, and may sue the Colorado corporation in the United States court on the contract, even though the former has not complied with the Colorado statutes as to filing its charter and paying an annual license tax, and even though it may not be able to

1 Baltimore, etc. R. R. *v.* Cary, 28 Ohio St. 208 (1876); Moore *v.* Chicago, etc. Ry., 21 Fed. Rep. 817 (1884).

2 Southern Pac. Co. *v.* Denton, 146 U. S. 202 (1892); Barron *v.* Burnside, 121 U. S. 186 (1887); Doyle *v.* Continental Life Ins. Co., 94 U. S. 535 (1876); Insurance Co. *v.* Morse, 20 Wall. 445 (1874); Shelby *v.* Hoffman, 7 Ohio St. 450 (1857); Hartford F. Ins. Co. *v.* Doyle, 6 Biss. 461 (1875); s. c., 11 Fed. Cas. 702. A statute requiring foreign corporations to agree not to remove suits to the federal courts is void. Rece *v.* Newport News, etc. Co., 32 W. Va. 164 (1889); Commonwealth *v.* East Tennessee Coal Co., 97 Ky. 238 (1895). Under the statute of North Carolina requiring foreign telephone companies to file copies of their charter and by-laws and thereby become domestic corporations before doing business in the state, a foreign telephone company that has complied with this cannot remove a case to the federal court on the ground of diverse citizenship. Debnam *v.* Southern, etc. Co., 126 N. C. 831 (1900). A contrary conclusion was reached in South Carolina as to a foreign railroad corporation. Wilson *v.* Southern Ry., 36 S. E. Rep. 701 (S. C. 1900). A statute requiring foreign corporations to file a stipulation and obtain a permit, which is forfeited in case the corporation removes any case to the federal courts, is void. And even if valid the corporation cannot be forbidden to litigate past rights or recover property already acquired. Texas, etc. Co. *v.* Worsham, 76 Tex. 556 (1890). See also Allen *v.* Texas, etc. Ry., 25 Fed. Rep. 518 (1885), where a consolidation of a United States corporation with domestic corporations had been made and state statutes prohibited the removal. See also § 759, *infra.*

foreign corporation doing business in the state to file certain papers and declares that it thereby becomes a domestic corporation, yet so far as the jurisdiction of the United States courts is concerned it is still a foreign corporation.[1] Although a state has no power to require a foreign corporation to agree not to remove cases into the federal courts, yet a state may exclude a foreign corporation from doing intrastate business in the state if it does remove cases to the federal courts,[2] but as to interstate commerce the rule is different.[3]

maintain a suit in the state court. The jurisdiction of the federal court cannot be impaired by such legislation. Butler, etc. Co. *v.* United States Rubber Co., 156 Fed. Rep. 1 (1907). A foreign corporation engaged in interstate commerce may sue in a state court without showing that it has complied with the laws of the state entitling it to do business there. Zion, etc. Assoc. *v.* Mayo, 22 Mont. 100 (1899). A foreign corporation may sue a railroad company in Texas for breach of a contract in regard to transportation of cattle from Texas to another state, even though such foreign corporation has not filed its charter with the secretary of state, and hence could not maintain any other suit. A state cannot prohibit a foreign corporation from instituting suit on a contract involving interstate commerce. Texas, etc. Ry. *v.* Davis, 93 Tex. 378 (1900); Pasteur, etc. Co. *v.* Burkey, 22 Tex. Civ. App. 232 (1899), allowing an Indiana corporation shipping goods to Texas to sue in Texas for the price thereof, although it has not filed its articles of incorporation in Texas as required by statute. The business is interstate business. As to license fees, see p. 2150, *supra.* A foreign corporation not having an office in the state may sell machinery to persons in Tennessee without filing its papers, etc. Milan, etc. Co. *v.* Gorten, 93 Tenn. 590 (1894). The Arkansas provision requiring foreign corporations to file certificates, etc., and rendering void contracts made by a foreign corporation not complying therewith, does not apply to a sale of a sewing-machine made in Ohio and shipped to Arkansas, this being interstate commerce. Gunn *v.* White S. M. Co., 57 Ark. 24 (1892). As against a milling company that solicits business and sells goods through commercial agents, the statute of Texas prohibiting a foreign corporation from transacting business in the state without filing its articles of incorporation with the secretary of state is void as being an interference with interstate commerce. Bateman *v.* Western, etc. Co., 1 Tex. Civ. App. 90 (1892). See also cases in note, p. 2157, restricting the application of these statutes where sales are made through agents, etc.; also note 1, p. 2153, *supra.*

1 Southern Ry. *v.* Allison, 190 U. S. 326 (1903).

2 Security, etc. Co. *v.* Prewitt, 202 U. S. 246 (1906). Where an insurance company is sued at law in the state court on a policy, it cannot maintain a suit in equity in the United States court to cancel a policy on the ground of fraud, even though it alleges that it does not remove a suit in the state court to the United States court because thereby its license will probably be revoked by the state on account of such removal. Cable *v.* United States, etc. Co., 191 U. S. 288 (1903). See also § 759, *infra.*

3 A foreign corporation doing business in Missouri may enjoin its secretary of state from canceling its state license to do business in that state, because it has removed a case to the United States court, even though the statutes of Missouri prescribe that the

Corporations are not "citizens" entitled to the privileges and immunities of citizens in the several states within the meaning of article 4, section 2, of the constitution of the United States.[1] But a corporation, foreign or domestic, is a "person" whose property cannot be taken without due process of law and is entitled to the equal protection of the laws within the meaning of the United States Constitution.[2] A statute requiring corporations, foreign and domestic, to pay their employees once a month and giving the latter a lien prior to all liens, excepting recorded mortgages, is unconstitutional as being a grant of special privileges, and as denying the corporation the equal protection of the laws, and as depriving them of their property without due process of law in that such statute interferes with the freedom to make contracts.[3] Where a foreign railroad company has extended its lines into a state under a statute, the legislature of the latter state cannot afterwards require it to become a domestic corporation. Such a statute impairs the obligation of the contract.[4] Where the

license shall be revoked if a case is removed to the United States court. Chicago, etc. Ry. *v.* Swanger, 157 Fed. Rep. 783 (1908). The Alabama state statute that a foreign corporation shall forfeit its right to do business in the state if it brings suit in the United States court is unconstitutional as denying the equal protection of the laws. Seaboard, etc. Ry. *v.* Railroad Commission, 155 Fed. Rep. 792 (1907).

1 A corporation is not a citizen whose privileges and immunities as a citizen cannot be impaired by a law of the state, and whose liberty cannot be taken away except by due process of law. Wester, etc. Assoc. *v.* Greenberg, 204 U. S. 359 (1907). The liberty referred to in the fourteenth amendment of the Constitution of the United States is the liberty of natural persons and not corporations. Northwestern, etc. Co. *v.* Riggs, 203 U. S. 243 (1906). A corporation is not a citizen, within the meaning of article IV, §2, of the United States Constitution. Attorney-General *v.* Electric, etc. Co., 188 Mass. 239 (1905); *In re* Speed's Estate, 216 Ill. 23 (1905). A corporation is not a citizen within the meaning of the fourteenth amendment to the Constitution of the United States prohibiting any law which abridges the privileges or immunities of citizens, and hence a statute in regard to insurance corporations is not affected by that amendment. Ætna Ins. Co. *v.* Brigham, 120 Ga. 925 (1904). Paul *v.* Virginia, 8 Wall. 168 (1868), holding that a statute requiring foreign insurance companies to obtain a license before doing business is not in conflict with that clause; Western Union Tel. Co. *v.* Mayer, 28 Ohio St. 521 (1876); Tatem *v.* Wright, 23 N. J. L. 429, 444 (1852); Warren Mfg. Co. *v.* Ætna Ins. Co., 2 Paine, 501 (*c.* 1837); s. c., 29 Fed. Cas., 294; Fire Department *v.* Noble, 3 E. D. Smith, 440 (1854); Ducat *v.* Chicago, 48 Ill. 172 (1868); aff'd, 10 Wall. 410; Cincinnati, etc. Co. *v.* Rosenthal, 55 Ill. 85 (1870); Pierce *v.* Crompton, 13 R. I. 312 (1881). *Cf.* McKinley *v.* Wheeler, 130 U. S. 630 (1889); Thomas *v.* Chisholm, 13 Colo. 105 (1889).

2 American, etc. Co. *v.* Superior Court, 96 Pac. Rep. 15 (Cal. 1908); also 111 S. W. Rep. 456.

3 Johnson *v.* Goodyear, etc. Co., 127 Cal. 4 (1899). To same effect, State *v.* Haun, 61 Kan. 146 (1899).

4 Commonwealth *v.* Mobile, etc. R. R., 64 S. W. Rep. 451 (Ky. 1901).

statutes provide that no foreign corporation shall transact business which a domestic corporation cannot transact, and domestic corporations are not allowed to act as executors, a foreign corporation cannot act as such in the state.[1]

A statute making void all contracts made in the state by foreign corporations unless a certain fee is paid to the state is unconstitutional as to sales made by traveling salesmen of foreign corporations.[2] A foreign corporation is not "doing business in New York state," even though it sells a cargo of coal in New York city through an

Under the Kentucky statutes prohibiting foreign corporations from owning or operating railroads in the state until they have become domestic corporations and prescribing the method of becoming such, they do become domestic corporations if they comply therewith. Davis, Adm'r, *v.* Chesapeake, etc. Ry., 116 Ky. 144 (1903). See first opinion in 70 S. W. Rep. 857 (Ky. 1902).

1 Farmers', etc. Co. *v.* Smith, 74 Conn. 625 (1902).

2 Aultman, etc. Co. *v.* Holder, 68 Fed. Rep. 467 (1895); aff'd, 169 U. S. 81. A state cannot require a foreign corporation manufacturing farm machinery and selling the same in the state by means of agents, local or transient, who take orders subject to approval, to file its articles of incorporation and designate an agent upon whom process may be served. Belle City, etc. Co. *v.* Frizzell, 11 Idaho, 1 (1905). A foreign corporation may send its agents into a state to take orders for the sale of goods without complying with the statutes relative to foreign corporations doing business in the state. Barnhard Bros. etc. *v.* Morrison, 87 S. W. Rep. 376 (Tex. 1905). Where an Illinois corporation by a traveling salesman sells goods in Minnesota, the sales being subject to the approval of the home office in Illinois, it is not doing business in Minnesota, in violation of the statutes, but is interstate commerce, even though the corporation keeps goods on storage in Minnesota for delivery. Rock Island, etc. Co. *v.* Peterson, 93 Minn. 356 (1904). Where a foreign corporation has an agent in the state, who takes orders, this is doing business in the state, especially where the goods were sent to the agent to deliver. Sherman, etc. Co. *v.* Aughenbaugh, 93 Minn. 201 (1904). A foreign corporation which employs traveling men in the state to take contracts, the title to remain in the corporation until the goods are paid for after they are delivered, and collection is made in the state, is doing business in the state. Elliott *v.* Parlin, etc. Co., 71 Kan. 665 (1905). A foreign corporation is not doing business in the state, within the meaning of the Ohio law, where the corporation merely sells through traveling agents and delivers goods manufactured outside of the state. Toledo, etc. Co. *v.* Glen, etc. Co., 55 Ohio St., 217 (1896). It has been held that a license fee required of foreign corporations before doing business in the state is unconstitutional as an interference with interstate commerce. Coit *v.* Sutton, 102 Mich. 324 (1894). But see Moline Plow Co. *v.* Wilkinson, 105 Mich. 57 (1895). *Cf.* note 1, p. 2150, *supra*. A statute by which Pennsylvania requires a New York railroad corporation doing business in Pennsylvania to pay to the latter a part of coupons due to residents of Pennsylvania, such coupons being by their terms payable in New York, is void. New York, Lake Erie, etc. R. R. *v.* Pennsylvania, 153 U. S. 628 (1894). See also in general, note 2, p. 2153, *supra*, and notes 1 and 2, p. 2158, *infra*.

agent, who sells through a large territory, including New York city.[1] A state cannot prohibit agents of foreign corporations entering the state and selling goods.[2]

Where a state statute provides that contracts made by foreign corporations shall not be enforced in the courts of the state before compliance with certain requirements of the statute, the prohibition will not be extended to suits brought in the federal courts, the contracts not being void.[3] Even though a foreign corporation

1 The court said: "To be 'doing business in this state' implies corporate continuity of conduct in that respect, such as might be evidenced by the investment of capital here, with the maintenance of an office for the transaction of its business, and those incidental circumstances which attest the corporate intent to avail itself of the privilege to carry on a business. In short it should appear . . . that the corporation and its officers intended 'to establish a continuous business in the city of New York and not one of a temporary character.'" Penn., etc. Co. *v.* McKeever, 183 N. Y. 98 (1905).

2 Davis, etc. Co. *v.* Dix, 64 Fed. Rep. 406 (1894). Soliciting business is not doing business in the state. Berger *v.* Pennsylvania R. R., 65 Atl. Rep. 261 (R. I. 1906). A soliciting agent who has no power to bind the company is not doing business in the state. Abraham Bros. *v.* Southern Ry., 42 S. Rep. 837 (Ala. 1906).

3 Sullivan *v.* Beck, 79 Fed. Rep. 200 (1897). The United States court will entertain a suit by a foreign corporation which has not complied with the statutes of the state, where such statutes do not make the contract void. Groton, etc. Co. *v.* American Bridge Co., 151 Fed. Rep. 871 (1907). A foreign corporation may bring suit in the United States court in New York on a contract made outside of the state, even though it has not filed papers so as to do business in New York. Robinson *v.* American, etc. Co., 147 Fed. Rep. 885 (1906). A statute prohibiting a foreign corporation from bringing suit if it does not file its certificate of incorporation and appoint an agent to accept service and pay a fee to the state, does not prevent such corporation bringing suit in the federal court. Blodgett *v.* Lanyon Zinc Co., 120 Fed. Rep. 893 (1903). A foreign corporation may bring suit in the federal court for goods sold outside but delivered in the state, but a state statute applies to goods sent into the state for sale in the general market in that state. United States, etc. Co. *v.* Butler, etc. Co., 132 Fed. Rep. 398 (1904); aff'd, Butler, etc. Co. *v.* United States, etc. Co., 156 Fed. Rep. 1 (1907). A state can neither prohibit nor impose conditions on the power of a foreign corporation to transact interstate business within the state, even though it may prohibit such corporation from transacting intrastate business within the state. Hence a New Jersey manufacturing company may sell goods in Colorado, through a selling Colorado corporation, and may sue the Colorado corporation in the United States court on the contract, even though the former has not complied with the Colorado statutes as to filing its charter and paying an annual license tax, and even though it may not be able to maintain a suit in the state court. The jurisdiction of the federal court cannot be impaired by such legislation. Butler, etc. Co. *v.* United States Rubber Co., 156 Fed. Rep. 1 (1907). Dunlop *v.* Mercer, 156 Fed. Rep. 545 (1907), the latter case being a case where two Arizona corporations had been doing business in Minnesota

is engaged in a state in manufacturing products and sending them beyond the limits of the state, yet it is subject to a state statute forbidding foreign corporations to transact business in the state until they have filed a copy of their charter with the secretary of state is legal, and the penalty that the contracts of such a corporation in the state are void as regards the corporation, but are enforceable against the corporation, applies, and such statute may apply to a contract made after the statute was enacted but before it went into effect.[1] A North Carolina corporation may bring suit in the state of New Jersey against a New York corporation and recover judgment on a note, even though the North Carolina corporation has not complied with the statutes of New York relative to doing business in that state.[2] The statute of New York prohibiting suits in that state by a foreign corporation against another foreign corporation on a cause of action arising out of the state is constitutional.[3] A decision of the state court that a foreign insurance company cannot collect assessments on a policy issued in the state, because the company has not qualified under the state law to do business in such state, does not present any federal question.[4] A state may constitute the state auditor as attorney-in-fact to accept process on all foreign corporations doing business in the state, and may require them to pay him ten dollars annually.[5] A foreign corporation may be unable to revoke a designation

without complying with the statute, and both became bankrupt, and the trustee of one petitioned that the trustee of the other return certain property. The court held that a state statute prohibiting a suit in such a case did not apply to the federal courts. A state statute which does not invalidate a contract made by a foreign corporation which has not complied with the statutes but prohibits its bringing suit thereon, does not prevent suit in the United States court. Vitagraph Co. *v.* Twentieth, etc. Co., 157 Fed. Rep. 699 (1907). A statute that no suit shall be brought by a foreign corporation which shall not have filed a statement concerning its business does not prevent the federal courts from exercising jurisdiction. Barling *v.* Bank of British N. A., 50 Fed. Rep. 260 (1892).

1 Diamond, etc. Co. *v.* United States, etc. Co., 187 U. S. 611 (1903), the court holding also that the corporation is doing business in the state when it takes the management of a factory and helps to operate it and supplies it with a superintendent. The supreme court of the United States will not review a decision of the highest court of a state to the effect that a foreign corporation that has not complied with the statute of the state relative to filing a copy of its charter, etc., cannot have the benefit of the laws of the state. Telluride, etc. Co. *v.* Rio Grande, etc. Co., 187 U. S. 569 (1903).

2 Allen *v.* Allegheny Co., 196 U. S. 458 (1905).

3 Anglo-American, etc. Co. *v.* Davis, etc. Co., 191 U. S. 373 (1903).

4 Swing *v.* Weston, etc. Co., 205 U. S. 275 (1907); aff'g, 140 Mich. 344.

5 St. Mary's, etc. *v.* West Virginia, 203 U. S. 183 (1906). A statute authorizing service on the secretary of state as regards business done by a foreign corporation in the state,

of an agent upon whom service may be made, so far as claims already accrued in the state are concerned.[1] But after an insurance company has withdrawn from the state and cancelled its appointment of an agent to accept service, a non-resident cannot, by assigning a claim on a policy to a resident, obtain judgment by service on the former agent.[2] A state may declare void the contracts of a foreign corporation which does business in the state without designating a local agent and paying a license.[3]

A requirement that a foreign corporation shall duly execute a power of attorney appointing an agent upon whom service of process may be made, or obtain a certificate from a state officer, is valid. The corporation is usually forbidden to contract or sue in the state before complying with it. It was formerly held that contracts made before complying with the requirement were void;[4]

unless such foreign corporation has appointed an agent to accept service, is constitutional. Olender *v.* Crystalline, etc. Co., 149 Cal. 482 (1906).

1 Groel *v.* United Electric Co., 69 N. J. Eq. 397 (1905).

2 Hunter *v.* Mutual, etc. Co., 184 N. Y. 136 (1906).

3 Chattanooga, etc. Ass'n *v.* Denson, 189 U. S. 408 (1902). A foreign corporation cannot make a legal contract to construct a railroad in Pennsylvania where it has not complied with the Pennsylvania statute relative to doing business in that state, and hence cannot recover on such a contract, even though it complied with the statute before doing the work, and even though the railroad received the benefit of the contract, although the judgment may not be a bar to a suit for services performed. Pittsburg, etc. Co. *v.* West Side, etc. Co., 151 Fed. Rep. 125 (1907); aff'd, 154 Fed. Rep. 930.

4 *Re* Comstock, 3 Sawyer, 218 (1874); s. c., 6 Fed. Cas. 244; Bank of British Columbia *v.* Page, 6 Oreg. 431 (1877); Semple *v.* Bank of British Columbia, 5 Sawyer, 88 (1878); s. c., 21 Fed. Cas. 1063; Oregon, etc. Inv. Co. *v.* Rathbun, 5 Sawyer, 32 (1877); s. c., 18 Fed. Cas. 764; but here a note made in Oregon, but payable in Scotland, was treated as if made in Scotland; American Button, etc. Co. *v.* Moore, 2 Dak. 280 (1880), holding under a similar statute that the foreign corporation could sue in the courts of the state, but could not transact business. To same effect, Utley *v.* Clark-Gardner, etc. Co., 4 Colo. 369 (1878); Columbus Ins. Co. *v.* Walsh, 18 Mo. 229 (1853); Union, etc. Co. *v.* Thomas, 46 Ind. 44 (1874); Farmers', etc. Ins. Co. *v.* Harrah, 47 Ind. 236 (1874); Smith *v.* Little, 67 Ind. 549 (1879), holding that the statute referred only to actions upon contract and not to suits in replevin; Beard *v.* Union, etc. Pub. Co., 71 Ala. 60 (1881), holding that soliciting subscriptions for a foreign newspaper is not "doing business" within the meaning of such a statute; New England F. & M. Ins. Co. *v.* Robinson, 25 Ind. 536 (1865), holding, however, that a contract is not void as to a citizen; Morgan *v.* White, 101 Ind. 413 (1884), holding that requiring an agent to file his authority to act does not apply to a general agent appointing local agents; American Ins. Co. *v.* Butler, 70 Ind. 1 (1880), holding that a failure of the state officer to furnish the proper certificate after the corporation has substantially complied with the statute does not affect its contracts; Ætna Ins. Co. *v.* Harvey, 11 Wis. 394 (1860).

but the later doctrine is that they are not void, though not enforceable until compliance,[1] and that the corporation cannot defeat its obligations by such a defense.[2] Some states have gone much farther than this, and by statute have declared void and unenforceable the contracts of foreign corporations which have not complied with the state laws in reference to filing certificates, appointing a local agent, and keeping an office in the state. The courts endeavor to alleviate the harshness of such statutes as much as possible, but do not always succeed. Various decisions on different statutes are given in the notes below.[3] The supreme court of the United States has

1 Walter A. Wood, etc. Co. *v.* Caldwell, 54 Ind. 270 (1876); Singer Mfg. Co. *v.* Brown, 64 Ind. 548 (1878); Elston *v.* Piggott, 94 Ind. 14 (1883), holding that advantage of the failure to comply can only be taken by answer in abatement, and that a foreclosure and title under sale cannot be questioned on that ground; American Ins. Co. *v.* Butler, 70 Ind. 1 (1880); Behler *v.* German Mut. F. Ins. Co., 68 Ind. 347 (1879); National Mut. F. Ins. Co. *v.* Pursell, 92 Mass. 231 (1865); Hagerman *v.* Empire Slate Co., 97 Pa. St. 534 (1881), holding that a foreign corporation cannot take advantage of its own neglect to file the power of attorney; and that service upon an acting agent will suffice in such case; American Ins. Co. *v.* Wellman, 69 Ind. 413 (1879); American, etc. Co. *v.* East, etc. R. R., 37 Fed. Rep. 242 (1889).

2 Swan *v.* Watertown F. Ins. Co., 96 Pa. St. 37 (1880), holding that a foreign corporation doing business in the state cannot set up its failure to comply with the provisions of the statute relating to such companies to defeat an action on contract. A corporation cannot repudiate its obligations on the ground that it was not authorized to do business in the state. Williams *v.* Bank of Commerce, 71 Miss. 858 (1894). A foreign corporation doing business in Pennsylvania without authority cannot defeat its contract on that ground. *In re* Naylor Mfg. Co., 135 Fed. Rep. 206 (1905).

3 *Federal Courts:* A failure to file the certificate is a question that cannot be raised for the first time in the higher court. Dahl *v.* Montana Copper Co., 132 U. S. 264 (1889); Northwestern, etc. Ins. Co. *v.* Overholt, 4 Dill. 287 (1878); s. c., 18 Fed. Cas. 403, where, the requirement not being made a condition precedent to doing business, a foreign corporation which had not complied with it was held to have power to take a mortgage upon real estate. The Tennessee statute prohibiting foreign corporations doing business in the state without first complying with certain requisites does not render invalid a note held by a *bona fide* purchaser from a foreign corporation. Lauter *v.* Jarvis, etc. Co., 85 Fed. Rep. 894 (1897). A statute compelling a foreign corporation to file its charter before doing business in the state may have the effect of making it a domestic corporation. James *v.* St. Louis, etc. Ry., 46 Fed. Rep. 47 (1891).

Arkansas: Under the Arkansas statute a foreign corporation may comply with the statute and then sue on business transacted prior to such compliance. Woolfort *v.* Dixie, etc. Co., 77 Ark. 203 (1905). A foreign corporation may sue on contracts made out of the state, although it has not complied with the law as to contracts made in the state. White River Lumber Co *v.* Southwestern Imp. Assoc., 55 Ark. 625 (1892).

California: A foreign corporation may defend against a suit in California, even though it has not filed its charter, etc., as required by

held that, where a contract made by a foreign corporation is not to

statute. American, etc. Co. *v.* Superior Court, 96 Pac. Rep. 15 (Cal. 1908). In California a foreign corporation cannot commence suit until it has filed a copy of its certificate of incorporation. Ward, etc. Co. *v.* Mapes, 147 Cal. 747 (1905). The California statute requiring a corporation purchasing property to file a copy of its charter in the office of the clerk of the county does not apply to a mortgage. Anglo-Californian Bank *v.* Field, 146 Cal. 644 (1905). The California act requiring foreign corporations to designate an agent does not affect the validity of business transacted before such agent was designated. Black *v.* Vermont, etc. Co., 1 Cal. App. 718 (1905). Under the California statute forbidding foreign corporations to maintain suits until a certain statement has been published, the publication may be prior to the time specified in the statute. Bank of British N. A. *v.* Madison, 99 Cal. 125 (1893), passing upon the requisites of the statute, and what constitutes compliance therewith. The defense that a corporation has not filed its articles in the county where property is to be foreclosed must be set up by plea in abatement. Ontario State Bank *v.* Tibbits, 80 Cal. 68 (1890).

Colorado: Even though a note is payable to the order of a foreign corporation which has not complied with the laws of the state, yet a *bona fide* purchaser of such note before maturity may enforce it. McMann *v.* Walker, 31 Colo. 261 (1903). A foreign corporation purchasing a piece of machinery in the state may be held liable therefor, although it has not filed the certificate. Colorado Iron Works *v.* Sierra Grande Min. Co., 15 Colo. 499 (1890). A sale by a foreign corporation f. o. b. its factory in the state where it is incorporated is not doing business in the state. International, etc. Co. *v.* A. Leschen, etc. Co., 92 Pac. Rep. 727 (Colo. 1907). See 96 Pac. Rep. 177.

Idaho: A purchaser with notice from a foreign corporation of a note taken by the latter while doing business in the state without complying with a statute requiring it to file its charter, etc., before doing business, cannot collect such note. Katz *v.* Herrick, 12 Idaho, 1 (1906).

Indiana: Where the statute requires foreign corporations to file a statement of their condition before doing business, a foreign corporation cannot enforce a contract until it does so. Walter A. Wood, etc. Co. *v.* Caldwell, 54 Ind. 271 (1876). But it may recover from an agent money paid to him for it. U. S. Express Co. *v.* Lucas, 36 Ind. 361 (1871).

Kansas: The Kansas statute that foreign corporations doing business in the state without complying with the statute shall not bring suit, does not prevent suit if they cease doing business, even though the suit grew out of business done in the state. Boggs *v.* Kelly Mfg. Co., 90 Pac. Rep. 765 (Kan. 1907). Even though a foreign corporation may not be able to enforce a note because it has not complied with the state statutes, yet its endorsee may enforce it. Northwest, etc. Co. *v.* Riggs, 89 Pac. Rep. 921 (Kan. 1907). In Kansas a foreign corporation doing business in the state must file certain papers or else be unable to bring a suit until it has filed such papers. Vickers *v.* Buck's Stove, etc. Co., 70 Kan. 584 (1905). A foreign telegraph company that has tried to comply with the state law requiring the filing of papers may maintain a suit. Jordon *v.* Western, etc. Co., 69 Kan. 140 (1904). Contracts made by a foreign corporation are not void, even though under the statute such foreign corporations cannot maintain suit thereon in the state court until they have complied with certain regulations. State *v.* American Book Co., 69 Kan. 1 (1904).

Kentucky: An unincorporated express company need not obtain a per-

be valid until approved in its home office in another state, the commit from a state under a statute requiring foreign corporations to do so. Commonwealth *v.* Adams Express Co., 97 S. W. Rep. 386 (Ky. 1906). A foreign railroad company cannot avoid its contracts in the state by reason of a subsequent statute prohibiting it from doing business in the state unless it first becomes a domestic corporation. Newport, etc. Co. *v.* McDonald, etc., Assignee, 109 Ky. 408 (1900).

Massachusetts: The Massachusetts statute in regard to foreign corporations maintaining suits in that state without complying with the statutes was considered in National, etc. Co. *v.* Fall River, etc. Bank, 82 N. E. Rep. 671 (Mass. 1907). Although the statute requires foreign corporations doing business in the state to file a power of attorney authorizing the commissioner of corporations to accept service for them, yet a corporation not doing so may sue on one of the contracts. Rogers, etc. Co. *v.* Simmons, 155 Mass. 259 (1892).

Michigan: A foreign corporation for mining and *various other purposes* cannot file its certificate under the Michigan statute authorizing foreign corporations for mining purposes to file such certificate and have all the rights of domestic corporations. Isle Royale Land Corp. *v.* Osmun, 76 Mich. 162 (1889).

Minnesota: In Minnesota a resident agent of a foreign corporation may, in a suit by the company against him for moneys received by him for its use, interpose the defense that it is not qualified to do business in the state. Thomas, etc. Co. *v.* Knapp, 112 N. W. Rep. 989 (Minn. 1907). A foreign corporation is presumed to have complied with the statutes. Lehigh, etc. Co. *v.* Gilmore, 93 Minn. 432 (1904). In Minnesota the statute prohibiting foreign corporations from maintaining suits in the state where they have not complied with the law relative to filing papers with the secretary of the state is construed as prohibiting suit, even though such papers were filed after the commencement of the suit; and the court intimated that even a compliance with the statute after the contract was made would be insufficient. Heilman, etc. Co. *v.* Peimeisl, 85 Minn. 121 (1901). A statute to the effect that foreign corporations doing business in the state shall file an appointment of an agent in the state does not prohibit the doing of such business without the appointment of an agent, but merely provides for a convenient means of obtaining jurisdiction. Tolerton, etc. Co. *v.* Barck, 84 Minn. 497 (1901).

Mississippi: As to the Mississippi statute relative to foreign corporations doing business in the state, see Hart *v.* Livermore, etc. Co., 72 Miss. 809 (1895).

Missouri: Under the Missouri statute a contract made in the state by a foreign corporation which has not complied with the statute cannot be enforced. Chicago, etc. Co. *v.* Sims, 197 Mo. 507 (1906). Under the Missouri statute a foreign corporation cannot maintain suit on business transacted before it complies with the statute. Tri-state, etc. Co. *v.* Forest, etc. Co., 192 Mo. 404 (1905). A person who sells his stock in a ferry company to a trust company cannot repudiate the sale on the ground that the trust company purchased it for a foreign railroad company, which was not entitled to do business in the state, the stockholder not knowing that the purchase was for the railroad company. Newman *v.* Mercantile T. Co., 189 Mo. 423 (1905).

Montana: An alien corporation may sue to recover back taxes paid under protest although it has not filed its charter as required by statute. Powder River Cattle Co. *v.* Custer County, 9 Mont. 145 (1889).

New York: Under the New York statute a foreign corporation in bringing suit must allege that it has complied with the statutes and the de-

tract is not made within the former state, within the meaning of

fendant does not waive the defense by failing to demur or set it up in his answer. Wood & Selick *v.* Ball, 190 N. Y. 217 (1907). South Bay Co. *v.* Howey, 190 N. Y. 241 (1907). But the defendant must set up that the plaintiff is a *stock* corporation. Portland Co. *v.* Hall, etc. Co., 121 N. Y. App. Div. 779 (1907). The defense of failure to pay the license fee, must be set up as a defense. Halsey *v.* Jewett, etc. Co., 190 N. Y. 231 (1907). Under the New York act providing that foreign corporations shall not sue on contracts where they have not taken out a license from the state, a foreign corporation may, subsequently to the breach of contract, take out a license and then sue. Neuchatel, etc. Co. *v.* Mayor, etc., 155 N. Y. 373 (1898).

North Carolina: Even though a foreign corporation is doing business in the state without complying with the statutes in regard thereto, a domestic corporation thereafter organized under the same name cannot enjoin the foreign corporation from doing business in the state. Blackwell's, etc. Co. *v.* American, etc. Co., 59 S. E. Rep. 123 (N. C. 1907).

North Dakota: Parties who have contracted with a foreign corporation and received the benefits of the contract cannot, when sued upon the contract, set up that the company has not complied with the statutory requisites in regard to doing business in the state. Washburn Mill Co. *v.* Bartlett, 3 N. D. 138 (1893).

Pennsylvania: Even though a domestic telephone company has erected its lines on the street of the city without the consent of the city, as required by statute, and even though it has leased the same to a foreign telegraph company, which has no right to use the streets for that purpose, yet where the poles have been in the streets for twenty-one years without objection, and have cost a large amount of money, and various ordinances have been passed in regard to them and license fees collected, a bill in equity by the city to remove the poles will be denied. City of Bradford *v.* New York, etc. Co., 206 Pa. St. 582 (1903). Under the Pennsylvania statute a foreign construction company that has constructed a railroad in the state cannot collect therefor, where it did not file the statement required by statute until two months after the completion of the work, the work having occupied six months. Delaware, etc. Co. *v.* Bethlehem, etc. Ry., 204 Pa. St. 22 (1902). A corporate agent who employs labor and buys goods in the state for a foreign corporation which has not complied with the law prohibiting such corporations to do business in the state until a resident office and agent have been named is personally liable for such labor and goods. Lasher *v.* Stimson, 145 Pa. St. 30 (1892). The objection that the foreign corporation has not filed the statement as required by statute must be clearly raised in order to be avilable. Campbell, etc. Co. *v.* Hering, 139 Pa. St. 473 (1891). Stockholders dealing with their corporation cannot defeat their contracts by alleging that it was a foreign corporation and had not complied with the state laws. Kilgore *v.* Smith, 122 Pa. St. 48 (1888).

South Carolina: A statute that a foreign corporation, upon filing its charter, shall become a domestic corporation is constitutional as to the right to construct a railroad. State *v.* Southern Ry., 48 S. C. 49 (1896).

South Dakota: Under the South Dakota statutes a foreign corporation cannot enforce a contract which it has made in the state before complying with the statutes. American, etc. Co. *v.* Eureka Bazaar, 108 N. W. Rep. 15 (So. Dak. 1906). Under the South Dakota statute a foreign corporation cannot maintain a suit in the courts of that state until it has filed a copy of

the Michigan statute declaring all contracts void when made by foreign corporations in the state without having filed their articles

its charter in the office of the secretary of state. Bishop, etc. Co. *v.* Schleuning, 104 N. W. Rep. 854 (So. Dak. 1905). In Wright *v.* Lee, 4 S. Dak. 237 (1893), the court passed upon the statute which requires foreign corporations to file a copy of their articles of incorporation, etc., with the secretary of state, and prohibiting the doing of business by such corporations until such certificates are filed. The court held that the failure to file such certificate did not invalidate contracts of the corporation.

Tennessee: A foreign corporation is doing business in a state, within the meaning of a statute, where a mortgage deed of trust is made to a resident for the benefit of such foreign corporation. Myers, etc. Co. *v.* Wetzel, 35 S. W. Rep. 896 (Tenn. 1896).

Texas: Where a foreign corporation does business in the state without complying with the statute, it cannot enforce in that state a judgment obtained by it in another state on business so transacted. St. Louis, etc. Co. *v.* Beilharz, 88 S. W. Rep. 512 (Tex. 1905). A bondsman for a corporate agent cannot escape liability by alleging that the corporation has not complied with the law relative to foreign corporations. Singer Mfg. Co. *v.* Hardee, 4 N. M. 175 (1888); American, etc. Co. *v.* Bateman, 22 S. W. Rep. 771 (Tex. 1893).

Utah: In Utah the courts refuse to enforce a contract made by a foreign corporation in the territory without compliance with the statute for appointing an agent, etc. A. Booth & Co. *v.* Weigand, 28 Utah, 372 (1904). Under the Utah statute a foreign corporation cannot defend against condemnation if it has not complied with the Utah statute relative to foreign corporations. Rio Grande, etc. Ry. *v.* Telluride, etc. Co., 23 Utah, 22 (1900).

Virginia: A statute making officers of a foreign corporation, doing business in the state without authority, liable for debts, does not authorize an attachment against an officer residing outside of the state. Richmond, etc. Co. *v.* Dininny, 105 Va. 439 (1906). A vice-president of a foreign corporation may be punished criminally for causing the corporation to sell goods through a peddler without taking out a license. Crall *v.* Commonwealth, 103 Va. 855 (1905). The court said: "A corporation can act alone through its officers and agents, and where the business itself involves a violation of the law the correct rule is that all who participate in it are liable."

Washington: Although the statutes require a foreign corporation, before doing any business in the state, to file certain papers, and make it a misdemeanor not to do so, yet this does not render contracts void, although such statute is not complied with. Dearborn Foundry Co. *v.* Augustine, 5 Wash. St. 67 (1892).

West Virginia: A contract of a West Virginia construction company made in the state of Pennsylvania to construct a railroad in Pennsylvania cannot be enforced if such West Virginia corporation has not complied with the statutes of the state as to doing business in that state. Pittsburgh, etc. Co. *v.* West Side, etc. R. R., 154 Fed. Rep. 929 (1907).

Wisconsin: The Wisconsin statute was applied and the plaintiff, a foreign corporation, defeated in its suit in International, etc. Co. *v.* Peterson, 113 N. W. Rep. 730 (Wis. 1907). A taxpayer in Wisconsin may enjoin a city from paying to a foreign corporation, which has not complied with the state statute, the contract price of paving. Allen *v.* City of Milwaukee, 128 Wis. 678 (1906). A statute requiring foreign corporations to file

of association in that state,[1] and the tendency of the courts is not to apply these statutes to sales by correspondence or without a regular place of business in the state.[2] Moreover such transactions are practically interstate commerce.[3] Furthermore, single or occasional transactions are not considered as doing business in the state.[4] Finally, it

certified papers before doing business in the state does not apply to contracts made before such statute was enacted. Chicago, etc. Co. *v.* Bashford, 120 Wis. 281 (1904). The Wisconsin statute that a foreign corporation doing business within the state without complying with the statute cannot enforce a contract, but such contract shall be void, was upheld in City of Ashland *v.* Whitcomb, 114 Wis. 99 (1902).

1 Holder *v.* Aultman, 169 U. S. 81 (1898). An agreement of a foreign corporation to sell all its property cannot be enforced by the corporation in Michigan, where such corporation has not complied with the Michigan statute relative to doing business within the state. Rough *v.* Breitung, 117 Mich. 48 (1898).

2 Where a Maine corporation has no office in New York, but merely receives orders from New York and fills them by shipments to New York, it is not doing business in the latter state within the meaning of the statute requiring foreign corporations to obtain a certificate allowing it to do business in the state. Vaughn, etc. Co. *v.* Lighthouse, 64 N. Y. App. Div. 138 (1901). A foreign corporation which merely sells its bonds and stocks in New York and borrows money therein is not doing business therein within the meaning of the New York statute applicable to foreign corporations. Union Trust Co. *v.* Sickels, 125 N. Y. App. Div. 105 (1908). A loan by a New York building association in Pennsylvania, secured by mortgage in the latter state, but the debt being payable in New York, is not within the Pennsylvania statute prohibiting foreign corporations doing business within the state without complying with certain requirements. People's, etc Assoc. *v.* Berlin, 201 Pa. St. 1 (1901). A foreign corporation which has sold a bill of goods to an Illinois corporation in that state may sue for the price, although it has no office in the state. John Spry, etc. Co. *v.* Chappell, 184 Ill. 539 (1900). A foreign corporation's purchase of property located in the state, the purchase being made out of the state, is not doing business in the state. Lakeview, etc. Co. *v.* San Antonio, etc. Co., 95 Tex. 252 (1902). The Montana statute requiring foreign corporations to file their charter in the state before doing business there does not apply to a foreign trust company which purchases bonds of a domestic corporation and takes a mortgage to secure them. Gilchrist *v.* Helena, etc. R. R., 47 Fed. Rep. 593 (1891). The statute relative to foreign corporations doing business in the state is not applicable to loans made out of the state, and the securities delivered and money paid out of the state. Scruggs *v.* Scottish Mortgage Co., 54 Ark. 566 (1891). Even though a foreign corporation purchases land in the state, yet if the purchase was made outside of the state, this is not doing business in the state. Goldsberry *v.* Carter, 100 Va. 438 (1902).

3 See note 1, p. 2153, *supra.*

4 Cooper Mfg. Co. *v.* Ferguson, 113 U. S. 727 (1885), holding that a single act, without the purpose of doing others, in a state does not bring a foreign corporation within the statute of the state forbidding it to transact business there without complying with certain requirements. A single transaction in the state may be doing busi-

is held that a corporation of one state, which sends its goods to another state to be sold by an agent on commission, the title to remain

ness in the state if there is an intent to engage in business in that state. International, etc. Co. *v.* Lynch, 69 Atl. Rep. 541 (Vt. 1908). A single transaction by which a foreign corporation builds a sugar factory in the state and warrants its efficiency is not "carrying on" business in the state within the meaning of the Michigan statute rendering contracts of foreign corporations void unless they have first paid a tax to the state, such statute, however, not being applicable to corporations engaged entirely in interstate commerce. Oakland, etc. Co. *v.* Fred W. Wolf Co., 118 Fed. Rep. 239 (1902). A New Jersey corporation may sell and ship goods to a citizen in South Carolina and collect therefor, even though it did not comply with the statutes of South Carolina in regard to doing business in that state until after the transaction. A single transaction is not doing business in the state, and subsequent compliance with the statute was sufficient, and the interstate commerce clause of the federal constitution does not allow such a statute to prevent collection. Kirven *v.* Virginia, etc. Co., 145 Fed. Rep. 288 (1906). A single transaction is not doing business in a territory within the meaning of an act of congress relative to foreign corporations doing business in such territory. Ammons *v.* Brunswick, etc. Co., 141 Fed. Rep. 570 (1905). A bond given by a Pennsylvania surety company to a corporation in Wisconsin for the good conduct of the manager of the latter in its business in Pennsylvania, cannot be enforced, if the Wisconsin corporation has not complied with the statutes of Pennsylvania in regard to a foreign corporation doing business in the state. M'Canna, etc. Co. *v.* Citizens', etc. Co., 76 Fed. Rep. 420 (1896). A Pennsylvania statute relative to foreign corporations applies only to transactions constituting the doing of business in the state, and does not apply to the enforcement of a mortgage given to secure a loan, where such foreign corporation has no charter power to make loans. New York, etc. Co. *v.* Winton, 208 Pa. St. 467 (1904). An isolated transaction is not within the meaning of a statute declaring void a contract made by a foreign corporation in the state without complying with the statutes of the state. Allegheny Co. *v.* Allen, 69 N. J. L. 270 (1903). A single transaction by a foreign corporation is not doing business in the state. Henry *v.* Simanton, 64 N. J. Eq. 572 (1903). A foreign corporation that makes a single sale and takes a guarantee of payment in New Jersey is not doing business within that state within the meaning of the statute applicable to such corporations. Delaware, etc. Co. *v.* Mahlenbrock, 63 N. J. L. 281 (1899). Merely entering into a contract with a city for street lighting is not doing business within the state, within the meaning of laws requiring the keeping of a public office and paying a license fee, etc.; Hogan *v.* City of St. Louis, 176 Mo. 149 (1903); neither is the purchase of a piece of real estate on judicial sale thereof at the instance of the purchaser. Meddis *v.* Kennedy, 176 Mo. 200 (1903). A foreign telephone company selling its stock in the state is not doing business in the state. First Nat. Bank *v.* Leeper, 97 S. W. Rep. 636 (Mo. 1906). An isolated transaction in the state is not doing business in the state. Sigel-Campion, etc. *v.* Haston, 68 Kan. 749 (1904). A single transaction by a foreign corporation is doing business in the state, where such transaction is a part of the ordinary business and indicates a purpose of carrying on further business in the state. John Deere, etc. Co. *v.* Wyland, 69 Kan. 255 (1904). A single sale is not doing busi-

in the company until sold, need not comply with the statutes of the latter.[1]

In Alabama there has been a large number of decisions on this subject of foreign corporations transacting business in the state.[2]

ness in the state. Lutes Co. *v.* Wysong, 100 Minn. 112 (1907). A mortgagee cannot defend against the mortgage on the ground that it was given to a foreign corporation which had not complied with the statutes of the state. Prudential, etc. Co. *v.* Cushman, 130 Iowa, 378 (1906). A mortgage made in Michigan to a New York building association is not enforceable if the latter has not filed its certificate of incorporation with the secretary of state as required by statute. Hoskins *v.* Rochester, etc. Ass'n, 133 Mich. 505 (1903). The taking of a single mortgage is not doing business with the state by a foreign corporation, within the meaning of the statute. Roseberry *v.* Valley, etc. Ass'n, 35 Col. 132 (1905). A single transaction is not doing business in the state. Jameson *v.* Simonds Saw Co., 2 Cal. App. 582 (1906). A foreign corporation purchasing a piece of property in the state is not thereby doing business in the state. Louisville, etc. Co. *v.* Mayor, etc., 114 Tenn. 213 (1905). A single transaction is not doing business within the state. State *v.* Robb, etc. Co., 106 N. W. Rep. 406 (N. Dak. 1906). A foreign trust company may foreclose a mortgage given by a Texas telephone company on its property in Texas, even though such trust company has not been granted permission to transact business in Texas under its statutes. Commercial, etc. Co. *v.* Territorial, etc. Co., 86 S. W. Rep. 66 (Tex. 1905). Owning land in the state and leasing the same on shares is not doing business in the state. Wilson *v.* Peace, 85 S. W. Rep. 31 (Tex. 1905). A holding company incorporated in South Africa does business in London, within the meaning of the income tax law, where most of its purchases and sales of stocks are made in London, and some stockholders' meetings and all directors' meetings are held there. Goerz & Co. Ltd. *v.* Bell, [1904] 2 K. B. 136. A foreign corporation is not necessarily doing business in the state, sufficient to authorize service upon one of its directors under the New York statute, merely because its transfers of stock are registered in the state and its directors meet there and it keeps a bank account there. Honeyman *v.* Colorado, etc. Co., 133 Fed. Rep. 96 (1904). A New Jersey iron manufacturing corporation may sell iron to be delivered in New York, and may collect therefor in the New York courts, it not appearing that the contract was made in New York state, and it appearing that this was the only business transacted by it in New York state. New York, etc. Co. *v.* Williams, 102 N. Y. App. Div. 1 (1905); aff'd, 184 N. Y. 579. Where a foreign corporation makes a contract in Michigan appointing an agent for a certain county to sell its product, etc., this is doing business in the state. Neyens *v.* Worthington, 114 N. W. Rep. 404 (Mich. 1908). A statute requiring foreign corporations doing business in the state to have a known place of business at which there shall be an agent to accept service, is not applicable to a steamship company engaged in interstate traffic. Ryman, etc. Co. *v.* Commonwealth, 101 S. W. Rep. 403 (Ky. 1907). A foreign corporation selling its stock to a resident and taking a mortgage on land in the state as security for the payment, is not doing business in the state. Brown *v.* Guarantee, etc. Co., 102 S. W. Rep. 138 (Tex. 1907).

1 Atlas Engine Works *v.* Parkinson, 161 Fed.Rep.223 (1908). *Cf.* 71 Kan. 665.

2 In the case of Dundee, etc. Co. *v.* Nixon, 95 Ala. 318 (1891), an alien

Restrictions upon foreign insurance companies are found in all the states and are strictly enforced.[1] A foreign insurance company

corporation failed in its suit on a note because it had no known place of business or authorized agent in Alabama, as required by the constitution and statutes of the state. The note was dated in that state. A purchase of brick in another state, to be delivered in the state, is an act of interstate commerce, and a foreign corporation making the sale need not comply with the state laws. A foreign corporation not complying with the statute as to doing business in the state cannot recover for goods sold, even though the statute did not prescribe a penalty. Armour, etc. Co. *v.* Vinegar, etc. Co., 42 S. Rep. 866 (Ala. 1906). A statute in regard to foreign corporations doing business in the state does not prevent a foreign corporation bringing suit in the state if it does no business in the state. Woodall & Son *v.* People's Nat. Bank, 45 S. Rep. 194 (Ala. 1907). A foreign corporation may bring suit in the state without complying with the state law in regard to having a place of business and an agent in the state. Cook *v.* Rome Brick Co., 98 Ala. 409 (1893). Where a foregin corporation not complying with the statute sells chattels, the sale is void and the corporation may reclaim its property. Boulden *v.* Estey Organ Co., 92 Ala. 182 (1890). The statute against foreign corporations doing business in the state unless they conform to certain requisites does not apply to interstate traffic, such as selling goods to be shipped in, having been sold out of, the state. Ware *v.* Hamilton, etc. Co., 92 Ala. 145 (1890). The objection as to the failure to file the certificate cannot be raised for the first time on appeal. Ginn *v.* New England, etc. Co., 92 Ala. 135 (1890). A mortgagor to a foreign insurance company cannot demur to a bill for foreclosure on the ground that the taking of the mortgage was *ultra vires* and no certificate was filed. Boulware *v.* Davis, 90 Ala. 207 (1890). A mortgage taken by a foreign corporation in Alabama which has no known place of busines or authorized agent in the state, as required by the constitution of the state, is void and not enforceable. Farrior *v.* New England, etc. Co., 88 Ala. 275 (1889). A foreign corporation suing in Alabama to enforce a mortgage made in that state must allege that it has a known place of business and an authorized agent in the state. Christian *v.* American, etc. Co., 89 Ala. 198 (1889). An agent suing a person for a commission on a loan made by the latter with a foreign corporation which has not filed its certificate as required by statute cannot recover. Dudley *v.* Collier, 87 Ala. 431 (1888). For a valuable discussion as to what constitutes the doing of business in the state, see Sullivan *v.* Sullivan Timber Co., 103 Ala. 371 (1894).

1 If an insurance company does business in the state without complying with the statutory conditions it cannot collect a premium note. Reliance Mut. Ins. Co. *v.* Sawyer, 160 Mass. 413 (1894); Cincinnati Mut. etc. Co. *v.* Rosenthal, 55 Ill. 85 (1870), holding that a premium note given to a foreign company which had not obtained a certificate from the state auditor as required was void in its hands. To same effect, Hoffman *v.* Banks, 41 Ind. 1 (1872), and Roche *v.* Ladd, 83 Mass. 436 (1861); Ætna Ins. Co. *v.* Harvey, 11 Wis. 394 (1860), where filing a statement of the condition with the secretary of state was required; Lycoming F. Ins. Co. *v.* Wright, 55 Vt. 526 (1883); Charter Oak L. Ins. Go. *v.* Sawyer, 44 Wis. 387 (1878), but holding that they may sue for or secure debts due from residents without complying with such statutes; Williams *v.*

cannot enjoin a state officer from enforcing a law prescribing the terms upon which it may do business in the state.[1] A state may require foreign insurance companies before doing business in the state to comply with conditions similar to the conditions imposed on foreign insurance companies by the laws of the state under which they are organized; in other words may impose reciprocal burdens.[2] A foreign mutual insurance company cannot collect an assessment where a similar domestic corporation would not be allowed to collect.[3]

The Tennessee statutes giving its citizens preference as to assets of an insolvent foreign corporation within the state is unconstitutional as to non-resident persons, but is constitutional as to foreign corporations, which are creditors of the insolvent corporation.[4]

Cheney, 69 Mass. 215 (1855), but holding that a premium note void for this season is valid in the hands of a *bona fide* holder for value without notice; Jones *v.* Smith, 69 Mass. 500 (1855), holding that the payee of a premium note must prove compliance by the insurance company with the statute; Ehrman *v.* Teutonia Ins. Co., 1 Fed. Rep. 471 (1880), holding that if the statute merely imposes penalties for non-compliance with such requirements, the contracts of a foregin corporation not complying are not void. To same effect is King *v.* National M. & E. Co., 4 Mont. 1 (1881); Clark *v.* Middleton, 19 Mo. 53 (1853), holding that the failure of an agency to file a statement was not to make void a promise to pay premium notes given to the foreign insurance company; Brooklyn Life Ins. Co. *v.* Bledsoe, 52 Ala. 538 (1875), holding that a foreign corporation cannot avail itself of its own failure to comply; Union, etc. Ins. Co. *v.* McMillen, 24 Ohio St. 67 (1873), holding that neglect to comply does not make void a policy issued by a foreign company nor excuse the holder from paying premiums; Eureka Ins. Co. *v.* Parks, 1 Cin. Super. Ct. (Ohio), 574 (1871), holding that a company which issues a policy on property in another state from its home office is not subject to the restricting statute of that state, though it has paid a commission for obtaining the insurance to a resident thereof; Mutual, etc. Ins. Co. *v.* Bales, 92 Pa. St. 352 (1879), holding that it cannot recover from sureties upon an agent's bond unless it has complied with a statute requiring the agents to be commissioned. To same effect, Thorne *v.* Travelers' Ins. Co., 80 Pa. St. 15 (1875); but in U. S. Life Ins. Co. *v.* Adams, 7 Biss. 30 (1873); s. c., 28 Fed Cas. 816, it was held that compliance with a restraining act is not essential to the validity of an agent's bond; Lamb *v.* Bowser, 7 Biss. 315 (1876); s. c., 14 Fed. Cas. 980; aff'd, 14 Fed. Cas. 982, holding that a policy of insurance is not void because the company has not complied with the statute. *Cf.* Isle Royale Land Corp. *v.* Osmun, 76 Mich. 162 (1889). As a defense to a note, see Dudley *v.* Collier, 87 Ala. 431 (1880). See also § 696, notes, *supra;* Charter Oak, etc. Ins. Co. *v.* Sawyer, 44 Wis. 387 (1878), holding that it may sue or take security for a debt without complying with the local act. To same effect, Columbus Ins. Co. *v.* Walsh, 18 Mo. 229 (1853). See also People *v.* Howard, 50 Mich. 239 (1883).

1 Hartford, etc. Co. *v.* Perkins, 125 Fed. Rep. 502 (1903).

2 State *v.* Insurance Co. etc., 71 Neb. 320 (1904).

3 Walker *v.* Rein, 106 N. W. Rep. 405 (N. Dak. 1905). .

4 McClung *v.* Embreeville, etc. Ry.,

A foreign corporation may sue or be sued in the courts of a state provided jurisdiction is properly obtained.[1] A foreign corporation may bring suit in the state on a contract made outside of the state without filing a certificate to do business in the state.[2]

103 Tenn. 399 (1899), following Blake *v.* McClung, 172 U. S. 239, 259 (1898).

1 This question is fully discussed in §§ 757, 758, *infra.*

2 MacMillan Co. *v.* Stewart, 69 N. J. L. 212 (1903); Slaytor-Jennings Co. *v.* Specialty, etc. Co., 69 N. J. L. 214 (1903). The statute relative to foreign corporations doing business in the state does not prevent a corporation bringing suit on a contract made elsewhere. Mason *v.* Edward Thompson Co., 94 Minn. 472 (1905), and see notes, *supra.* A foreign corporation may be sued by a non-resident in the courts of the state unless he thereby obtains an undue advantage. Hunter *v.* Wenatchee, etc. Co., 36 Wash. 541 (1905). A state may prohibit such suits. See § 757, *infra.*